

Victoria's watchdog losing teeth

Victorian Government is placing more restrictions on its already weak corruption watchdog

Victoria's Independent Broad-based Anti-corruption Commission (IBAC) Act makes IBAC one of the weakest corruption watchdogs in the country. Limitations on its jurisdiction, investigative powers and ability to hold public hearings make it less effective than its counterparts in NSW, Queensland and Western Australia. It is now being weakened further by the Victorian Government, with an amending bill placing more restrictions on its ability to hold public hearings before the Legislative Council.

Prime Minister Malcolm Turnbull has said that the Federal Government has not ruled out the establishment of a federal corruption watchdog, and expressed preference for a federal body modelled on the design of Victoria's Independent Broad-based Anti-corruption Commission (IBAC).¹ This briefing paper outlines the weaknesses in the IBAC model.

Existing weaknesses

Jurisdiction

The jurisdiction of the Victorian IBAC restricts it to investigating the specific conduct of specific people. It can only investigate conduct of public officials that amounts to an offence against a prescribed list of Acts. It must have a 'reasonable suspicion' that either a criminal offence has been committed, or that a common law offence has been committed involving misconduct in public office, perverting or attempting to pervert the course of justice, or bribery of a public official.²

The NSW ICAC, WA CCC and Queensland CCC allow investigation of any conduct of any person, whether or not they are a public official, that adversely affects the impartiality of public administration.

¹ Massola and Hartcher, 11th December 2017, *Malcolm Turnbull opens door to national anti-corruption body but dismisses ICAC model as best as 'hearsay and rumour'*, <https://www.smh.com.au/politics/federal/malcolm-turnbull-opens-door-to-national-anticorruption-body-but-dismisses-icac-model-as-beset-by-hearsay-and-rumour-20171211-h02ivi.html>

² *Independent Broad-based Anti-corruption Commission 2011* (Victoria)

Investigative powers

NSW ICAC, Queensland CCC and the WA CCC all have the full investigative powers of a Royal Commission, including:³

- Power to obtain information including to compel production of document, statement of information or other thing at a specified time and place
- Power to enter public premises at any time
- Search warrant for private premises can be provided by Commissioner (in NSW and WA)
- Conduct private compulsory examinations if in the public interest to do so
- Conduct public inquiries, if in the public interest to do so
- Examination and cross-examination of witnesses
- Apply for a warrant for arrest of witness if they fail to appear before examination or withhold evidence
- Apply for use of surveillance devices
- Claims to protection by privilege not accepted (except some in Queensland)

The Victorian IBAC, has limitations placed on its investigative powers including on its power to search premises, call witnesses, hold hearings, and gather and hold evidence.⁴

- The Commissioner cannot provide search warrants, as in WA and NSW. IBAC must apply to the Supreme Court and the warrant must include the purpose and certain conditions of the search.
- Once the warrant has been provided, the officer must seek permission to enter the property and must give a copy of the search warrant to the occupier.
- When summoning witnesses, IBAC must be satisfied on reasonable grounds that the witness has information that is necessary to the investigation and that cannot be obtained by other means.
- IBAC must also have regard to the value of the information or evidence and to the age and mental state of the witness.
- Any public officer can decide not to give IBAC the requested evidence if a reasonable excuse is given.
- Once evidence is found, IBAC must make copies of it and return it to its owner. In some circumstances IBAC can take the original document but must provide a receipt and return the evidence within a certain timeframe.
- The restrictions on IBAC's ability to hold public hearings are discussed below.

³ See for example: *Independent Commission Against Corruption 1988* (NSW)

⁴ *Independent Broad-based Anti-corruption Commission 2011* (Victoria)

Public hearings

The Victorian IBAC can only hold a public hearing if it is satisfied on reasonable grounds that there are exceptional circumstances, it is in the public interest, and that the hearing would not cause any unreasonable reputational damage. The reasonable grounds test means that the decision to hold public hearings can be challenged in court, resulting in an unnecessary delay in investigations, investigation evidence being revealed prematurely, and high legal costs being borne by the public.

This contrasts with the Queensland, WA and NSW commissions that can hold public hearings if the Commissioner considers it to be in the public interest. From 2012-2017, NSW ICAC held 30 public hearings, and 721 private hearings. Victoria's IBAC held only 5 public hearings over this time.⁵

As the role of anti-corruption commissions is to investigate and expose corruption, and much of the content of investigations comes out in hearings, the act of hiding hearings from public view threatens the proper function of the commission.

Anti-corruption commissioners across Australia have recognised the power of public hearings.

- SA ICAC Commissioner Bruce Lander, who is currently the only commissioner who is not able to open hearings, has successfully advocated for the ability to hold public hearings in order to increase public confidence.⁶
- Victorian IBAC former Commissioner Stephen O'Bryan QC has said that openly examining cases of alleged serious corruption and misconduct in public hearings has encouraged and empowered people to come forward and report suspected wrongdoing.⁷
- Former assistant NSW ICAC 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."⁸

⁵ NSW ICAC Annual Reports 2012-2017, Victoria IBAC Annual Reports 2012-2017

⁶ Wills, 2018, *Legislation to allow ICAC public hearings coming to Parliament*, <http://www.adelaidenow.com.au/news/south-australia/legislation-to-allow-icac-public-hearings-coming-to-parliament/news-story/534fd1d0f984b4d36e7e73e2f2e2d4f6>

⁷ IBAC, 2016, *IBAC sheds light on serious corruption in its third year*, Media release, 14th September 2016

⁸ 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>

- Former NSW ICAC Commissioner David Ipp QC has said that “Its main function is exposing corruption; this cannot be done without public hearings.”⁹

Process to begin inquiries

The NSW ICAC, WA CCC and the Queensland CCC can begin preliminary investigations and full inquiries using all their investigative powers at the discretion of the Commissioner.

