

CLOSED PROCEEDINGS

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

Melbourne — 11 April 2016

Members

Mr Kim Wells — Chair

Ms Marsha Thomson — Deputy Chair

Mr Sam Hibbins

Mr Danny O'Brien

Mr Simon Ramsay

Mr Tim Richardson

Ms Jaclyn Symes

Staff

Executive officer: Ms Sandy Cook

Research officer: Ms Kirstie Twigg

Witnesses

Mr Stephen O'Bryan, QC, Commissioner, and

Dr John Lynch, General Counsel, Independent Broad-based Anti-corruption Commission.

The CHAIR — Firstly, thank you for your time, Commissioner. We will go through the procedure first. Welcome to the closed hearing of the Independent Broad-based Anti-corruption Commission Committee. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and where applicable the provisions of reciprocal legislation in Australian states and territories. However, it is important that you note that any comments you make outside the hearing, including effective repetition of what you have said in evidence, may not be afforded such privilege. This hearing is closed to the public. However, it will be transcribed by Hansard, and the transcripts will be published when the committee tables its report in Parliament. Have you received and read the guide for witnesses presenting evidence to parliamentary committees?

Mr O'BRYAN — I have, thank you.

The CHAIR — It is important to note that any action which seeks to impede or hinder a witness or threaten a witness for the evidence that they would give or have given may constitute and be punishable as a contempt of Parliament. We are recording the evidence, and we will provide a proof version of the Hansard transcript at the earliest opportunity so you can correct it as appropriate. I would like to invite you to make a verbal submission, and we will ask questions as appropriate. Again, we thank you very much for your time.

Mr O'BRYAN — Thank you for the opportunity to meet today. Before responding to the committee's questions concerning the Protected Disclosure Act 2012, I would like to make some initial observations on IBAC's role. A protected disclosure regime is essential to a well-functioning public sector integrity system, encouraging and protecting disclosers — whistleblowers — who come forward with information about possible serious misconduct and corruption. The clandestine nature of corrupt conduct means it may never come to light unless people on the inside report what they know or suspect. The protected disclosure scheme is designed to encourage people to report corruption by providing legislative protection against detrimental action as a result of them speaking up.

The key protections for disclosers in the act are ongoing confidentiality of identity; welfare management; protections against detrimental action; and employment transfer opportunities. Regarding the third protection, against detrimental action, that involves protections against reprisal action as well as civil and criminal liability in areas such as defamation and breach of secrecy rules, regulations and statutory laws.

These important protections are backed up by legally enforceable rights through the courts, including for injunctive relief and damages. IBAC plays a key role in the protected disclosure scheme in that we assess whether disclosures — be they made directly or notified by prescribed agencies — are protected disclosure complaints, which in shorthand can be referred to as PDCs. We decide whether PDCs should be investigated, and if so, by which prescribed agency. We support the sound administration of the scheme, such as issuing guidelines on the making and handling of disclosures and the protection of people from detrimental action; reviewing protected disclosure procedures established by public bodies; providing advice, making recommendations and giving other assistance to the public sector; undertaking research on the functioning of the scheme; and regularly reporting to Parliament about the scheme's operation. IBAC is central to the effective operation of the protected disclosure scheme, and I welcome the opportunity to discuss the scheme with the committee, including where it can be improved.

I turn now to the committee's specific questions contained in the Chair's letter to me dated 21 March 2016. Is it convenient if I quickly repeat each question before I answer?

The CHAIR — Yes, sure. That would be great.

Mr O'BRYAN — Question 1 is: how many notifications of protected disclosures has IBAC received under the Protected Disclosure Act 2012 following its establishment? How many of those notifications were assessed by IBAC to amount to protected disclosure complaints?

I should note from the outset that IBAC considers all complaints it receives, and the allegations contained within those complaints, as possible protected disclosures. For the period from 1 July 2013 to 30 June

2015, IBAC received a total of 4763 complaints or notifications, containing 9303 separate, individual allegations. Of these, some 524 allegations were assessed as being protected disclosures. So for the 18 months from July 2013 to the end of June 2015, approximately 6 per cent of assessed allegations were determined to be protected disclosures. Our preliminary assessment of the data for 2015–16 indicates the number of allegations determined to be protected disclosures may be significantly higher than previously. Specifically, for the period 1 July 2015 to 31 March 2016, IBAC has assessed 437 allegations as protected disclosure complaints.

