

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

CLOSED PROCEEDINGS

Melbourne — 23 November 2015

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Mr George Brouwer, former Victorian Ombudsman.

The CHAIR — I declare open the hearing. 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 other 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. Have you received and read the guide for witnesses presenting evidence to parliamentary committees?

Mr BROUWER — Yes, I have.

The CHAIR — Did you write it? It is also 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 contempt of Parliament.

We are recording 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. I really appreciate you giving up your time to come in here today.

Mr BROUWER — No, that is all right; it is a pleasure. I have lived this for long enough. I am glad to be out of it, as I said to the Chairman before; it is a great relief. There are a few things that I want to just mention, already covered to some extent in the subsequent questions. I suppose your concern is to basically determine what kind of effective — and ‘effective’ is an important element in this — anti-corruption or integrity commission Victoria should have. I think the prerequisites are fairly simple. There ought to be broad jurisdiction, and that broad jurisdiction ought to minimise any threshold or prescriptive preconditions to the jurisdiction that can be exercised by IBAC, and we will come back to that in addressing some of the other questions here.

The other thing, of course, is the balance of civil liberties versus the effectiveness of inquisitorial procedures. There is a third related point to the point I have just made, and that is the inquisitorial, as opposed to the adversarial, methodology. What is a problem, I think, in Australia generally is that there is confusion between the adversarial and inquisitorial approaches. It is a problem that does not exist so much in Europe or overseas because the systems there — the systems of law — are inquisitorial, whereas here you have got the adversarial system. England used to be inquisitorial. Then it went to the adversarial system in about, I think, the 17th or 18th century. It is a recent development if you look at the longer term development of the way Parliament and the judicial systems have operated.

The purpose of having a royal commission or an anti-corruption commission is to equip them to find out what has really happened, and that means an inquisitorial-based procedure. You find royal commissions do not really operate on the basis of adversarial procedures. What is happening increasingly in the legislation here is you get a kind of marriage or a kind of compromise between adversarial and inquisitorial approaches in the legislation, and that is problematic. It is problematic because the adversarial approaches that were meant for a particular context, that is legal proceedings where people are represented by barristers and lawyers and all the rest of it, pitted against each other, are compromising the effectiveness, in some ways, of the inquisitorial approach, which is the whole rationale for having a separate commission.

I mean, you could say, ‘Well, leave it to the courts to deal with corruption issues’. That has never worked in the past. I do not know whether you have seen this report I did many years ago about 150 years of police corruption in Victoria. It is a black book — very appropriate. It is out of print now, but it would be available electronically, because it was snapped up at the time. It indicates that over the period of, say, 150 years since the foundation of Victoria, every 10 to 15 years there has been a royal commission required to deal with police corruption. It was not dealt with in the intervening period by the judicial system or by anything else.

What is happening in the modern day is that parliaments have said, ‘Rather than have royal commissions every so often, it is better to deal with it systematically’, and that means we are having a standing kind of ‘royal commission’, which are the anti-corruption bodies. In Victoria it has been the Ombudsman in the past, then the Ombudsman and OPI, and now the Ombudsman and IBAC. I think it is an important concept to bear in mind because I think we will not get the balance right unless we are clear about what we want the body to be. The question is of balancing civil liberties in all of this, and I, for one, feel that the bodies equipped with these powers should not be having public hearings. And I am talking here from, basically, experience over my career in the past.

Public hearings can be effective and satisfy the media, but I think if you look at the history and what is happening at ICAC, they can trample too readily on what I would consider the rights of individuals to be treated with at least some understanding of where they are coming from. Let me give you a concrete example. In an ICAC investigation if you have public hearings, or in any kind of public hearing, you have to call up people. These people may be perfectly innocent but give their evidence. They may have nothing to do with findings of guilt or whatever it is at the end of the day, but what you get inevitably is that the media will beat it up and people get pilloried in the process. It is just for the sake of filling copy and headlines and satisfying newspaper proprietors half the time.

I think you can have a very effective anti-corruption function without necessarily the need for public hearings. To give you a concrete example of that, look at the Ombudsman’s jurisdiction in Victoria. As Ombudsman I could not have public hearings, and it never worried me. Instead I was forced to do reports, bring the whole thing to conclusion and, if it was sufficiently important, report it to Parliament or to the minister. I think that worked well because you are enabled to talk to witnesses — it is all done in secret — you were able to write a report, and natural justice is afforded by allowing witnesses who have given evidence and were going to be written up in your final report to have their say in terms of any response or excuse they have. You would be familiar with it; you have seen too many of them. That, I think, is the balance: that the individual can have his say and her say, but it is done in private. It is not that they are having to justify things publicly and then people are prejudging the interpretation of it. I think the civil liberties can be safeguarded in that way.

