

# INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

## Review of Protected Disclosures

Melbourne — 20 June 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 Rob Spence, Chief Executive Officer, and

Ms Alison Lyon, General Counsel and Corporate Secretary, Municipal Association of Victoria.

**The CHAIR** — I would like to welcome Rob Spence and Alison Lyon from the MAV to the public 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 other Australian states and territories. Any comments you make outside the hearing may not be afforded such privilege. Have you received and read the guide for witnesses presenting evidence to the parliamentary committees?

**Ms LYON** — I have.

**Mr SPENCE** — Yes.

**The CHAIR** — 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. Before I ask you to make a submission, some of the committee members need to leave in between 15 and 20 minutes for other commitments. I now invite you to make a verbal submission, and we will ask questions as appropriate.

**Mr SPENCE** — Thanks, Chair. I am sure that you will be out in 15 to 20 minutes, based on what we have to say. I do not think you will be here for too long.

**Mr D. O'BRIEN** — We have got some serious questions to ask.

**Mr SPENCE** — It is a question of whether we have got answers for you.

**Ms LYON** — Whether we can answer. We have a narrow interest.

**Mr SPENCE** — We have a narrow focus. Thanks for the opportunity to come and present to you. We have approached this really from the view of the MAV as a public body but not controlled by the state and its role in the process of protected disclosures, but we will also just talk briefly about local government itself. We are one of those bodies that is covered by the legislation but cannot receive protected disclosures. We are required to have procedures et cetera to protect people where a protected disclosure occurs and to ensure that no detrimental impact and so on occurs to those individuals. For an organisation that actually does not receive protected disclosures, that is quite a complex process, because we will only know whether there is a protected disclosure if IBAC tells us or if the individual who makes the disclosure gets the permission of IBAC to advise it. So from our viewpoint we are required to have procedures and so on in place in sort of extreme circumstances — if something like this would pop up.

I suppose our comment in terms of the broad process is — and everyone I have tested this view with has indicated the same thing — that basically the legislation seems to work okay. I think the challenge is in the guidance and how the guidance works. For us, we would say that the guidance for an organisation like ours is not strong — in fact there is not particularly much guidance there at all. The guidance deals with organisations that can receive protected disclosures and not organisations that cannot receive protected disclosures.

So in our case we have had to go to a third party to assist us in putting policies and processes in place, and that has its own implications. But I suppose our observation would be that it would be really useful I think if there was much stronger guidance coming out of the process for organisations like ours, who sit at the fringe of the process really but are still involved in it, in knowing what we need in place and how it will work. Is there any comment you want to make?

**Ms LYON** — No. It is primarily a matter of clarity and simplicity for organisations that will rarely have a role in relation to the Protected Disclosure Act and regs, although we are required to have a policy and procedures, and we have those. As Rob said, we went to an external specialist in order to be provided a draft policy and procedures, and we then tailored that internally. But the prime focus, naturally, of the guidance provided by IBAC is on procedures for entities that can receive disclosures, and that relates even to welfare management, which is the part that we have got a role in — so, it is welfare management for disclosers, cooperators and the subject of the disclosure, if IBAC permit the discloser or direct the discloser or contact the agency directly, and we suspect that it is in a very, very small proportion of cases that that may happen. So it is really looking at this little subset of public bodies and whether or not some additional clarity can be provided for their role.

**Mr SPENCE** — Then if we look at it from a council viewpoint, our role in that really is that we get calls asking for advice or support to understand process and what steps should be taken by a council. We would normally — Alison is the one who deals with these issues; she is the sort of go-to person on inquiries from councils. It is amazing that she looks so amazing when she has to deal with this stuff all the time.

**Ms LYON** — I am actually only 33!

**Mr SPENCE** — Yes, she gets all the complaints; fighting councillors and — you name it, they go to Alison. That is why I look so good when I am 90; okay? The issue that comes up there is — really, again, it is in the understanding of the process and the detail that is there to support the council officers when a protected disclosure may have occurred and they are trying to step their way through the process.

**Ms LYON** — Or when a complaint is a complaint that perhaps should be a protected disclosure and how to go about — what are the next steps? There is a natural reluctance, perhaps, to go direct to IBAC in order to take advantage of their resources and knowledge of the processes. Most council officers are keen to have a bit of an understanding before they go to an agency. It is also natural that this is not something that officers have to deal with frequently, so there is a very limited level of understanding in the sector about these matters. It is a good way for the legal firms to make a little bit of money too. So, yes, often specialist advice is required for councils that find themselves in this space.

**Mr SPENCE** — So in summary our view is: it sort of works okay; the question is really about the level of guidance and support that is there and, at the fringe, for councils to have enough confidence as to when they put something to IBAC, so where the boundary sits, really. There is a cautiousness about putting a matter to IBAC and potentially losing control of it at a time when the council is still trying to work through the issue.