Ms THOMSON — Sorry, what was that figure?

Mr O'BRYAN — Four hundred and thirty-seven allegations have been assessed as protected disclosure complaints in that period. This compares to a total of 210 allegations being assessed as protected disclosures for all of 2014 and 15. This appears to be largely the result of an increase in complaints by police about other police. There is a lower threshold for these complaints to be determined protected disclosures than is the case with other types of disclosures. It follows, then, that a substantial portion of new or recent protected disclosures relate to allegations made by police officers about police misconduct or corrupt conduct.

Question 2 is: how many potential disclosures did IBAC receive directly from members of the public in the financial year 2014–15?

In 2014–15 IBAC received around 1000 complaints from members of the public and public sector employees. There can be overlap between complainants who are members of the public as well as being employed within the public sector. However, it is estimated that less than half of the complaints we receive are made by members of the public. Every complaint received by IBAC is assessed under the Protected Disclosure Act, so we can estimate that up to 500 potential protected disclosures were received from the public in 2014–15.

Question 3 is: how long does it take, on average, for IBAC to assess whether a notification amounts to a protected disclosure complaint? Does IBAC have internal targets for the length of time to assess a notification? And if not, what might be a reasonable time frame?

IBAC has a standard assessment process for all complaints and notifications. When IBAC was first established, we sought to assess 75 per cent of all complaints and notifications within 60 days. In 2014–15 IBAC assessed 98 per cent of complaints and notifications within 60 days. We now seek to assess 90 per cent of all complaints and notifications, including protected disclosure matters, within 45 days. For the second quarter of 2015–16, 93 per cent of complaints and notifications were assessed within 45 days. The current average time frame for assessment of a complaint or notification is 21 days. We report on our performance publicly in our annual report and as part of the state budget reporting process, for budget paper 3.

Question 4 is: in 2014 IBAC conducted a review of the guidelines and procedures produced by public sector bodies in relation to the handling of protected disclosures. Could you outline what the major findings of this review were? What were some of the major learnings of this review about how agencies are handling the new protected disclosure regime?

IBAC released its *Review of protected disclosure procedures* report in December 2014. The review involved 114 public bodies and found that 88 of those bodies met the requirements of section 58, requiring entities to establish procedures, and section 59, requiring procedures to be consistent with the protected disclosure scheme — that is, sections 58 and 59 of the Protected Disclosure Act.

The review found that 26 public bodies were not compliant because they had no procedures in place or because the procedures contained substantially incorrect material or omitted essential information. A total of 57 recommendations were made to 25 public bodies, including that entities establish protected disclosure procedures; ensure such procedures are readily available, including to members of the public; and amend their procedures to address deficiencies identified.

In conducting the review, IBAC observed the following challenges in how public bodies deal with the protected disclosure regime: dealing with complex protected disclosure legislation, including understanding which agencies can and cannot receive a protected disclosure, and the application of confidentiality provisions, which are complex and inflexible; transitioning to the new legislation, as a number of public bodies incorrectly adapted procedures developed pursuant to the Whistleblowers Protection Act 2001 and failed to address key differences in the legislation — for example, which agencies can receive or investigate a protected disclosure; the importance of education and support for public bodies in applying the legislation; and the need for public bodies to ensure that procedures are correctly followed once established. IBAC issued a further progress report on the *Review of protected disclosure procedures* in January 2016. The report concluded that the public bodies to whom recommendations were made had taken steps to address issues and improve their understanding of the protected disclosure regime.

Question 5 is: what are the major reasons notifications made to IBAC are not assessed as protected disclosure complaints?