The other thing that is happening is that we are limiting the anti-corruption body by attempting all sorts of adversarial privileges and everything else to come into play. For instance — I will be quite frank about this — there should be no privileges allowed in inquisitorial procedures. Privileges belong to the legal system. I keep on coming back to the fundamental question: what is the procedure all about? It is to find out the facts. That is all it is — find out the facts. It is not there to play games in terms of legal niceties or anything like this. In order to find out the facts, why should everything not be available? The royal commissions operate on that basis. If you are going to have halfway houses, you are already going to have a less effective approach. I can go on talking, but perhaps you might want to progress to questions, because that will pick up on some of the things I want to say. Thank you.

The CHAIR — That was a great opening. Can I start with a question: based on your experience over many years, if there is corruption in a department, should it be mandatory for the department to report that to IBAC, from the department head? Some response on that would be great. But also, I guess, the second part of that question would be: if you were going to report corruption to IBAC, then the department would have to determine how serious that corruption is, and should it fit into the same threshold requirements that IBAC has?

Mr BROUWER — It is a very good question, and I need to answer that in two parts. The answer to it simply is: yes, it should be mandatory on the department to report if they come across something that, ‘This looks a bit like corrupt conduct’, to IBAC. That is very important. In terms of the threshold question, I have to say that the IBAC threshold question is highly unsatisfactory at present, because we are talking about the broad-based anti-corruption commission, yet the legislation is serious corruption. Serious corruption is nowhere defined — it is a nebulous concept — and it puts a very high threshold to IBAC’s jurisdiction.

This is one of the fundamental objections I had to the whole approach, looking from an effectiveness point of view, because the moment you start building in words like ‘serious’ — the moment you start using adjectives like that — you get the whole question of legal interpretation about, ‘Well, what does “serious” mean as opposed to “not so serious”? What does “serious” mean as opposed to “corruption”?’. This is one of the fundamental weaknesses that the IBAC legislation introduced. If you want to have an effective body, that ought to be got rid of. Does that answer your question?

The CHAIR — Yes; I will come back to it. I guess this was going to be an obvious question: so if you are going to get rid of the ‘serious corruption’ definition threshold — —

Mr BROUWER — And corruption.

The CHAIR — Yes, corruption. What should it be replaced with?

Mr BROUWER — By just the corruption definition, which basically is corrupt conduct. You see, corruption indicates a kind of intent by benefiting yourself or benefiting your friends. Let us take the whole spectrum of administrative actions. You might have proper administrative actions. You can get bungled administrative actions. You can have very inefficient administrative actions. So you have a whole series of gradations. Then you may have what you would call corrupt or improper administrative actions, corrupt administrative actions and serious corrupt administrative actions. That is basically the spectrum.

The other ones do not have much of an intent. You may have a public servant who is stupid and mucks up the whole thing, and, ‘Naughty, naughty; you should not do this again’, and all the rest of it. That is the run-of-the-mill stuff; that is probably 90–95 per cent of what goes wrong in public administration. But then you come to corrupt conduct. It often indicates a kind of deliberate attempt to subvert proper actions and administration and considerations because of self-interest — because you are trying to benefit friends or family or whatever else there is — or there is another motive. So the intention comes into place. Very often we get complaints to the Ombudsman about so-called corrupt conduct and irate complainants as well — you know, ‘I want you to investigate this corrupt conduct’ — and what we often have to investigate was not corrupt conduct but was just stupid conduct on the part of the public servants or whoever was administering anything.

The other thing I should just mention is that the strength of the Ombudsman jurisdiction in Victoria until recently — and one thing I have benefited from, as you will have also seen yourselves in your experience — is that there were not many barriers to the Ombudsman’s jurisdiction. It was a very simple jurisdiction. If you look at the original legislation, which lasted for 40-odd years, the Ombudsman could basically investigate anything that went wrong in public administration, and that has enabled me, together with the Whistleblowers Protection Act, to also deal with some of the corrupt conduct. There are other examples like Brimbank City Council and all this kind of stuff; there are many others that you are familiar with. So what I am saying is that the Ombudsman had a flexible jurisdiction, and there were not too many prescriptive thresholds for doing this or doing that or doing everything else. IBAC is the opposite. They have to labour under all sorts of prescriptive barriers, thresholds and preconditions. I think that is basically where the fundamental dynamics come into play.

