

Victoria's anti-corruption watchdog is still too weak

Victoria's IBAC has a number of defects that make it a weak watchdog. In its current state it is not a suitable model for a national integrity commission.

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Summary

- Victoria's anti-corruption watchdog, the Independent Broad-based Anti-corruption Commission (IBAC), has been suggested by Prime Minister Malcolm Turnbull as a preferred model for a federal anti-corruption watchdog.
- IBAC has significant flaws that mean it is not a suitable model, in its current state, for a federal anti-corruption watchdog.
- The previous Victorian government in 2011 intentionally set up a weak corruption watchdog to avoid being damaged by IBAC's investigations. There is a risk of this happening again at a federal level if the federal government opts for a federal anti-corruption watchdog modelled on IBAC in its current state.
- Victoria should strengthen IBAC by broadening the definition of corrupt conduct in its jurisdiction, strengthening its investigative powers and ability to use them, and widening its ability to hold public hearings.

Background

A month ago, Fairfax newspapers reported that the Prime Minister was prepared to consider a National Integrity Commission, his preferred model being Victoria's IBAC, rather than Sydney's ICAC. It was plainly a tribute to the performance of IBAC in its first five years of operation.

The original IBAC legislation constructed a number of obstacles preventing IBAC from use of its statutory powers, because ministerial advisors were afraid that IBAC might damage the Victorian government by its investigations. The effect was that, at the

outset, IBAC could only investigate a very limited range of matters, and only if it could beforehand articulate precisely what it wanted to investigate. IBAC's investigators were asked 'what is the indictable offence?'

When the Andrews government was elected, it amended and improved the legislation in various ways, principally by including in the definition of corrupt conduct the offence of 'misconduct in public office'.

The flaws in Victoria's anti-corruption watchdog

The IBAC legislation remains seriously flawed in a number of respects, including:

- The definition of 'corrupt conduct' is limited to a narrow range of particular indictable criminal offences, prescribed within the narrow definition of 'relevant offence'
- IBAC must still overcome hurdles built into the legislation before it can use its statutory powers. It must be first able to articulate on reasonable grounds the corrupt conduct it seeks to investigate
- IBAC lacks a number of statutory investigative powers that are held by similar agencies in other Australian jurisdictions. For example, IBAC has no powers of arrest and only limited powers to search persons, to gather and hold evidence, and to have full standing before the courts for the purposes of arraignment. This is particularly important to IBAC's police jurisdiction.
- IBAC is permitted to conduct a preliminary investigation, but only using limited statutory powers, to determine whether to dismiss or refer a complaint, or to fully investigate a matter under the legislation
- IBAC's entitlement to conduct a public hearing is limited to circumstances which IBAC considers on reasonable grounds are "exceptional".

The consequences of the first three defects can be quickly demonstrated. Possibly the best known ICAC inquiry is Operation Jasper, the inquiry into the granting of coal mining licences in the Bylong Valley, which it was alleged could have improperly gained for the Obeid family in excess of 100 million dollars. At the opening of the public hearing (the transcript is available on ICAC's website), Counsel assisting alleged that at the outset of the inquiries, ICAC had nothing more than a suspicion that something was wrong, and that it had taken many months, the evidence of many witnesses in secret, and the obtaining of thousands of documents and computer records, before a picture began to appear of what was actually happening.

If similar circumstances had arisen in Victoria, IBAC would at first have been entitled only to make preliminary inquiries, without using its statutory powers. As soon as IBAC

attempted to use those powers, it would have been challenged and would have had to articulate the corrupt conduct it was investigating, and specify the relevant offence involved. Anyone suspected, or required to give evidence or produce documents, could then seek a court injunction to stop IBAC's investigation, at which point IBAC would have been obliged to expose all it had discovered to support its right to investigate, leading to delay and the destruction or disappearance of evidence, as well as the risk of the inquiry being terminated.

There are serious problems for IBAC in conducting a public hearing during an investigation. The value to the community involved in such hearings was amply demonstrated by the investigations IBAC conducted into the Department of Education & Training and Public Transport Victoria, and into alleged excessive use of force by the police in Ballarat. IBAC has held only five hearings in the fifty five operations completed to date. Operation Ord, which exposed corrupt conduct at the Department of Education & Training, showed the community what was happening, lead to immediate action by the Department to prevent any recurrence and was followed by many complaints to IBAC about other possibly corrupt conduct at the Department, and elsewhere.

By s.117 of the IBAC Act, IBAC is prevented from holding a public inquiry unless it considers on reasonable grounds that (a) there are exceptional circumstances (b) it is in the public interest to do so and (c) a public examination can be held without causing unreasonable damage to a person. The only objection is to par. (a) s.117, as "exceptional" is so uncertain a requirement that it is impossible to predict in what circumstances the term would be invoked in, or accepted by, a court of law. On the rare occasions when a public hearing is considered necessary, there will be the likelihood of appeal, inevitable delay and uncertainty, and possible interference with the inquiry.

Conclusion

The real question now is whether Victorians are prepared to leave IBAC in its present weakened state, still unable to use its statutory powers at the outset of most investigations in the absence of a well-informed tip-off. IBAC should be entitled to full use of its statutory powers at the start of any investigation, unhampered by statutory thresholds, enabling it to perform its critical functions effectively.

If Victorians serious about addressing the risk of corruption in this state, our parliament should amend the IBAC Act now to remedy the defects identified above. And IBAC should certainly not be used as the model for any new National Integrity Commission unless these defects have been removed from the IBAC Act.