The main reason a notification is not assessed as a protected disclosure complaint is that it is not technically a disclosure under part 2 of the Protected Disclosure Act. An example is where a complaint has come from an entity that is not authorised under the act to receive protected disclosures. The second area where notifications are not assessed as a protected disclosure complaint is that they do not meet the thresholds prescribed in section 9 of the act — for instance, because a matter lacks substance or credibility. A matter may further be denied protected disclosure status on the grounds that the complainant has made the same complaint to numerous entities and sometimes publicly through the media and IBAC therefore assesses the matter as being too widely known to be a disclosure as such. This is an issue which could benefit from further consideration to find the right balance between not excluding matters that have been reported elsewhere yet upholding the general principle that the details of a protected disclosure should not be widely known.

Question 6 is: in the special report published in 2014 it was identified in IBAC's experience that the PD act could not provide protection to an individual if they make a disclosure to another public sector entity and where IBAC is not notified under the PD act by an entity that is prescribed for the purpose for receiving such a disclosure. In particular, it was identified that this often arose in corrupt conduct notifications, whether mandatory or voluntary, and notifications from the Victorian Ombudsman about police-related complaints. Do you still hold this concern? Will the mandatory reporting requirements contained in the proposed Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 impact on this concern in any way through expanding the corrupt conduct notification process?

The concern regarding limitations around protections that can be provided to an individual, if that person makes a notification to an entity not authorised to receive disclosures remains. We are of the view that there is merit in amending the Protected Disclosure Act so that IBAC is able to assess all notifications for protected disclosure status regardless of their source. In short, we should be assessing notifications against the threshold criteria in section 9 of the act and not be excluding such notifications if they originate from a non-authorised entity.

The committee in its question has referred to an example regarding notifications from the Victorian Ombudsman to IBAC about police-related complaints. Another example is that government departments are authorised to receive disclosures about the department or its employees, but not about other organisations, such as agencies funded by the department. However, there have been instances where individuals have concerns about conduct occurring within such agencies but are reluctant to report the matter to IBAC, preferring to report to the department. The department may notify the matter to IBAC but the matter cannot be assessed as a protected disclosure because it has not been made according to the statutory procedure. As a result, the individual is not entitled to the protections under the Protected Disclosure Act. The stronger system bill currently before the Legislative Council does not appear to resolve the matter despite the problem having been publicly reported on in 2014.

Question 7 is: has IBAC's engagement with public sector bodies on the development and compliance with the guidelines issued identified any common problems experienced by agencies with the legislation? Have there been any suggestions for improvements or enhancements?

IBAC is responsible for providing information and education about the protected disclosure regime and assisting the public sector to increase its capacity to comply with the regime. To this end IBAC has undertaken a program of education and engagement with public sector bodies over the last three years, including audits and research relevant to the protected disclosure system, such as the *Review of protected disclosure procedures* I referred to earlier; publications, including guidelines on making and handling protected disclosures and welfare management; and face-to-face and online training and forums with designated protected disclosure coordinators from across the public sector.

At our most recent forum for protected disclosure coordinators in March this year IBAC sought views on the operation of the protected disclosure scheme, including challenges experienced in applying the Protected Disclosure Act. The challenges identified by PD coordinators included the general complexity of the legislation; difficulty in determining who is a public body and therefore subject to the legislation; difficulty in interpreting the legislation to identify matters that are appropriately subject to the Protected Disclosure Act; difficulty in maintaining the confidentiality of disclosers, particularly if there are delays in assessing a complaint; managing complaints that upon further inquiry may be deemed appropriate for protection under the Protected Disclosure Act, which may compromise confidentiality; abuse of the protected disclosure regime by some employees for their own ends — for example, if they have themselves engaged in corrupt conduct or to avoid disciplinary action; conflicts with other legislative obligations — for example, WorkCover claims or industrial relations matters; and difficulty in maintaining experience and knowledge in managing protected disclosures, particularly in small agencies that may infrequently receive a disclosure.

Question 8 is: do you have concerns about the operation of the current legislation pertaining to protected disclosures? How could improvements be made?

From IBAC's perspective the operation of the Protected Disclosure Act could be improved in the following ways: a number of agencies have reported difficulties in understanding the restrictions on disclosing information and advising others, such as people who make disclosures, on the information they can and cannot disclose. The confidentiality provisions could therefore be simplified and made more flexible, in particular to make clear what can and what cannot be divulged.

