

Public hearings key to investigating and exposing corruption

A National Integrity Commission must have the ability to hold public hearings if the Commissioner considers it would make the investigation more effective and be in the public interest

Briefing paper prepared by the National Integrity Committee

Summary

- The majority of state integrity commissions have the ability to hold public hearings
- The importance of public hearings in Royal Commissions and anti-corruption investigations has been verified by the High Court, by anti-corruption commissioners, by independent reviews of NSW ICAC and Vic IBAC, and by the outcomes of anti-corruption investigations themselves
- Public hearings have been critical to investigations finding and exposing corruption, including Operation Ord in Victoria and Operations Jasper and Acacia in NSW.
- Limitations placed on the ability of Victoria's Independent Broad Based Commission to hold public hearings have led to allegations of serious misconduct not being exposed to the public
- The Commissioner of SA ICAC has been vocal in calling for the ability to hold public hearings, as it is the only commission currently not able to do so
- A National Integrity Commission must have the ability to hold public hearing if the Commissioner considers it would make the investigation more effective and be in the public interest

The National Integrity Committee

The National Integrity Committee was established to design and advise policy makers on specific accountability reforms, including a national anti-corruption commission. Members of the committee are: Margaret McMurdo AC, David Ipp AO QC, Stephen Charles AO QC, David Harper AM QC, Paul Stein AM QC and Antony Whealy QC.

The role of public hearings in corruption investigations

Public hearings fulfil important functions in corruption investigations. They are a crucial mechanism to meeting corruption commissions' objectives of promoting integrity and investigating and exposing corruption.

Public hearings expose corruption and misconduct to the public. Exposing corruption is a core objective of corruption commissions. The only other mechanism for exposing corruption to the public is the investigation reports that summarise evidence and findings, and are made public only when investigations are concluded. These reports are hundreds of pages long and often are made public months or years after investigations commence.¹

Public hearings increase public trust that allegations of corruption are being investigated fairly and in the public interest. Polling from The Australia Institute shows that 78 per cent of Australians want a federal corruption commission to be able to hold public hearings, and 85 per cent think it will increase public trust if it can hold public hearings.²

Public hearings make investigations more effective, by encouraging witnesses to come forward with new evidence. Without public hearings, witnesses with key information may not know that an investigation is occurring, and may not know how the information they have fits into the case. Witnesses coming forward with new evidence during the NSW ICAC investigation into Liberal party fundraising practices were critical to the investigations scope and findings.³

Public hearings educate the public sector and community about corruption and misconduct issues. Cases revealed through public hearings educate the public about the detrimental impacts of corruption, and how it can be prevented. This can

¹ Ipp (2017), *Accountability and the Law – anti-corruption agencies in Australia*, Accountability and the Law conference paper

² Aulby (2018), *Out in the open – federal ICAC with public hearings key to tackling corruption and public trust*, The Australia Institute

³ Watson (2017), *The Darkest Corners – the case for a federal anti-corruption commission*, Accountability and the Law Conference paper

encourage members of the public service and the community to identify cases in their workplaces and come forward with complaints.

Public hearings deter others from engaging in corruption and misconduct in the future. Individuals that may consider engaging in corruption may be deterred by the knowledge that a corruption commission is actively working to investigate allegations. Public hearings raise the profile of investigations, and demonstrate that allegations of corruption are taken seriously and investigated thoroughly.

Public hearings improve the integrity of the public sector. The public is able to hear and assess the allegations and evidence directly, and the investigation can make findings in an accountable and transparent manner. Public hearings can also lead to the behaviour under investigation ceasing, directly improving the integrity of the public sector.

Public hearings make investigations fairer. The investigation is conducted with full transparency, meaning that the commission is accountable to the public and must treat witnesses and those under investigation fairly. The commission will be accountable for following the rule of procedural fairness, as opposed to a private ‘star chamber’. The Queensland CCC provision acknowledges this, allowing hearings to be public if closing the hearing would be unfair to a person.

