INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

CLOSED PROCEEDINGS

Melbourne — 7 December 2015

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The Hon. Tim Smith, QC.

The CHAIR — I welcome the Honourable Tim Smith, QC, to the public hearings 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 in 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 SMITH — I have indeed.

The CHAIR — It is also important to note that any action which seeks to impede or hinder a witness or threaten a witness for the evidence they would give or have given may constitute and be punishable as a 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 invite you to make a verbal submission and we will ask questions as appropriate. Welcome.

Mr SMITH — Thank you. I was kindly supplied with a list of questions, and what I have attempted to do is to put some material together which tries to focus on those questions. I hope that will be of assistance. Please do not hesitate to interrupt me. There are some issues in here that need to be discussed, I suggest, which are not easy, and which I had not thought about until recent years I must say, issues that have been largely ignored in our democracy for many years. But I think it is time we talked about them.

It struck me that questions 1 and 8 were perhaps a good starting point, because they require a look at the changes needed, the rationale for the changes and the balance to be struck between an effective integrity system and the protection of civil liberties. It seems to me that to consider those questions one has to look at the level of the risk of corruption and also think about what are the principles that should guide us in assessing possible changes to IBAC's legislation and the balance to be struck between an effective integrity system and protecting civil liberties, which I suppose is one of the major issues in this, is it not? My impression has been that much of the concern about the IBAC legislation and which led to it being in the form it is is this concern about the protection of civil liberties, and that is a very legitimate concern — an important one.

Looking at the risk of corruption in government in Victoria, we provided a submission to the government, which I think you have. Essentially we drew attention to the reality that unfortunately here in Victoria we have one of the worst government integrity systems in Australia. That is the reality which we need to face. Another major point that we look into is that over the last 20 or 30 years the changes that have occurred in the way we conduct our government — things like outsourcing, public-private partnerships, providing ministers with unguided statutory powers, the growth of the lobbying industry, the donations arms race — and the lack of transparency in those areas has meant that the circumstances in which corruption can thrive are there. That is unfortunately where we are at. We are yet to approach the issues I have described in Victoria, but maybe in phase 2, which is being promised, we can mark a start on that. But we do have IBAC.

Another point made was experience shows repeatedly that one cannot rely upon the controls within departments and agencies and their execution to adequately deal with the risk of corruption. The best example and I think the most remarkable example of that, and it is mentioned in the submission, is the example of the departmental officer whose job it was to handle tenders for security systems for IBAC — I emphasise 'for IBAC'; this was a few years ago now — and he sought a bribe of $20 000. When I read about that I thought this guy is either not well — —

Mr RICHARDSON — Not very bright.

Mr SMITH — Not very bright perhaps, or perhaps he had been doing it before; perhaps this was just normal. That wasn't handled. It was mentioned to a parliamentary committee I think. It was told that the department had looked into it and sacked him, but there was nothing to suggest that this particular person had been charged with any offence, and that is not an unusual reaction in the way things are done.

I do not know whether you agree with me, but I think we are in the situation, though, where there is general support for the establishment of IBAC. It has been brought home, I think, by the fact that cases like the Obeid case indicate how serious, sophisticated and highly secretive corruption can be.

But what changes need to be made? This is where I come to some issues that I have to confess I was not aware of until a few years ago — and I found that most people are not — and that is the existence of a guiding principle that is both ethical and, importantly, part of our common law: that holders of public office, be they judges, members of Parliament, public servants, have an ethical and common-law obligation, and that is that they must put the public interest ahead of their own personal interest — what we are calling the Public Office Public Trust principle. It is in fact recognised in the IBAC legislation, because on the list of corrupt conduct you will find in section 4(1)(c), conduct:

> of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust.

Could I just say this — I meant to raise this before: some of this analysis in this area I have not had the opportunity to put to our members. I offer it to you as something for your consideration but I wonder if my appearance here might be treated as simply my appearance and not a round table appearance?

The CHAIR — Yes, so let us acknowledge that.

