

CLOSED PROCEEDINGS

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

Review of protected disclosures

Melbourne — 15 August 2016

Members

Mr Kim Wells — Chair

Mr Simon Ramsay

Ms Marsha Thomson — Deputy Chair

Mr Tim Richardson

Mr Sam Hibbins

Ms Jaclyn Symes

Mr Danny O'Brien

Staff

Executive officer: Ms Sandy Cook

Witness

Mr Robin Brett, QC, Inspector, Victorian Inspectorate.

The CHAIR — 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, provisions of reciprocal legislation in others Australian states and territories.

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. 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. Have you received and read the guide for witnesses presenting evidence to parliamentary committees?

Mr BRETT — Yes, I have.

The CHAIR — It is also important to note that any action which seeks to impede or hinder a witness or threaten a witness for evidence they would give or have given may constitute and be punishable as contempt of Parliament. We are recording the evidence and 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.

Mr BRETT — Okay. Thank you very much. This is my first-ever PowerPoint presentation.

The CHAIR — We are all bracing ourselves.

Mr BRETT — Yes. And if we cannot use it, I have to tell you my heart will not be broken, because I can quite happily talk to the hard copy, which I think you have all got now. Would you prefer that I do that?

The CHAIR — Yes. Keep trying, and we will keep making note of which page you are up to.

Mr BRETT — Okay. Well, we first of all have just got a table of contents, but if you go to the page following that, which is headed ‘Overview 2015–2016’, what this essentially does is give a comparison between the year that has just finished and the year before in three of the major areas of our activities.

Starting at the top table, you will see that it is headed ‘Complaints’, and you will see that each year is divided into complaints and inquiries. An inquiry is when anybody rings up or contacts us in any way and says, ‘How do I make a complaint? I would like to make a complaint about something or other’, and we direct them to our complaint notes, which explain what our jurisdiction is and the way in which we handle complaints.

We have a complaint form, and if they wish to proceed then they complete the complaint form. It is not absolutely compulsory, but we do encourage it very strongly. Some of the complaints may have previously started life as inquiries, so there is a bit of overlap there. But the thing to notice is on the far right of that table. The total number of contacts has increased from 118 in 2014–15 to 154 in the year that has just passed. Complaints have increased by a smaller amount, but they have nevertheless increased, from 57 to 67.

The next thing is investigations. This year we have commenced three formal investigations. We have completed one of them. Two of them were own-motion investigations, and they both concern aspects of IBAC’s activities. They are both continuing, and they are both quite substantial matters. One in particular is a very substantial matter, and that will take some time to complete. The other one is of a smaller compass.

Proceedings in camera follow.

Mr BRETT — Then the bottom table there is statutory notifications. As you know, IBAC are required to give us a lot of notices of various steps that they take under their act — every time they issue a summons, every time they issue a confidentiality notice or vary a confidentiality notice. From our point of view the most significant is the fourth line in that table, which is coercive examinations. It is significant because they are required to give us a recording — and it is not only IBAC; it is also the Ombudsman and the chief examiner who are required to give us a recording — of every coercive examination that they conduct, and we then have to review those recordings to check that everything has been done properly in the course of those examinations. You will see that there were 179 from IBAC plus 42 from the Ombudsman plus 29 from the chief examiner. That is a very substantial area of our work. The other matters I do not think I need to trouble you with.

If we go to the next page — complaints — I probably do not need to take you through the tables again, because they really repeat what is in the previous a matter, but I will just draw your attention to the lower box on the right-hand side of that page. We note in the middle dot point that one of the consistent themes we have had from people who complain to us about IBAC is that they do not provide reasons for their decisions. Not invariably, but almost invariably, people who complain to us complain that they have made a complaint to IBAC, often about the police but about other bodies as well, IBAC have declined to investigate and they have not given any reasons for doing so.

We have raised this with IBAC. It was the subject of something I wrote in the annual report last year. They are not required to provide reasons by statute. We strongly suggested that they should. I did not proceed to make a formal recommendation about that, because it seemed to me that if the statute had specifically provided that they do not have to give reasons, then it was not really a matter for me to recommend that they do. But I did strongly suggest it, and they say that they have changed their practice and that they do now provide reasons as a matter of discretion on some occasions. We have not seen a lot of evidence of that happening. So that is that matter there.