Public hearings in state integrity commissions

Table 1: Use of public and private hearings, and investigation reports from 2012-2017

Body	Private examinations	Public inquiries	Investigation reports made public
NSW ICAC	721 examinations	30	32
Qld CCC	36 days	2	1
Vic IBAC	Data not available	5	11
WA CCC	52 examinations over 136 days	5	33

Source: Annual Reports NSW ICAC, Qld CCC, Vic IBAC and WA CCC 2012-17

Public hearings have been critical to the success of many corruption investigations at a state level. Two examples are provided below, one from NSW ICAC and one from Victoria’s IBAC.

During 2012 and 2013, NSW ICAC held public inquiries concerning the issuing of mining leases and licences involving former NSW Government ministers. The investigations

resulted in the prosecution of Eddie Obeid and Ian Macdonald for misconduct. Public hearings were critical to uncovering the information needed to finalise the investigations. During the Operation Jasper and Operation Acacia public hearings, the NSW ICAC called 138 witnesses and in fact had to build a bigger room to hold the hearing. According to former NSW ICAC commissioner David Ipp, “the stark fact is that Operations Jasper and Acacia could not have been undertaken without it.”⁴

In 2017 the Queensland CCC held a public inquiry into allegations of non-compliance with local government electoral laws and political donations disclosures. The investigation report states that a public hearing was critical to fulfilling its functions of promoting integrity, building public confidence and reporting on its investigations:

In coming to this decision, the CCC considered the necessary impact of issues to be canvassed at the hearing relating to exposing the inadequacies of the current system and promoting the need to reform the legislation to provide more transparency and accountability. These issues fall within the CCC’s corruption function to raise standards of integrity and conduct in units of public administration and ensure that corruption is dealt with in an appropriate way, and for the CCC to report its recommendations. In dealing with these issues the CCC has an overriding responsibility to promote public confidence. These functions and responsibilities could not be achieved by private hearings. The CCC considered that closing the hearing would be contrary to the public interest.⁵

Victoria’s IBAC has conducted five public inquiries to expose corrupt conduct in the public sector. One of those, Operation Ord, involved allegations of serious corrupt conduct in the Education Department. The inquiry revealed that millions of dollars were transferred to “banker schools”, supposedly for the purpose of facilitating the payment of invoices on behalf of a region or clusters of schools. But the investigation showed that senior departmental officers instead used these schools as a slush fund to pay for alcohol, lavish hospitality and expensive retreats, and goods and services completely unrelated to departmental activities. The principal player in this conduct was the officer responsible for overseeing the administration of the multi-billion dollars budget allocated to schools. Among the consequences of the public hearings was a significant spike in the number of fresh allegations made to IBAC about corrupt or improper conduct in the education sector. And the Department itself immediately

⁴ NSW ICAC (2013), *Annual Report 2012-2013*

⁵ Queensland CCC (2017) *Operation Belcarra*, p 3, <http://www.ccc.qld.gov.au/corruption/operation-belcarra-public-hearing>

developed a reform program designed to address the vulnerabilities identified in its systems by IBAC's investigation.⁶

Public hearings threshold tests

Each state integrity commission has a slightly different legislative test to satisfy before a public hearing is held. Provisions from the NSW, Queensland, Victoria, Western Australia and South Australia integrity commissions are provided below.

New South Wales

31 Public inquiries

- (1) For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry.
- (2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:
 - (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
 - (b) the seriousness of the allegation or complaint being investigated,
 - (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
 - (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.⁷

Queensland

177 Whether hearings are to be open or closed

- (1) Generally, a hearing is not open to the public.
- (2) However—
 - (c) for a hearing other than a hearing mentioned in paragraph (a) or (b), the commission may open the hearing to the public if it—
 - (i) considers closing the hearing to the public would be unfair to a person or contrary to the public interest; and
 - (ii) approves that the hearing be a public hearing.⁸

Victoria

117 Examinations generally to be held in private

- (1) Subject to subsection (2), an examination is not open to the public unless the IBAC considers on reasonable grounds—
 - (a) there are exceptional circumstances; and
 - (b) it is in the public interest to hold a public examination; and
 - (c) a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing.⁹

⁶ Charles (2016) *Submission to the NSW Parliamentary ICAC Committee on the Report of the ICAC Inspector*