We have also experienced issues with some Victoria Police officers coming directly to IBAC seeking protected disclosure status to enable them to argue that Victoria Police disciplinary action for other matters is unlawful retribution. This is a growing issue and needs to be addressed comprehensively by reference to both the Protected Disclosure Act and the Victoria Police Act. It is noted that the current threshold for a protected disclosure made by a police officer about misconduct by another police officer is low, as any complaint made in accordance with section 167(3) of the Victoria Police Act is deemed a protected disclosure. It would be preferable for IBAC to have greater discretion around assessment of Victoria Police complaints.

Elements of the Protected Disclosure Act in relation to assessment are quite vague. For instance, the act could be clearer in requiring an assessment to consider a person's relationship to the entity — for example, whether the person is an employee or a member of the public, the subject of the complaint as well as the credibility of the complaint.

As indicated in response to question 6, we are concerned regarding limitations around protections that can be provided to an individual if that person makes a notification to an entity other than IBAC, and where that entity is not authorised to receive a disclosure. There would be value in amending the Protected Disclosure Act so that all notifications to IBAC, regardless of their source, can be so assessed.

Question 9 is: a number of concerns have been raised about the operation of the legislation. These concerns relate to substantial areas of the legislation including how disclosures are made; who disclosures

are made to; who should conduct investigations; and the extent of protections provided to disclosers. In your view, in order to resolve these concerns, would it be more beneficial to amend the legislation in its current form or create a new act? What are the potential impacts of creating new legislation on IBAC and public sector agencies?

The Protected Disclosure Act is still relatively new legislation with which all stakeholders are becoming more familiar through our implementation of it. While there are certainly issues that need to be addressed through amendment, as we are discussing here today, given the public resources that have been invested in the development and implementation of this legislation to date, IBAC considers there would need to be strong evidence that it is not meeting the principal objects and in keeping with current best practice in other jurisdictions before consideration should be given to creating a whole new act.

I trust this information helps to inform the committee's consideration of the protected disclosure scheme, and I am happy to answer any further questions today or on notice that members of the committee may have. I have also brought with me for the committee a copy — and we can supply more copies if necessary — of various materials that I referred to earlier that have been issued publicly by IBAC, in particular protected disclosure procedures, materials relating to protected disclosure, coordinator forums, guidelines for making and handling disclosures, and the various materials relating to our reviews of the protected disclosure scheme, so if it is convenient, I can pass that to Ms Cook.

The CHAIR — Thanks, Commissioner, for that comprehensive response. Just in regard to question 8, where you referred to public agencies and sometimes the confusion around what can and cannot be disclosed. Is that a matter for further amendments to the legislation or is it a matter of better education by IBAC, maybe, to the public agencies on how best to ensure that the quality of their disclosure is clear?

Mr O'BRYAN — I think in light of my answer to the question earlier it is perhaps a bit of both, and we are continuing to chip away at that issue. There are a lot of public sector agencies to engage with and we have put out a considerable volume of material. We have had a considerable number of meetings with public sector agencies. We have a person or persons who are available to be telephoned to discuss any issues they have in these matters, and otherwise there are the areas for consideration of possible legislative change to just make things a little bit simpler as well for agencies.

The CHAIR — So a combination of both, I suppose — better understanding and some legislative changes just to make it clearer.

Mr O'BRYAN — Yes.

Mr D. O'BRIEN — I have a follow-on to that, Commissioner. You talked about some of the reasons for a complaint not being assessed as a protected disclosure including someone not following the procedure. Can I just get you to give your view on that as an issue in that if a member of the public, for example, has got an issue, whether it is with the police or a departmental officer, and they just do not know what to do, if they make a complaint to the department or someone else rather than going to IBAC, is that making whistleblowing harder than it necessarily needs to be?

Mr O'BRYAN — It could have that effect. At the moment you have an act that is highly prescriptive regarding how notifications are made, and that cuts out of the loop some agencies. So the best example is perhaps the one the committee picked up on, which is someone complaining, as they often do, to the Ombudsman about Victoria Police. The Ombudsman is not authorised to then notify us in a way where that particular kind of complaint could have been received and could then be a protected disclosure.