On the next page is just a flowchart setting out how we deal with complaints. It would have been better if we could set this out in the opposite direction, where the print would have been a bit bigger, but I hope you can make it out. It is fairly straightforward. We receive a complaint, we acknowledge receipt and we assess it for two matters: do we have jurisdiction to deal with it, and then does it warrant investigation? At both of those stages we may need to get further information from the complainant, and quite frequently we would go to IBAC also and ask for further information from them about exactly what they have done in handling the complaint that has been made to them. The two ultimate outcomes are either that we do proceed to investigate or that we tell the complainant that it does not merit investigation, and that is in fact the vast majority of the cases — almost every one.

Proceedings in camera follow.

Mr BRETT — In the course of those investigations we have issued nine formal summonses to attend and give evidence — well, nine summonses, a number of which were to produce documents. We have held four formal examinations. We have held eight informal interviews — that is to say, not after a summons. We have issued 11 confidentiality notices. We have in two cases given notice to people that we have summoned that they should not seek representation from a particular lawyer — we can do that under our Act — and we have made two requests to bodies for assistance in the form of provision of documents. And we conducted one inspection of part of IBAC's premises.

Ms THOMSON — Before you go further, I just want to ask on the 'Directions to lawyer', not to —

Mr BRETT — Yes.

Ms THOMSON — What would the basis of that be?

Mr BRETT — If they have been representing a number of other examinees or if there is perceived to be some position of conflict if that particular lawyer is consulted.

Ms THOMSON — Okay; thank you.

Mr BRETT — 'Investigation flowchart', I do not think I need to bother you with that. It is pretty straightforward. Then there is 'Notifications'. I referred before to coercive examinations, which is the second line in the top table. You will see that they increased from 119 in 2014–15 to a total of nearly 180 in 2015–16, so that was a very substantial increase in the workload there.

We, in the course of the last financial year, have substantially increased the size of the office. I think at the beginning of the last financial year we had only six staff. We got up to 11. The additional people were all taken on probation. One of those was not retained at the conclusion of the probation period, so we are looking for a replacement for her. But we are basically more or less doubling in size at the moment, and it is to a considerable extent as a result of the increase in the coercive examination load, plus the investigations that we have been conducting, plus another thing which I will come to in a moment.

We did sort of make a recommendation. That is in the first of the little boxes under the top table. A matter arose in the context of the issue of summonses. What happened was that a witness had been summonsed to give evidence and was then required to attend on a second occasion and on the second occasion sought an adjournment on the ground of her mental condition, and medical reports were produced for that purpose. IBAC granted the adjournment, but then during the course of the adjournment IBAC issued summonses to the two medical practitioners who had provided reports, without informing the patient, who was the person we were originally seeking to examine, and I took the view that that was a highly inappropriate thing for them to do.

There was correspondence about that — they maintained that it was perfectly legal, perfectly proper — and I recommended therefore that they should seek advice from the solicitor-general about that and see whether it really was a proper thing to do. They informed me that in fact they had already sought advice from Gerard Nash, QC, who is not the solicitor-general but is a highly regarded constitutional lawyer, and I thought in those circumstances that was appropriately impartial advice to seek, so I withdrew that recommendation. Just to complete the sequence, what happened was that the examination of the medical witnesses did not proceed, ultimately. So what I was concerned about did not happen.

We have also — in the second box there — on a number of occasions had issues with the content of some of the statutory notifications that they are required to give us. Under section 122 of the IBAC act they are required to notify us each time they issue a summons and give us a report stating the reasons why they have issued that summons, and on a number of occasions we have thought that the reports were deficient. We corresponded with them a number of times about that. Each time they promised to do better, and indeed they did, but we would inevitably find after a period of time that, again, deficiencies would creep in. We have now instituted a new system where immediately a section 122 report is received that we consider is not adequately explained in the section 122 notice we write to them immediately and require another one, which they then provide. The thinking behind that is that the best way to ensure continuous improvement is to make sure that every single time they give us a defective report, we require them to remedy it, and that seems to be working.