Mr SMITH — This principle is particularly important — that is, that holders of public office when exercising their power must place the public interest of the people ahead of their own and other private interests. It is particularly important in a situation like the present where you and all the ultimate decision-makers are placed unavoidably in a conflict of interest position. That is the interesting reality, because you are making decisions about changes to be made to a body that is your watchdog. I must say that from what I have seen through the Round Table and in my discussion of issues — and thanks also to a wonderful lecture by Fred Chaney, our first Integrity Lecture — I had not appreciated how many conflicts of interest you have to deal with in your work. I do not envy you. It strikes me as being not only the most important job but the most difficult.

Let me come back to this point: the decisions made in this area are ones where, as I say, you are dealing with a conflict of interest issue. My submission would be that, as Fred Chaney said in his speech, when members of Parliament are faced with a conflict of interest — the way he put it was what you have to do is ask yourself what is in the public interest, and that should be the guiding principle, and I guess that is obvious. But it seems he was not aware at the time of it as a principle of law as well as ethics and he did not rely upon the principle, but what I am putting to you is that it is in fact part of the law. I will not go into that in great detail. It is touched upon in the most recent submission we gave, with source material, dealing with this conflict of interest issue. I think it was on about 16 September that we gave it to the government.

Taking up that principle, we have to consider the impact on civil liberties in this situation. What are they here? Presumably they include the right of citizens to equal treatment under the law, due process, privacy. Due process would include the common-law presumption of innocence and privilege against self-incrimination. You have posed the question for us of what should be the balance between ensuring an effective integrity system and protecting civil liberties. May I suggest that perhaps the first thing to look at is the extent of civil liberty protection that holders of public office have and the extent of any changes that might flow as a result of IBAC investigating something. You have to start, I suggest, by looking at the position of holders of public office and the position of ordinary citizens and the operation of this Public Office Public Trust principle.

The point I want to raise is that holders of public office are in a different position to ordinary citizens when it comes to issues of this kind, because to start with is it not an incidence of public office that the holder is

obliged to answer questions and provide information about the conduct of their public office? They are accountable. When one looks at the Public Trustee's position, do they not have a fiduciary duty to account?

Before IBAC was created, people in public office were held accountable — they had to explain themselves within their departments, within Parliament and so on and so forth. What has happened with the legislation is that we have another statutory body brought into the situation which is empowered to ask these same people, who have these obligations to answer their questions. But of course it is not concerned with day-to-day administrative matters and the quality of performance of duties. But what it is concerned with is misuse of power by holders of public office involving a breach of their fiduciary duty to the people and doing so for their own personal benefit. That is the sort of area that it is supposed to be looking at. The result is that instead of the Parliament or senior officers exploring matters with public officers, IBAC will itself be asking questions in addition to them, as they should be.

The CHAIR — So, Tim, in regard to protecting civil liberties, do you have a view in regard to public hearings versus closed hearings? We have had, I guess, conflicting evidence from various people that if you are going to be absolutely sure about protecting the rights of the person, why not just have it as a closed hearing so it remains that way and then if the person is innocent, it is not in the public domain.

Mr SMITH — I was just coming to the point.

The CHAIR — Right.

Mr SMITH — That is quite all right. Another special feature of this, which you have just raised, is that not only do you have public officers caught up in these hearings, you have private citizens caught up in these hearings. We would agree with what you say, that you do need strong rules that will ensure that the publication of what occurs in public hearings only occurs when it is necessary, because that is probably the best way to protect people from being casualties when they should not be, if I can put it that way.

But can I just add this point as well: the citizens who will be caught up within investigations will usually be people who have sought to engage with government, to get involved with the processes of government. We would say, and I think the committee would agree, that government should be open unless the public interest requires otherwise. I put this proposition to you that as beneficiaries of what I call the mega Public Trust, which is our democracy, we expect that the public officers we are dealing with can and will be obliged to account to their superiors as to what they have done or not done. I ask the question: when we have engaged with public officers, particularly when it is for our own benefit, should we not also be expected to respond to questions about our involvement in the mega Public Trust of which all of us are ultimately the beneficiaries? That is a point I will come back to in a moment.