⁷ *Independent Commission Against Corruption Act 1988* (NSW)

⁸ *Crime and Corruption Act 2001* (Queensland)

⁹ *Independent Broad-based Anti-corruption Commission Act 2011* (Victoria)

Western Australia

140 Public examinations, when allowed

(2) The Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.¹⁰

South Australia

Schedule 2.3 Conduct of examinations

(3) An examination before an examiner must be held in private and the examiner may give directions as to the persons who may be present during the examination or a part of the examination.¹¹

Importance of public hearings

The reasons why it is necessary for a body such as ICAC to be entitled to hold public inquiries have been considered on many occasions, and are well-understood. In the Royal Commission into the Builders Labourers Federation (BLF) in the 1980s, the issue was raised in the High Court. Chief Justice Anthony Mason stated that an order that a commission proceed in private:

... seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy; denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive.

The denial of public proceedings immediately brings in its train other detriments. Potential witnesses ..., lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.

... Here the ultimate worth of the Royal Commission is bound up with the publicity that the proceedings attract and the public has a substantial and legitimate interest in knowing what is happening before the Commissioner.¹²

¹⁰ *Crime, Corruption and Misconduct Act 2003* (Western Australia)

¹¹ *Independent Commissioner Against Corruption Act 2012* (South Australia)

¹² In *Victoria v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 97.

The importance of open and transparent anti-corruption investigations is supported by former Federal Court judge and commissioner of the Fitzgerald Inquiry, the Hon Tony Fitzgerald AC QC:

The proposal to close anti-corruption hearings and repress information on public issues to save those involved from embarrassment demonstrates a fundamental ignorance of democracy. Effective democracy depends on informed voters. In a truly open society, citizens are entitled to full knowledge of government affairs. Information about official conduct does not become any less important because it diminishes official reputations.¹³

The leading textbook on the Law of Royal Commissions also contains the observation that –

Royal Commissioners are frequently reluctant to use private hearings, as they diminish the capacity of commissions to acquire information from the public, undermine public confidence in commissions, and reduce the ‘cleansing effect’ of hearings.¹⁴

The direct experience of anti-corruption commissioners across Australia has supported the benefit of public hearings. SA ICAC Commissioner Bruce Lander, who is currently the only Commissioner not able to open hearings, has made a recommendation to the SA State Government to allow the commission to hold public hearings to ensure transparency.¹⁵ Victorian IBAC Commissioner Stephen O’Bryan QC has said that public hearings are key to exposing corruption:

Public examinations are vital to IBAC in fulfilling its primary function of exposing public sector corruption and police misconduct. I consider them an invaluable tool for informing the public sector and the community about the detrimental impacts of corruption and police misconduct, and highlighting ways in which it can be prevented. Public examinations also help deter further wrongdoing, not only for potentially corrupt individuals, but also for public sector agencies which are prompted to examine their own processes and activities.¹⁶

¹³ McKenzie (2017) *Peter Dutton’s Home Affairs ministry will investigate itself for corruption*, <https://www.smh.com.au/politics/federal/peter-duttons-home-affairs-ministry-will-investigate-itself-for-corruption-20170721-gxfwov.html>

¹⁴ Donaghue (2001), *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, p 154.

¹⁵ MacLennan (2016), *ICAC Commissioner Bruce Lander pushes for public hearings to ensure transparency*, <http://www.abc.net.au/news/2016-10-31/icac-commissioner-bruce-lander-wants-public-hearings-in-sa/7980960>

¹⁶ Independent Broad-based Anti-corruption Commission (2015), *Annual Report*

Former NSW ICAC Assistant Commissioner Anthony Whealy QC has said:

There are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost.¹⁷

Former NSW ICAC Commissioner David Ipp AO QC has said that:

Its main function is exposing corruption; this cannot be done without public hearings.¹⁸

This majority view is opposed by former NSW ICAC Inspector David Levine, and former NSW crown prosecutor Margaret Cunneen.