**The CHAIR** — So if, hypothetically, a council in Victoria has received notification from IBAC that they are dealing with a protected disclosure issue, is it more likely that they would call you for advice?

**Ms LYON** — It would be preliminary to that. It is where a council has something that it is contemplating needing to address and whether or not they would be advising the complainant that they should make a protected disclosure application as opposed to a simple complaint, so it is ahead of it getting into the hands of IBAC. One of the pieces of advice we give councils is that IBAC actually triages, so it will assist — clearly — in determining whether or not the matter is a protected disclosure and subject to the protected disclosures regime. But it will also look for an alternative home for the complaint if it is not IBAC — if it is not one of corrupt conduct or specified conduct.

**Ms THOMSON** — Just quickly, would you feel that from the MAV's point of view you would like to have your own sessions with IBAC around how to guide councils and give support to councils and then maybe even be able to run sessions for councils in relation to the procedures and what they need to be taking care of?

**Ms LYON** — I think that would be really helpful.

**Mr SPENCE** — We have had engagement with IBAC, but it would be really useful if we had a stronger relationship in terms of education.

**Mr RICHARDSON** — Alison, how often do you get inquiries from some of the — —

**Ms LYON** — I am pleased to say relatively rarely. It is not commonplace. If it were commonplace, we probably would have gone down a process where we sought input from councils about their needs and where the guidelines were insufficiently comprehensive from the local government perspective so that we could, together with IBAC, provide better guidance, because we understand that IBAC is not the only source of guidance. They will have their general guidance, and it may be that we can do something across the local government sector for all councils, which might save a bit in terms of legal fees and increase understanding.

**Mr RICHARDSON** — In going to that point about the legal fees, is there a view that where protected disclosures or those issues are presented there is a challenge for councils in understanding their requirements under the act?

**Ms LYON** — Naturally. I think you would find that with state government departments, which have got considerably greater resources and better avenues for advice, so definitely, because it is not commonplace. You

do not end up with a significant level of experience informed by your past practice in this sort of space. It is something that most councils might encounter perhaps once every five years or less frequently than that. They may have a run of allegations, some of which are protected disclosures. That is not entirely uncommon, to have a couple sort of piggybacking on one another, but I am really pleased to say there is not a wealth of experience that can be shared within the sector. It is also an environment in which people are very careful about what they share because they do not want to share something that turns into confidential information, because that is exactly what the act is intended to prevent.

**Ms SYMES** — Thank you so much for coming in today. When you get the phone calls, is the first question, ‘I am not sure what this is’?

**Ms LYON** — Yes. It is, ‘Help. I am not sure what we are confronted with here’, but there is a knowledge that specific information cannot be shared. It can be quite a circular conversation. My advice is to go to IBAC. That is the central repository of knowledge, and that cannot be and should not be avoided as a resource. I do get the calls from people who have waded through as much information as they can find and still feel quite confused, and it is that sort of space.

**Ms SYMES** — When people are calling you, is it specific allegations about conduct or — we get advice that a lot of people get a bit confused with personnel disputes?

**Ms LYON** — No. My experience is that I have not had calls that relate to an HR-type matter. There are issues where a community organisation or a member of the community may make allegations about an officer, so those sorts but not intra-council.

**Mr WELLS** — So you are not getting the vexatious claims?

**Ms LYON** — I would not be saying that.

**Mr SPENCE** — We are in local government.

**Mr WELLS** — I am just expanding on Jaclyn’s question.

**Ms LYON** — It is very easy to make a claim, and I would probably rarely be in that position. There are a fair number of anonymous claims, and of course there is an issue about how can you protect the discloser. However, there are times when it is handwritten or the identity could become known not only because it is handwritten but because of the information. So, yes, there are definitely, in my view, complaints or disclosures that are of that vexatious, frivolous, ‘I haven’t been able to get my own way by A, B and C, so therefore the only reason that could possibly be is somebody is corrupt’ nature. Local government confronts that from time to time.

**Mr SPENCE** — It is potentially the difference in the state bureaucracy where the interface with the citizen is not as great as it is in local government. In local government the vast majority of the complaints we get are of a citizen in relation to the organisation, whereas I suspect in the state government potentially more internal issues would surface. We get a mass of complaints. The Ombudsman talks about the number of complaints that come in from citizens about local government activity, and that is certainly the common stuff.

**Ms LYON** — Just on that, a good proportion of the complaints that the Ombudsman receives are because councils say, ‘We have done everything we can. Barley. Here is the address of the Ombudsman’. So it is really useful to be able to say, ‘No, there is nothing more we can do in relation to that complaint by you. We have investigated it. We have reviewed the original response. Here is the address of the Ombudsman’.