Our submission would be, in relation to the public hearing regime, that the risk of wrong and unfair damage to reputations has been addressed in Victoria in what we see as the most rigorous fashion in Australia. I do not know if that is appreciated, but section 117 is very, very rigorous. We would suggest that this provides the necessary protection. But we have said, and I should draw this to your attention — this is in paragraphs 14 to 16 of our submission to the government on IBAC — that we are concerned about the requirement of exceptional circumstances. We would submit that it is more than enough to have the protection that is there provided.

That protection is that a public examination may be conducted where it is in the public interest and it can be held without causing unreasonable damage to the reputation of any person or their safety or wellbeing. They are, we would suggest, very significant limitations and very strong guidance to IBAC. Of course there is a countervailing argument that you have a Star Chamber here operating secretly, and I am afraid this is a classic situation that, as Fred Chaney said, parliamentarians and governments have to deal with, in that you have a situation where there is no perfect solution. You have to try to identify the best solution, guided again, as I would submit, by what is the best solution having regard to the overall public interest.

Mr D. O'BRIEN — Is it your view that section 117 is good enough as it is, does not need any further amendment? And should public hearings be the exception rather than the rule or vice versa?

Mr SMITH — Well, with its present language, leaving out the exceptional circumstances for the moment, you have the requirement that it be in the public interest, you also have the requirement that it can be held without causing unreasonable damage to the reputation of any person or their safety or wellbeing. I do not think our presently constituted IBAC has conducted many public hearings, has it?

Mr D. O'BRIEN — The education department.

Mr SMITH — The education department. That was when they were well into it, I think and the people questioned were primarily public officers. I think there might have been one or two who were not. I do not know. Is the committee happy with that as an example of where it is appropriate? I ask that rhetorically.

The CHAIR — Yes. I guess that is why we are looking for your view on that particular issue.

Mr SMITH — As I say, I think I can speak for the round table when I say that our position would be that at the moment it goes too far because it also says 'exceptional circumstances'. When are the circumstances going to be exceptional? I do not know what they would be for IBAC to be satisfied that these are exceptional circumstances. Presumably they saw that satisfied in the two hearings you mentioned. They got to that point in their investigation — maybe they thought there was an imperative, for example, to let the community know because of what they were investigating, the clear evidence that they had, because they thought it important to ensure that they had all the evidence and there would be people out in the community who might come forward as a result of knowing what was being done — that sort of thing. But they seem to have handled it cautiously.

Could I come back to the question of the privilege against self-incrimination — one of the fundamental civil liberties — and the balance that is to be struck. One always needs to bear in mind of course that the government and Parliament did what is done for royal commissions — this being a standing royal commission, I suppose. The Act says that the privilege against self-incrimination is lifted for the purpose of the investigation but the evidence given by the person in question cannot be used against them in criminal proceedings. That is a longstanding approach to resolving this balancing of the need to inquire and the protection of civil liberties. We would suggest that is the appropriate balance. Again, might I refer to the Public Office Public Trust principle. We are not dealing with ordinary citizens by and large, but we are dealing with people who have fiduciary obligations to the people. That needs to be taken into account, I would suggest.

Are there any further questions arising out of that, because I am wanting now to go to some of the more specific questions.

Mr RAMSAY — Can I just ask for clarity, in relation to changes to the legislation, have you condensed the organisation's preferred changes to the legislation? I have not seen the submission, and I am not sure if we have access to it.

Mr SMITH — No, I have not seen anything about what they want.

Mr RAMSAY — No, but what you are looking for in relation to any potential changes in legislation.

Mr SMITH — Yes, it is in our submission to the government, and I think I passed that on to Sandy.

The CHAIR — Yes, we have a copy.