I think that is simply fixed by, as I have said earlier, all notifications to IBAC being capable of being assessed as protected disclosures. I am not sure why initially it was thought necessary to be so highly prescriptive in drafting the act. No doubt there was some thinking behind that, but it really could be simplified. I just do not see why if we can assess every direct complaint to us as a protected disclosure — about just about any agency or body — the same cannot prevail for notifications.

Mr D. O'BRIEN — So the solution to that would be, irrespective of how it got to IBAC, it could become a PD whether it has gone through the Ombudsman or the police — —

Mr O'BRYAN — Theoretically. Maybe there is rationale behind the high prescriptiveness in the act, but no-one has ever explained it to me, and I do not think Dr Lynch has ever had it explained to him. I cannot quite understand why it has to be so. But sometimes, as you know, legislation gets drafted in committee fashion and — —

Mr D. O'BRIEN — You end up looking like a donkey.

Mr O'BRYAN — Well, it gets complicated because everybody has thoughts on things and things become compromised, as we know, and they like the look of it, but in practice it just seems overly complicated.

Mr D. O'BRIEN — Chair, the next one is related. An extension to that, really, is the question about media disclosure. Just because someone has gone to the *Herald Sun* or the *Age* anonymously and it has been published there, do you think that is a fair reason that it does not become PD for the purposes of the act?

Mr O'BRYAN — I must say you do tend in our position to be a little bit wary of ones where people have decided they will go to the media and also come to us. It does complicate things because it already compromises an investigation when it is known by potential wrongdoers that it has been brought to our attention and immediately they will probably stop or cover up or whatever, and they will know that through the media. So there is a degree of conflict, I would have thought, where you have an act where confidentiality is the upmost importance, both in the Protected Disclosure Act and the IBAC act and then suddenly it is not confidential because the media is all over it and that is a problem.

At the moment, as I think I said in a very early public report, we just give the word 'disclosure' its ordinary English meaning, which means something otherwise not known, something that is fairly much a secret. The moment it is out in the media it is no longer a secret and you have difficulty in interpreting the act, at least from a lawyer's point of view, as a disclosure. So it pretty much automatically rules it out if it has been disclosed in the media. I am not sure that there is an easy solution to that one but I have proposed this morning, as you have heard, that perhaps we could have a little bit of discretion around that.

Sometimes these things go to the media from another source, not from the person who is seeking the protection, so that is perhaps where the discretion would kick in and although we are wary of the person who has gone to the media and then come to us and wonder what their true motive is, where it has come out from someone else — it might be some other whistleblower or whatever — but the person who has not chosen to go to the media, perhaps they should be more fairly assessed as a protected disclosure, even though technically the matter is no longer a disclosure because it is all over the front of the *Herald Sun*.

Mr D. O'BRIEN — Yes, I guess, again, I am coming from the same position as the first question in that sometimes people just do not know what to do and a lot of people think, 'I'll go to *A Current Affair*. That'll fix it'.

Mr O'BRYAN — And we have seen ones, which you will have seen, where they go to everyone. They go to the Premier, to the minister, to the Leader of the Opposition — —

Mr D. O'BRIEN — Copy to every member of Parliament — —

The CHAIR — Local members of Parliament — —

Mr O'BRYAN — The Governor et cetera, and the media, and hope someone will pick up on it, and to us. That can create problems. But, yes, that is the way some people operate.

Ms THOMSON — I just have a couple of questions around the proportion of the disclosures, the PDs, that are actually coming from police. It seems to me that the vast majority are police related, so I am a bit interested in what that ratio looks like. That is the first question.

Mr O'BRYAN — Yes. The exact ratio I would have to take on notice — —

Ms THOMSON — An estimate will do.

Dr LYNCH — Look, I could not — —

Mr O'BRYAN — I think, just guessing, it is probably not the vast majority but it is probably somewhere around 60 to 70 per cent. But certainly the majority, yes, and that is because I have explained that, firstly, the threshold is very low for police in terms of what might be a protected disclosure, and generally speaking a police complaint about police is automatically deemed under the legislation to be a protected disclosure. So we have no discretion. Pretty much anything will just be stamped 'protected disclosure' and treated in that way, which is what boosts the numbers, which is not the case for anything that is non-police — they all have to be assessed, they all have to jump the hurdles in the Protected Disclosure Act. So it is a much higher bar for non-police complaints compared to police complaints which, as I say, normally do not involve discretion at all. The act just says they are protected disclosure complaints.