If I can now take you to the next page, which is headed ‘Monitoring’, this is the other area that has contributed substantially to the increase in our workload over the last financial year. What we instituted was a program to basically examine the entire sphere of IBAC’s operations, and you will see that the various areas that we have looked at have been listed there. What we did in each case was we would arrange a meeting with IBAC and prior to the meeting we would submit to them a list of questions that we wanted answered about their activities in each area. IBAC would normally respond to that with written responses, and we would then hold a meeting with them at which we would discuss those and get a proper overview of exactly how they have organised themselves and how they are carrying out their statutory functions.

In the course of that we have identified a number of areas — not an awful lot, I would have to say, but a number of areas — where in the current financial year we intend to look further at particular aspects of things that we have found that they do, with a view to seeing if we can recommend some improvements in the way in which they carry out various aspects of their activities, and those are listed in broad terms there: complaint handling, police complaints, referrals to other agencies and certain aspects of investigation practice. We have also commenced similar programs with the Ombudsman and the chief examiner.

The final area of our activity in relation to IBAC is what we call compliance, which is really regulatory compliance. This particularly relates to covert operations and covert activities that IBAC carries out: telephone interceptions, use of surveillance devices and the conduct of controlled operations. There are strict legislative and regulatory requirements about the records that IBAC and other agencies who use those means are required to keep, and we have two people whose function is basically to inspect all those records throughout the course of the financial year and check that they are all properly kept.

We identify invariably a number of particular issues, but if I could leap now to the bottom of the next page, called ‘Compliance inspection outcomes’, the overall level of compliance by IBAC was assessed as very good, and in each case where we did identify a deficiency, we discussed it with them and they agreed to make changes that would avoid it in the future.

In any area like this, human beings being what they are, there are going to be errors. And that does not just apply to IBAC; it applies to the police and it applies to the other bodies that can use these devices.

Mr D. O’BRIEN — Can you just remind me what a controlled operation is?

Mr BRETT — A controlled operation is basically an undercover agent who infiltrates a bikie gang, for example, and is indemnified against liability for committing certain crimes.

The CHAIR — Very brave people.

Mr BRETT — They are very brave people.

The CHAIR — Incredibly brave people, men and women.

Mr BRETT — Extremely brave people. I hasten to add that the crimes they are authorised to commit are not murder or anything like it, but, yes, they are at a lot of risk. What we do in relation to compliance is we do actually report separately in relation to each inspection that we carry out, and we present those reports to Parliament. I think there are probably a dozen or so during the course of the financial year, so this is just an overview.

Finally, apparently these days everybody is required to have a vision statement and values, so we have a vision statement and values. Personally I regard the vision statement as the Victorian Inspectorate Act; that tells me what I have got to do, and that is the scope of what we do.

The CHAIR — Robin, thank you for that very thorough overview of what your office has achieved. Can we move to PDs?

Mr BRETT — Yes.

The CHAIR — Do you want to open the batting with some comments?

Mr BRETT — Yes, I do. I do not have anything in writing for you here. I probably actually can, because I have prepared some notes. You essentially asked me to consider four supplementary questions arising out of the submission that I made earlier this year. You will recall that in that submission I started off by saying we do not actually have a lot to do directly with protected disclosures. We can receive protected disclosures where they are made about IBAC personnel, but we have not had any. The only other direct involvement that we have is where a protected disclosure is referred to us for investigation by IBAC, and that is what happened with the one that I referred to before about the former Auditor-General. That was referred to us by IBAC. But again that is, I think, the only one that we have ever had.

So everything that I am saying — everything that I said in that original submission — has got to be kind of regarded in that light. A lot of what I said was based on discussions I had had with Stephen O'Bryan, the commissioner of IBAC; what we have seen in IBAC's handling of complaints which have been assessed as protected disclosure complaints; plus just frankly my own knowledge of the legislation and my own reading of it.

Have investigations conducted by the inspectorate been affected by the confidentiality provisions, and how could they be amended? What I said in the original submission was that they were very inflexible. It is not only the confidentiality provisions themselves that are inflexible, as you undoubtedly know. The way the act operates is that if a person discloses something that constitutes improper conduct within the meaning of the legislation, which has a very wide definition, then the processes for assessment of that disclosure by IBAC and the automatic imposition of the confidentiality requirements follow automatically.

There is a limited opportunity for the person who makes that disclosure to opt out of the regime if that person wants to, but unless they do so at the time they actually make the disclosure, the opportunity is lost; they cannot do it subsequently. We have certainly seen at least a couple of occasions on which people who have had matters assessed as protected disclosure complaints have not realised that that was what they were making at the time they made it.