The CHAIR — Just back to the second part of my question then, if you were to reduce the threshold to corruption, then do we determine that the department itself would make that call — that the corruption that they are dealing with and are ready to report is going to fit in with that IBAC definition of the threshold?

Mr BROUWER — The department should be mature enough to know whether there is corrupt conduct happening or whether it is just clumsy administration. If they are still stupid enough not to understand what the difference is and refer something to IBAC which is not really corrupt conduct, it can just be batted back again; there is no hassle there. It should be quite an easy referral process. If it is corrupt conduct, then of course IBAC should have the flexibility to determine that they are going to deal with it themselves or refer it to the Ombudsman or whatever else it may be.

On this corrupt conduct, there is another interesting point you have raised because, for instance, at present with the new legislation, the Ombudsman must stop any investigation when it appears that it may be corrupt conduct and refer it to IBAC. Now, I have said this publicly in my report: it is unsatisfactory because really the other important element of an effective integrity system, if you have got multiple agencies, is to make sure that there is a seamless kind of to-ing and fro-ing between them. If you have got, say, the Ombudsman starting an investigation, and then, if it looks like corrupt conduct, stopping it, referring it to IBAC, then IBAC has to try to make an assessment from it. Then the main difficulty with these kinds of investigations is that any loss of time or any delay can jeopardise the evidence and witnesses.

Witnesses get nervous. If there is some uncertainty about who is going to deal with what and what might be happening on this particular complaint, witnesses will often start disappearing or standing back and saying, 'No, no, no, I don't want to. I've changed my mind', and all the rest of it. It does affect the evidence. That is why I have said a simple solution to that is that if, say, the Ombudsman finds there is some corrupt conduct, let the Ombudsman continue that — or whichever organisation may be in charge of that — but notify IBAC, and then IBAC might say, 'Yes, we're happy with the way this is being dealt with', or IBAC might then take it over, but there is a continuity, not a stopping of the procedures. That is a weakness of the current legislation.

Mr D. O'BRIEN — Thanks, George; that is good so far. I just want to go back to the issue of public hearings, more for my own benefit. Is the corollary that when police are investigating a drug crime, it is not done in public — they do it privately — but at the other end, where IBAC is effectively a standing royal commission, royal commissions are generally done in public? But I guess the situation there is they are investigating a specific area or issue, not a particular crime as such. Is that how you see it?

Mr BROUWER — Yes, that is what I feel. Generally speaking, I would say, people should be cautious about public hearings because of those reasons. The other thing, of course, is a royal commission is a once-off and then it disappears again, whereas the point you make is a good point, because it is the ongoing process. Of course an effective anti-corruption commission would look at the systemic issues, and the systemic issues can go over a period of time. Let me give you an example. I think, Kim, you would be very familiar with this one: the window shutters case many years ago.

The CHAIR — Yes.

Mr BROUWER — It finally involved 600 police or something like this, from recollection. Many hundreds had to resign. This was a scam by the police where windows were broken, and then they would ring up the operator. You have probably seen that; there have been reports on it and all the rest of it. That was the classic instance where: do you really want all that in public hearings that go on and on for months and months while all these 400 or 500 or 600 people have to give evidence?

The whole thing becomes rather impossible to manage, and in the process other witnesses would become a casualty of that. That is why, on balance, I would say no. I would be a bit concerned about public hearings because of the way they have gone in Australia in particular, and in a way there is no need for them because when you make your report public when it goes through the Parliament, that is when the public accountability comes in. That is really what you are talking about — public accountability. But why create public accountability with people in the form of the process of an investigation when it is not necessarily clear who did what?

Ms SYMES — I planned to ask about the Victorian Inspectorate, so are we done with that?

The CHAIR — Absolutely, yes.

Ms SYMES — Thank you for attending today and for your evidence so far. In your special report to Parliament you raise concerns about the Victorian Inspectorate, about not being able to complain about the VI and also about your view that it had inadequate controls. I wonder whether you could tease that out a bit more and say what improvements you might suggest.

Mr BROUWER — There are two things, and they include the PIM, the Public Interest Monitor, in this, because it is relevant to what I am about to say. I think there are too many bodies of accountability that have been created over many, many years. It is a general malady, I think. We have so many human rights, anti-discrimination, this commission and that commission, that corruption commission and all sorts of other things. It is just become a bit of a madhouse, to be quite frank. There should be much more of a rational approach to looking at what is needed in order to produce an effective outcome.