The NSW ICAC inquiry that resulted in the conviction of Eddie Obeid and Ian Macdonald began from an anonymous phone call with no further information other than the suggestion that ICAC look into the mining licence process at Doyles Creek. It was only through the lengthy application of all investigative powers that the full network of corruption around the Obeids was uncovered.¹⁰

The Victorian IBAC can only begin investigations once it has a ‘reasonable suspicion’ of a criminal offence being committed, which requires having existing information regarding the offence before the investigation begins. And once it begins, it can only use limited investigative powers in its preliminary investigations.¹¹

The threshold of needing sufficient information regarding a criminal offence before beginning an investigation defeats the purpose of an investigative body. An investigative body, whether a Royal Commission or a corruption commission, is not designed to prosecute against criminal offences. Investigative bodies are designed to discover whether any misconduct has occurred, expose it, and then refer it to the relevant body for prosecution, prevention or disciplinary action.

Once Victoria’s IBAC has information regarding a criminal offence, it can begin preliminary investigations using only its coercive powers. It can request information or documents, but can only hold public and private hearings once it has progressed to a full inquiry.

Complaints

The NSW ICAC, WA CCC and Queensland CCC allow anyone to make a complaint to the commission in any form.

The Victorian IBAC only allows written complaints in a prescribed form. As making an allegation of corruption is a serious matter that most people do not take lightly and may fear retribution if the person against they are complaining ever finds out, it is

⁹ Ibid.

¹⁰ Ibid.

¹¹ *Independent Broad-based Anti-corruption Commission 2011* (Victoria)

important that the complaint process allows anonymous complaints with any level of detail in any form.

New amendments

The Victorian Parliament has before it now a Bill to amend the Independent Broad-based Anti-corruption Corruption (IBAC) Act which will seriously affect and reduce the IBAC's powers to conduct public hearings during its investigations.

Under section 117, the IBAC cannot hold a public hearing unless IBAC considers on reasonable grounds that a) there are exceptional circumstances b) it is in the public interest to hold a public examination and c) that a public hearing can be held without causing unreasonable damage to a person's reputation, safety and wellbeing. The amending bill adds a fourth requirement that IBAC considers the conduct may constitute serious or systemic corrupt conduct or serious or systemic police personnel misconduct. A new provision in the bill allows IBAC to conduct part of a public hearing in private on application by a person under examination, or another person authorised to appear.

Public hearings are regarded by all anti-corruption commissioners around Australia as a significant aspect of their powers, and an important investigative and preventative tool. IBAC has held few public hearings since 2013, but the benefits were demonstrated by IBAC's investigation of the Education Department (Operation Ord), the Transport Department (Operation Fitzroy) and the Police in Ballarat. The level of public interest in these operations drove speedy reforms within the agencies concerned, and public interest led to a large number of complaints being made to IBAC in other areas. Public hearings enable the community to understand the nature and effect of corruption, and result in further witnesses coming forward. It must be remembered that an anti-corruption commission's function includes the exposure of corruption and the education of the community. Two Chief Justices of the High Court have supported the holding of public hearings by Royal Commissions.

The Victorian legislation is already weaker than others in the limited power given to IBAC to hold public hearings. The requirement that there be "exceptional circumstances" is so vague as to make it difficult for IBAC to predict when a court will intervene to prevent a public hearing taking place, when it is challenged in court. A new proposed requirement that IBAC considers the relevant conduct to constitute serious or systemic corrupt conduct will add to the hurdles IBAC must overcome to hold a public hearing.

The new provision allowing an application to be made to close a public hearing (to conduct part of it in private) will be used by every person or suspect attending for examination, and IBAC will be required to have regard to the public interest, and whether holding the examination in private is necessary to prevent unreasonable damage.

The confusion here will be made worse by two sections in the legislation in differing terms, one of which requires, and the other permits, IBAC to take steps to ensure that other legal proceedings are not prejudiced by an investigation.

The community will recall the opposition of the Police Department to the events of the Ballarat police station being examined in public, which led to film of police officers dealing with prisoners being shown on television. The police department is doubtless among those pressing for these amendments to be passed. The police opposition in that case led to a lengthy hearing, followed by an appeal to the Court of Appeal, and many months delay before the inquiry could be completed.

When the Andrew's Government came to power it affirmed its commitment to strengthening Victoria's integrity and accountability system. If these amendments become law, IBAC's legislation, already significantly flawed, will be seriously weakened in relation to the holding of public hearings, which is anything but a strengthening of Victoria's integrity and accountability system, and damages IBAC's investigative powers.