Mr SMITH — Our first submission was: does Victoria have a corruption problem, in which we looked at the evidence as we saw it to explain why our view is that we plainly do. The next one was on the reform of IBAC, and I think the next one was the one I mentioned where I wrote something about the challenge of the conflict of interest that faces all public officer decision-makers and the importance of this Public Office

Public Trust principle to give guidance in those situations basically. In that there are some links to some references, one being a speech made by Sir Gerard Brennan just a couple of years ago, when presenting our Integrity Awards actually. I do not know whether you knew that we gave parliamentary integrity awards to the federal Parliament — that intrigues people, to put it politely — but we have awarded it for the last two parliaments. So there you go. If you are interested, that is on our website.

Mr D. O'BRIEN — We are interested if you are doing one for the state Parliament.

Mr SMITH — We do not have the resources in people to handle everything. We are struggling as it is, unfortunately. We would love to have one in Victoria.

Mr RAMSAY — Can I just ask: the government is talking about lowering the threshold in relation to serious corruption. Have you made commentary about that in any — —

Mr SMITH — In the submission to the government about IBAC we put in our proposals and our arguments. I would commend Sir Gerard's speech to you. Anyway, there are other references on that other one about the Public Trust principle, which goes into a bit more detail.

Threshold issues.

The CHAIR — Threshold issues — good. I am mindful, Tim, of the time. We have 15 minutes, and we are keen to get to the threshold issues.

Mr SMITH — Okay, questions 3, 4 and 5?

The CHAIR — And 6, about whether it is necessary to specifically include preliminary investigation powers in the IBAC legislation.

Mr SMITH — These are dealt with in our submission in any event. But I will just be as quick as I can. The concern is essentially about the current threshold. It limits the capacity of IBAC to investigate, particularly serious matters like the Obeid matter. The other is the potential of having a detailed limited threshold for actions being taken in court to stop inquiries, and also someone charged as a result of an inquiry, having objected during the inquiry to evidence being used or being illegally obtained can then raise those same objections at trial and the potential is considerable to make that very difficult. Of course if the person is convicted, they then have a ground of appeal or two.

As far as the general issue about do we need to legislate a detailed threshold is concerned, I do wonder whether consideration has been given to an important reality, which is that IBAC, like all of these bodies, will not be adequately resourced and never will be. That reality would, in ordinary circumstances, focus any such body on trying to prioritise so that it spends its resources in examining serious matters. It will not want to spend its money chasing up what looks like a minor matter. I would suggest that that is a significant safeguard.

The next point I want to make is, paradoxically, that legislating the way we have, with a view to regulating IBAC so that it will only examine serious corrupt conduct, has in fact had the effect of preventing it investigating the very worst corrupt conduct of the kind like the Obeid matter. Stephen Charles has spoken extensively about this and has given details in much of his writing. Of course when that investigation started all they had was someone contacting them to suggest that something unusual had happened, but on the face of it there was nothing to suggest anything corrupt. It was not until they had used their investigative powers in ICAC that they were able to put together what had happened.

The sad reality is that in trying to ensure by legislation that IBAC will explore only serious corrupt conduct, the legislation has created a situation where it cannot investigate an Obeid-type matter. It has gone too far. So essentially what we have argued for, and I think what is required, is that the legislation do no more than direct IBAC in the terms of the ICAC legislation, which is section 12A:

> … as far as practicable … to direct its attention to serious corrupt conduct and systemic corrupt conduct and … take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct —

and give priority to the investigation of serious corrupt conduct. I am not sure that I copied that correctly; anyway you will get my drift.

I would submit to you that that direction plus the harsh reality, cold reality that with the resourcing they have got they will not want to do anything else anyway, you have a combination that should work, and it appears to have worked in New South Wales, although occasionally the odd mistake will be made, as was made in that recent matter. But views may differ on whether that was a mistake or not.

Question 4 asks: would lowering the threshold for investigation be beneficial? We have effectively discussed that already, I think, because the main thing is to ensure that it can investigate serious corrupt conduct where it has reason to think that the situation is one where certainly some investigation to explore it is required to determine whether it is serious.