The particular protected disclosure investigation that we did have, which was the [REDACTED] one, because of the confidentiality requirements that applied, we had in the course of making what I would have regarded as some fairly routine inquiries to government departments for copies of documents and so on, had to be attended by the issue of confidentiality notices and strict limits being placed on who people could talk to about things in order to provide the information. It just seemed to me to be unnecessarily restrictive. Just added to that I would simply say that, just as a matter of principle, to impose these requirement without any prospect of a

discretionary relaxation of them, no matter what the circumstances may be, seems to me to be generally not a good idea.

You did ask about the form of the amendments. I was actually a parliamentary draughtsman at one stage, but I am not about to attempt a draft, but I would have thought that it could be a simple provision which allows the investigating body to relax the confidentiality requirements, if they thought it was desirable and appropriate to do so or if doing so would not be inconsistent with the aims of the legislation.

The second supplementary question was about difficulties of interpretation. The one that I would principally mention there is just the scope of the definition of what constitutes improper conduct. Leaving police to one side, it includes any conduct involving a public official that would constitute reasonable grounds for dismissal from employment. For police conduct it is even wider; it is any complaint by one police officer about another.

All of those matters must then go to IBAC to assess whether it is a protected disclosure complaint, and based partly on just the nature of the definition, but it is also confirmed by discussions that we have had with IBAC in the course of the monitoring activities that I referred to before, it seems to be very much an area of judgement almost bordering on discretion as to whether a particular matter will be assessed as a protected disclosure complaint or not. With the definition in the form that it currently has, it is hard to see how that could ever change.

All these things are matters of policy. That may not be necessarily considered an undesirable thing; it might be thought that it is a good idea to have an element of discretion. I personally would have thought that if you want to give an area of discretion, it should be done expressly rather than simply as following from the nature of the definition, but it is ultimately a matter of policy.

The third question you asked was about whether all of the provisions relating to protected disclosures should be combined into one act. I do not really have a view about that. The way it is set up at the moment is that the Protected Disclosure Act deals with how protected disclosures are made and how they are assessed as to whether they are protected disclosure complaints or not, and then there are the provisions relating to confidentiality and things of that nature. What the act does not deal with is the actual investigation of protected disclosure complaints. What it effectively says is that the investigations will be governed by the acts that govern the investigating authority. So if IBAC investigates a protected disclosure complaint pursuant to the IBAC act, in the same way as it investigates anything else that it is looking at, it is subject to the additional confidentiality requirements and so on that apply to protected disclosures. If it is the Ombudsman, she investigates under the Ombudsman act, and if it is us, we investigate under our act.

What that means in practice is that it does create one substantial difference between the way in which they are investigated. IBAC, when it investigates anything, can issue summonses and require people to attend for coercive examinations, and when people are so summonsed to attend they are not allowed to rely on the privilege against self-incrimination. The Ombudsman also has powers to summon people for coercive examinations, but when people are summonsed by the Ombudsman they can claim the privilege against self-incrimination. So it does make a bit of a difference whether you are being investigated by the Ombudsman or by IBAC. On the sole occasion on which one has been referred to us for investigation, the privilege against self-incrimination was not available, but there were not criminal offences involved anyway so that did not matter.

The last question which you asked about protected disclosures was widening the range of bodies to whom a protected disclosure complaint can be referred for investigation. This was really picked up from both IBAC and the Ombudsman, but again it seems to me inherently to make sense, particularly given, as I said before, the width of the conduct that is comprised within the definition of a protected disclosure. In some cases it may be more suitable for the investigation to be carried out by the body from which it originates or some related body, perhaps. Referring it back to the originating agency is something that would obviously have to be exercised with a great deal of care, because if you are talking about a whistleblower within an organisation, you want to be very careful to know that the organisation has got proper procedures set up to protect the whistleblower before you would refer the thing back to them for investigation.

Those were the four things that were asked, and I am happy to answer anything further about those.

The CHAIR — Thank you for covering those matters. In addition to the questions we have already asked and Robin explaining the answers, are there any further questions? You have done an excellent job.

Mr BRETT — Thank you very much.

Proceedings in camera follow.

The CHAIR — We again thank you for your time.

Mr BRETT — Okay. My pleasure.

Witness withdrew.