Again, you have a fragmentation. Here you have the Ombudsman, you have IBAC, you have the Victorian Inspectorate, you have the Auditor-General of course, which is slightly to one side, and then you have the PIM. You have these bodies basically, with two of them having to check on the other one, which again I think is sometimes a counterproductive measure. I suggest that what would be more sensible would be to combine the Victorian Inspectorate with the PIM so that instead of two bodies you have one body. With the Victorian Inspectorate, there is some legitimacy in having an organisation such as IBAC with coercive powers and all the other powers that are contained in it — after all it wields quite extensive police and other powers or equivalent to police and other powers — under some reasonable supervision to make sure that things do not go off the rails. But the question is: what kind of supervision should it be?

In my view, seeing as you have parliamentary committees to which some of these bodies are responsible, the parliamentary committee is the most legitimate form of supervision, and I am talking about in a democracy. I take it we are still a democracy up to a point. If you are going to have public accountability like that, then I think it is perfectly legitimate for a parliamentary committee or the Parliament collectively to be assisted by bodies that have a certain monitoring function. But sometimes this kind of monitoring can degenerate into the creation of all sorts of paperwork and this and that and copies of all sorts of public documents that go around, which is just a bureaucratic exercise in cutting down a lot of trees unnecessarily very often. It does not come to the fundamentals.

One thing I found in dealing with police corruption in the past is that you can in fact kill accountability by excessive accountability. It is no good saying to a policeman, ‘Here is your code of conduct’, which is 10 inches high, ‘And we expect you to comply with all of that’. In the real world, that is a nonsense. The basic thing the police have to understand is one or two or three important ways of behaving ethically in their conduct and their dealings, but what inevitably happens the more you get these monitoring and checking bodies is it becomes paper warfare. You should have a look at the kinds of papers that are being generated by having to report under the current provisions, say, to the inspectorate or to whatever body it might be. It is quite formidable.

The other question of course is whether more and more detail will be required. But you need to keep on thinking, and in a business you would be thinking, ‘Well, on all this investment, what kind of return do we get?’. What you are looking for in return is proper accountability. How can you achieve that with what I would say is the minimum of bureaucratic toing and froing? That is basically what I am trying to say. I think that is basically at the heart of the way we deal with accountability issues.

I made an additional point in my parliamentary report. I have no problem with having an inspectorate or whatever it may be called to monitor IBAC’s activity because of its coercive powers. To me it is possibly ridiculous to include the Ombudsman in that. In fact the Ombudsman was never meant to be included in that. I spoke to ministers in the then government and all the rest who said no, that was not their intention. They were more concerned about giving powers to IBAC without any control. The other important thing I said there was that I think there is an unconstitutional element possibly in the legislation, and that is a matter that has not yet been determined in a court of law; it may be determined one day, which will then bring down the edifice in a sense. But I merely said that because they were trying to interfere with the operations of an office, which is one of the three constitutionally entrenched offices in Victoria. The electoral commission, the Auditor-General and the Ombudsman are entrenched in the constitution, and the responsibility of those bodies is to the Parliament or a parliamentary committee, not to another subsidiary committee.

The other issue I had is that if you have a body like the inspectorate, or whatever body it may be, those bodies should be properly accountable to the Parliament or to a parliamentary committee. That is very inadequate for the reasons I have indicated in my report, which are all there. It is inadequate in the way things are currently drafted. Does that answer your question?

Ms SYMES — Yes.

Mr BROUWER — It is a bit of a complex area.

Ms SYMES — No, that is helpful. Thank you.

The CHAIR — We went to Queensland last week, and one of the frustrations that came out was the issue that you are running up to an election and those on one side of the political fence scream blue murder about a corruption issue and they want it referred. All of a sudden you are the meat in the sandwich, and, George, you have been stuck as the meat in a sandwich more than once.

Mr BROUWER — Yes, that's right.

The CHAIR — How do we deal with that, or is it just one of those things that is part of the democratic system? You are running up to an election, there is a heap of political pointscoring to be done and the independent watchdog is stuck in the middle.

Mr BROUWER — I think the independent body should be able to just dismiss complaints like that. Let me give you some examples. I have had complaints coming to me where people have said, 'This politician is corrupt'. I have said, 'What evidence have you got?', and they say, 'Forget about it'. That is it. We are not going to look at it. It is a common-sense issue, is it not? ICAC told me some years back that they had the same problem — that politicians start referring things to each other just to make it part of the political process. The worst mistake an independent body can make then is to get sucked into the process, because it is quite obvious. You can determine quite easily whether a thing has substance or not.