Question 5: should the definition of 'corrupt conduct' be changed or further defined? What would be the benefit and how could this best be achieved? It seems to be common ground I think that misconduct in public office needs to be included in the list of offences, and we strongly support that. Interestingly, the origin of that common-law offence is the Public Office Public Trust principle actually; it gives effect to it. We would also submit, however, that Victoria should follow the model in other states — my example is section 8 of the ICAC legislation — where there has been a comprehensive list of offences which can be committed by corrupt conduct of people in government. This, I suggest, is a situation where a detailed list is a productive thing — —

Ms SYMES — Non-exhaustive, presumably.

Mr SMITH — Non-exhaustive, yes. That would be productive and advance the operation of the legislation.

Your question 6 was about preliminary investigative powers. The round table's position on that is that while that would be necessary if we retained the present threshold for IBAC's investigations, if you remove that threshold, it is no longer necessary. If a threshold is provided with specific requirements, you can run into the problem of providing opportunities for those with deep pockets who are being investigated to play the system. One should not dismiss that problem. We submit it is a real one, and at two levels — the investigation level and later if charged with offences and objecting to the obtaining of evidence. If there is an adequate solution to the threshold problem, we would submit there is no need for legislation dealing with preliminary inquiries. ICAC has been conducting preliminary inquiries for many, many years and it has not had any problems emerge in relation to that.

Question 7: limiting court action except when IBAC acts in bad faith. We have submitted that that is something that should be looked at and adopted. The rationale, as we see it, is, again to come back to striking the right balance, the balance between enabling citizens to protect their rights and enabling IBAC to discharge its role in investigations — striking the balance. It is not as if we have not got systems in place to which people can go, who are caught up in an investigation and who have complaints about the way it is being conducted. We do have those mechanisms in place. There is the Victorian Inspectorate and there is also this committee. The Ombudsman has this provision, and we raise the question: should IBAC have this provision? We submit that there are enough protections in place for the participants without creating a further opportunity for a corrupt person with a deep pocket to play the game.

I was going to go on to some additional matters that we have raised in our submission. Could I just briefly mention those?

The CHAIR — We are almost out of time, but yes.

Mr SMITH — Thank you. The first is to pick up the proposed 2014 amendments about mandatory reporting by bodies identified in the draft; clarify IBAC's power of delegation to appoint qualified persons to preside at examinations — that is paragraph 12 of our submission; apply to the Magistrates Court for a search warrant.

Which brings me to the issue of phase 2. Our understanding is that the government's present intention is, once these initial commitments have been dealt with, in the new year to look at its phase 2 approach to the review of Victoria's government integrity systems.

Might I just briefly indicate our present wish list includes whistleblower protection and political funding — whistleblower protection intimately connected to the operations of IBAC; political funding having been the subject of a recent review. We have the report of the Victorian Ombudsman and we also have of course the New South Wales report.

The other point that you have raised in the questions concerns the issue of an overarching authority. The question I think draws on a paper given by one of our members, Professor Charles Sampford. This goes back to the original Queensland model, which Tony Fitzgerald recommended. I think there is strong support generally for having a body existing side by side with IBAC, as in Queensland with the CCC, whose role is to look at what is happening, what is going on, anticipate problems, if you like, deal with problems as soon as they arise rather than have delays et cetera. It is a very interesting model, but we will give some attention to the question of whether, when we put a submission to the government in phase 2, we raise that matter. That is where we stand.

The CHAIR — Tim Smith, we are extremely grateful for your time this morning. Thank you very much. Please pass on our thanks to the other members of the Accountability Round Table. We appreciate what they have done in regard to what we have read in the media and the report that we have received into this committee. The secretariat will send you a copy of the transcript of this morning's hearing for you to correct as you see appropriate. We again thank you for your time.

Mr SMITH — Could I just thank you for the opportunity. I convey Stephen Charles's apologies; he was not able to make it. Discussing it with him, if there is any way you think we might be able to assist further or there is anything you want to get our views on — I understand that your plan at this point is to have a report ready for when the debate takes place in Parliament — if there is anything that you would like to talk with us further in the process of getting that ready, we would be delighted of course to do what we can.

The CHAIR — Thanks, Tim.

Committee adjourned.