Margaret Cunneen was investigated by NSW ICAC for allegations that she attempted to pervert the course of justice by telling her daughter-in-law to feign chest pains to avoid a blood alcohol level test at the site of a motor vehicle accident. The decision of NSW ICAC to investigate this matter was challenged by Cunneen, resulting in a majority High Court decision that NSW ICAC had overstepped its jurisdiction in this matter.¹⁹

This matter resulted in a review of NSW ICAC's powers and conduct by ICAC Inspector David Levine. Levine's report, released in 2016, recommended that NSW ICAC's investigations should be held entirely in private:

It will prevent the undeserved trashing of reputations and will still permit a proper focus and a fairly managed forensic process, without the distraction of temptation for flamboyance or theatre.²⁰

The NSW Parliamentary committee on ICAC conducted a review into Levine's report. It did not accept Levine's recommendation that hearings be held entirely in private, and also did not accept recommendations from submissions to increase the threshold for holding public hearings noting that this would increase litigation against ICAC's decision to hold public hearings. The committee did, however, recommend that rules of procedural fairness be followed during public hearings.²¹

¹⁷ Gerathy (2016), *ICAC inspector calls for end to public hearings to stop 'trashing of reputations'*, <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

¹⁸ Ibid.

¹⁹ *Cunneen v Independent Commission Against Corruption* [2015] HCA 14

²⁰ Ibid.

²¹ Committee on the Independent Commission Against Corruption (2016), *Review of the Independent Commission Against Corruption – consideration of the Inspectors' reports*,

The Government accepted the ICAC Parliamentary committee's recommendation, but also went one step further and legislated that in order to hold a public hearing the Chief Commissioner must get agreement from at least one of the part-time Commissioners.²²

NSW ICAC's ability to hold public inquiries had been considered and supported in at least two reviews of ICAC's operations, first by Bruce McClintock SC in his 2004-5 review and secondly in the more recent 2015 review conducted by the Hon. Murray Gleeson AC and Mr McClintock. This review by the Independent Panel was established in response to the Cunneen case, and found that:

public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes. The Panel is not attracted to the idea that the powers of the ICAC should all be exercised in private.²³

The report also noted that the Chief Commissioner is the best person to make the decision as to whether to open the inquiry, and that this process has led to predominantly good decisions:

The decision whether to conduct a public inquiry is an operational decision made for the purposes of the particular investigation. It is a decision best made by the Commissioner who is apprised of all the relevant facts and in the best position to weigh the public interest. There has, in fact, been little criticism brought to the Panel's attention (with one exception) of the ICAC's decisions to hold public inquiries, as distinct from the manner in which such inquiries are conducted. The exception is, of course, the decision to hold the public inquiry in [in the matter of Margaret Mary] Cunneen. That is an insufficient basis to recommend a change.²⁴

Recommendation

That a National Integrity Commission be able to hold public hearings if the Commissioner considers it would make the investigation more effective and be in the public interest.

<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=1958#tab-reports>

²² *Independent Commission Against Corruption Amendment Act 2016* (NSW)

²³ Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC*

²⁴ Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC* pp 60-61

This model is a combination of the NSW ICAC, Queensland CCC and Western Australian CCC tests. The Victorian IBAC test has not been recommended due to:

- “exceptional circumstances” being difficult to define and prove
- “reasonable grounds” allowing the decision to be challenged in court, damaging the investigation in a number of ways:
 - Investigations are delayed unnecessarily, with the potential for ongoing appeals
 - Public money is wasted on expensive trails, often against opponents with endless financial and legal resources
 - In the trial, to justify its public hearing order, the Commission would have to disclose all the evidence it has, including information collected earlier in private hearings. This would be revealed prematurely and may give those under investigation the advantage when the public hearing finally takes place
 - IBACs decision to hold public hearings has only been challenged once and IBAC won the case, suggesting that IBAC acted correctly
 - There must be trust in the Commissioner to make the right decisions, otherwise the Commission will not be effective
 - In NSW there is an administrative law appeal available which gives ample protection if the Commission steps outside its legislative boundary. No such appeal has ever succeeded in the past, suggesting NSW ICAC has acted correctly in ordering a public hearing. The same protection would be available for a National Integrity Commission.