We have never had this problem so much in Victoria, interestingly enough — not like Queensland's experience seems to be — mainly because there are some other people who might have been in a similar position who have knocked it on the head because often it is fatuous. But if you get something of substance, then of course you deal with it. But again, that is just part of the run of the mill things.

Mr D. O'BRIEN — What is your view on what powers, or probably more so resources, for IBAC should be available to proactively counter corruption? I am talking about education, but also the ability for IBAC to do what VAGO does in terms of performance audits — that is, to go into a department and say, 'We want to do an audit of whether there is corruption there', rather than waiting for people to make a complaint.

Mr BROUWER — Yes, I think that is very important. There should be a proactive element in this, and an educational element is also important. It is quite interesting. You talk to senior people sometimes about a corruption issue or a problem issue that has arisen in their portfolio, and the most obvious conflict of interest they had not quite been aware of. Not that they were necessarily bad or evil themselves, but they could not quite see that 'Oh, was that really wrong, what I did?' — that kind of thing. I think it is important to bring up the idea of the education function, which is in the legislation, which is very good, and to try to have that developed, and a proactive one. Let me give you an example, coming back to the window shutters one, but also if you look at my report about 150 years of corruption in Victoria Police, what you find is —

Mr D. O'BRIEN — Just a clarification, was that a report? It was an Ombudsman's report.

Mr BROUWER — It was a report, yes. It was an OPI report. In fact it became a textbook, I was told, in Harvard University as an interesting case study. I think it is out of print now, but it should be available electronically, probably on the IBAC website. IBAC might have it on its website. I am not sure what has

happened to the website. But the issue is that very often the same common denominators come up. I think it is so important that people should be reminded constantly because people move into a service and they move out of a service and those who have learnt the lesson may disappear and the new ones come in and have not learnt the lesson, so it is important to keep that education, on an ongoing long-term aspect, going.

I think the other thing is again to remind people that the same old things can happen. For instance, in the window shutters case, I think my predecessor at the time found that on average it takes six weeks, I think, for a non-corrupt police station to become corrupted when a corrupt officer is introduced. It is like the proverbial rotten apple in a basket.

Mr D. O'BRIEN — Plague.

Mr BROUWER — But it is not a long time, is it? When you think about it, that lead time is fairly short. Again, I think it is just partly because people drift and a rogue might say, 'Look, you know, you can make a bit of money on the side'. People say, 'Oh, that's good'. That is private, and then the next one will do it. It might start off at the low level, at the petty level, and then become a major one. That is why I do not like the division between serious corrupt conduct and corrupt conduct, because often little things become more major. The everyday problems become serious problems.

The CHAIR — Just following up on Danny's question, who should actually be delivering that education and that anti, prevention corruption? Is it IBAC itself or should it be the public service commissioner? Who is best? IBAC?

Mr BROUWER — IBAC. I would say IBAC, because you would assume it has now built up the expertise to know what to watch out for. One of the problems with legislation — any kind of legislation, like this, which is technical in many ways — is often it is drafted by people who have never done investigations, never done corruption investigations, so you get a kind of bureaucratic, at one remove view being imposed on the legislation, and it does not work at the coalface. The other thing, if I could just emphasise, is that the more thresholds you build into an IBAC jurisdiction, the more liable IBAC will be to get challenged on it by vested interests who will try to thwart the investigation. Then it gets taken into the court system, and no one quite knows what would happen at that point, but it delays the whole process, jurisdictional things and all that kind of stuff. It becomes problematic.

The CHAIR — I think on your point before about conflict of interest and not everyone in the public service understanding it, Sandy and I went to a conference and it was interesting to note the differing views on what was corruption and what was not corruption within the public service, and they were a mile apart.

Mr BROUWER — Yes, and the thing is to keep the concept simple. Basically you say these are the vital ingredients that you just need to avoid and watch out for. We do complicate things. You look at the IBAC legislation. I do not know whether you can understand it all, but sometimes I look at it and think, 'My God! The contorted minds that developed all these kinds of clauses and everything else!'. That already is an indictment of the quality of the legislation. It should not have to be a very long act. That is what I am saying.

The CHAIR — George, thank you very much for your time.

Mr BROUWER — A pleasure.

The CHAIR — I know you are trying to enjoy retirement. We really do appreciate, obviously, your experience and the input. As you know, the government is bringing in amendments and the committee needs to be well armed about what to look for and assist in the process where we can. We really appreciate your time.

Mr BROUWER — It is a pleasure. Thank you very much.

Witness withdrew.