**Mr RAMSAY** — I take from that, though, there is an internal public disclosure incident and/or it is the public that is doing it. How do you internally rationalise whether it should be an Ombudsman matter or an IBAC matter or could be done internally? Do you make that assessment internally, or do you just shunt it all off to the relevant agencies?

**Ms LYON** — ‘You’ being when we are assisting a council, or ‘you’ being the MAV?

**Mr RAMSAY** — Well, both. Say internally, if it was in the workforce of council or if someone from the public has a public disclosure matter that they want IBAC to investigate or believe IBAC should. They believe it is serious corrupt conduct, or in fact it might be an Ombudsman matter.

**Ms LYON** — An administrative matter.

**Mr RAMSAY** — What is the internal process that you use, because the argument to us is the current act is full of secrecy provisions and confidentiality provisions and is quite bureaucratic?

**Ms LYON** — Yes.

**Mr RAMSAY** — So I am wondering how much of the assessment you do.

**Ms LYON** — I do promote the triage approach that IBAC has. IBAC is really clear that when a matter comes to it, if it does not fit within the IBAC framework and it is an administrative act and it can be investigated by the Ombudsman, that is where it will be referred to. In the local government space it might also be referred to the municipal inspectorate. Presumably some may be referred to VicPol; I am not sure about that. Some matters are clearly administrative matters. That is probably unfair. It is clearer to me that it is an administrative matter but not necessarily clear to the officer who is looking at a complaint and trying to work out what to do with it and whether or not it is within the protected disclosure regime.

**Mr RAMSAY** — How many of those would you have that are actually referred to IBAC, say, in a given year?

**Mr SPENCE** — Small numbers, two or three.

**Ms LYON** — Two or three.

**Mr SPENCE** — And we are not directing the council. We are explaining their options. We are basically the helpline and a safe space.

**Ms SYMES** — You are also preventing a lot of people going directly to IBAC when it is not appropriate.

**Ms LYON** — Well, not a lot of people, but from time to time, yes. And probably supporting the legal fraternity because it is a difficult space for councils, and they need to get it right.

**Mr SPENCE** — Yes. They cannot afford to get it wrong.

**The CHAIR** — Just on Simon's question, I guess, as you said, it is VicPol, local government inspector, IBAC, Ombudsman — —

**Mr SPENCE** — Ombudsman. That is right; and potentially A-G, even.

**The CHAIR** — Auditor-General.

**Mr SPENCE** — Yes, depending on what it is. And that path is quite difficult to walk sometimes, for councils, in analysing the issue.

**The CHAIR** — I guess the frustration for the ratepayer in some respects if it has been sent to the wrong section, the wrong call has been made, and then it just takes forever in the bureaucracy?

**Ms LYON** — Yes, and particularly with some of the agencies that are less well resourced and have perhaps a greater number of local government complaints, that time frame can be quite high. Although there is that frustration for the ratepayer or the complainant, in some ways it is a relief to the council to have it homed somewhere. They are now responding to the requirement for information, and their people may be the subject of interviews but — —

**The CHAIR** — After the information has been vetted somewhat, in some regard?

**Ms LYON** — Oh, yes, in the protected disclosure regime; definitely, yes.

**Mr RAMSAY** — So you do not have an issue with the act itself? It is more about the guidelines and understanding it?

**Mr SPENCE** — Well. Go on.

**The CHAIR** — No, Rob; we want to hear from you.

**Mr RAMSAY** — Can we go off script?

**The CHAIR** — No, seriously.

**Mr SPENCE** — I mean, it works, I think. What is perfect? What is important is that people know how to use it effectively, I think. I mean there are some issues that have popped up with us in just simple things like definitions in one act. Do you want to talk about that issue, Alison? It is a simple issue.

**Ms LYON** — In the guidelines it is easy to identify what sort of conduct is the subject of protected disclosure, but if somebody starts with the act then they have to go to the IBAC act — —

**Mr SPENCE** — The IBAC act to find out what it is.

**Ms LYON** — Yes, and that is never ideal. So it is a defined term, and you go to the definition and it refers you back to another piece of legislation. That is never ideal.

**Mr SPENCE** — Yes. I would hate to think how a citizen would work their way through it.

**The CHAIR** — Yes. It is not an uncommon concern. Rob and Alison, thank you very much for giving up your time. We probably went a little bit longer than you thought, Rob.

**Mr SPENCE** — That is all right.

**The CHAIR** — But we obviously needed to tease out some of the issues that are consistent across the board, so we really appreciate your time. Thanks very much.

**Mr SPENCE** — Thank you.

**Witnesses withdrew.**

**Ms KARDELL** — Thank you. We have existed in our current form since 1993, and we did not ever think we would be here still. We thought we would have become irrelevant, and we are hoping that that is still going to be the case.

**The CHAIR** — Thank you very much for your time.

**Ms KARDELL** — Thank you. Good day.

**Committee adjourned.**