Ms THOMSON — And do you think that there needs to be a level of discretion within that?

Mr O'BRYAN — We do, because the Protected Disclosure Act then carries with it a whole lot of prescriptive obligations around confidentiality and of course the protections in the workplace, and it seems to us they are not always warranted for every police complaint, some of them being sort of minor management — many of them actually, you know, you might regard as more minor things, and there should be a discretion residing somewhere, we think.

I would imagine members of the police force generally are very happy to have everything a protected disclosure so deemed, so I would imagine, without knowing, that you will get no pushback from Victoria Police on that. But then again those who deal with the scheme at PSC might have a different view. I have not discussed it with them. I know you are discussing that with them. I would be interested to hear what their views are, and we might have some more direct discussion with them about that.

Mr HIBBINS — My question was about protected disclosures in relation to members of Parliament, and my understanding at the moment is to get a protected disclosure the complaint needs to be made through the Presiding Officer.

Mr O'BRYAN — Yes.

Mr HIBBINS — Would there be merit in removing that requirement and allowing complaints about MPs directly to IBAC to be assessed for protected disclosure?

The CHAIR — We are all very interested in this answer.

Mr O'BRYAN — Well, look you will all be pleased to hear that we have very little relevant experience in this, for reasons you can guess at, and at the moment it is not a problem, so to speak. So when you say 'benefit', I cannot actually say at the moment there would be a benefit. We would be perfectly happy to take them directly, and I have said in an early public report that as I read the legislation we can still investigate a matter that comes to our attention to do with politicians regardless of whether it has come through the Speaker as a protected disclosure. I read the act as allowing us to investigate it; it is just that we will not be investigating it as a protected disclosure. But, as I say, our practical experience is just, you know, quite threadbare in this area.

Mr HIBBINS — But could this provision be acting as a disincentive or a barrier to receiving complaints about MPs?

Mr O'BRYAN — Theoretically I suppose, but you would just be hypothesising without examples where it could. But if somebody was not keen to go through the Speaker or the President on the basis that they are a fellow member of Parliament, then I suppose in theory, yes.

Ms THOMSON — But you have also got the situation where it can be used the other way, say, if you have got someone who has got a gripe against someone, justified or not, who then takes it directly to IBAC and to the *Herald Sun* at the same time, and you have effectively killed the reputation of an MP who might be really upstanding, nothing wrong, and effectively get cleared from the investigation, but the damage is done.

Mr O'BRYAN — With respect, I take the point, they could — —

It might be a very handy filter for us, for all I know, because I would assume the presiding members of each house receive plenty of complaints and can effectively filter them, which I assume was the intention. But, as I say, we can still take the complaint directly; it is just that we cannot assess it as a protected disclosure complaint unless it comes from the Presiding Officers. But we could in theory, I suppose, if we got it directly and thought the person ought to be considered for the protection, bring it to the attention of the Presiding Officer, and if the Presiding Officer does not want to refer it to us, give them a bit of encouragement to do it and leave it at that. I suppose that is one way you could do it — a little bit roundabout, but it is not impossible to try to achieve a satisfactory outcome for the whistleblower, but already that adds a layer of complexity to the process, which may or may not be a deterrent to genuine complainants.

The CHAIR — Any other further questions? If not, Commissioner, I thank you very much for your time this morning. John, thank you very much. Do we have one follow-up question on notice?

Mr O'BRYAN — That was the statistical — —

The CHAIR — One to Marsha — just the stats?

Ms THOMSON — Yes.

Mr O'BRYAN — We could get those stats, yes.

Ms THOMSON — Yes, thank you.

The CHAIR — If we can get that back to the committee.

Mr O'BRYAN — Dr Lynch did take a careful note of that.

The CHAIR — We thank you very much for your time.

Mr O'BRYAN — Thank you very much, members of the committee.

Witnesses withdrew.