INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

CLOSED PROCEEDINGS

Melbourne — 14 December 2015

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Witnesses

Mr Stephen O'Bryan, QC, Commissioner,
Mr Alistair Maclean, Chief Executive Officer, and
Dr John Lynch, General Counsel, Independent Broad-based Anti-corruption Commission.

The CHAIR — We welcome Stephen O'Bryan, QC, to the closed hearing of the Independent, Broad-based Anti-corruption Commission Committee.

All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and where applicable the provisions of reciprocal legislation in 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 O'BRYAN — Yes, thank you.

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. Thanks, Stephen.

Mr O'BRYAN — Good morning, members of the committee. With me today, as was the case last time, is our CEO Alistair Maclean and, because we are looking at legislative matters, our general counsel Dr John Lynch. If it is convenient to the committee, I will start with the principal proposed changes to the IBAC act that are in the new bill.

Firstly, lowering the jurisdiction threshold from a belief in wrongdoing to reasonable suspicion I consider to be a change for the good, and it ought to better suit our needs going forward.

The addition of 'misconduct in public office' is I think a sensible addition. What remains of course is the important issue of whether our corrupt conduct jurisdiction should remain solely in the realm of criminal offending. I will not repeat what I said last time about some forms of corrupt conduct falling outside that area, but this will be something for the legislative review team and ultimately the government to consider in the new year.

Regarding the preliminary investigation power that is in the bill, it is not something that I raised; however, it is not unwelcome. We will work with the new power when it becomes available, and I can report on its utility after 12 months or so of the act's commencement.

Mandatory reporting is something I raised and I am pleased with its pending introduction as a way of boosting our intelligence capability in looking for patterns of behaviour that may warrant greater scrutiny either by us or by other appropriate entities. Search warrants being issuable by magistrates is something we sought, and I am pleased that we will now have in the near future the flexibility to go to the Magistrates Court where you can get on more quickly. Of course police have always gone to the Magistrates Court for warrants in relation to the most serious of criminal offences.

Suppression order power. Our power to make these at public hearings, which is where you would make them, in appropriate cases has never been clear, and I am pleased that that will be clarified.

The changes to the delegation's power. Presently in the act delegations power is highly prescriptive, and I think the proposed freeing up of a number of the powers in that sense and making them delegable further down the ranks in our organisation will aid the overall efficiency at IBAC.

I will turn now to address leftover matters that we raised previously and that are not in the bill but which I understand the legislative review team will be looking at in the new year. I will just address a handful of what we see as the more important matters, bearing in mind that we have still about 18 or 20 more technical amendments which mainly go to practical operations and which I do not see the need to go into

in any detail. An example of technical amendments is serving confidentiality notices on public service entities rather than individual persons, and widening the group of principal officers that we can send information to within government. Another example is specifically allowing us to defer assessments of complaints or notifications indefinitely in appropriate circumstances. For example, it may be that it is sensible to await the outcome of a related investigation by us or another body that might then have a bearing on the assessment of a given notification or complaint. There are other reasons for such deferrals, but that is one example.

Turning then to the more important matters that we still have outstanding, I think one of them is us seeking the ability to, in the colloquial, follow the dollar in terms of our investigations. That is important, because as committee members will be aware normally corrupt conduct is motivated by enrichment. Just as the Auditor-General has been seeking and I understand will be getting soon, being able to follow the dollar wherever it may lead, including beyond the public sector, means that normally you can get the whole of the story and that is important in terms of getting to the bottom of matters of serious corrupt conduct.

We have raised the question of whether the exceptional circumstances for public hearings should remain, and I think I addressed the committee on that last time, so I will try not to repeat myself. The concern that we still have is that this is a very nebulous concept and will only continue to land us in court with court challenges. It does seem to me that we being the only state with that requirement we should be seriously looking at deleting that as one of the tests for public hearings.

Another area, which is a fairly complex area of law, involves some decisions in the High Court in recent years which impose common-law restrictions on the use of coerced evidence. I do not have any quibble with the general position at common law that coerced evidence, and it is in our act, cannot be used against someone in a criminal prosecution, but there are other areas where I think our act needs to be shored up in terms of what is called derivative use of coerced evidence. So, for example, if a witness were to tell us in a coercive examination where they had hidden incriminating evidence and we sought a search warrant on that basis and found the material, that is arguably derivative evidence and, on one view of the common law, you need the act to be crystal clear about being able to use derivative evidence in a criminal prosecution. I think that is one area for tidying up.

Another area for tidying up is the ability, in appropriate circumstances and without prejudicing any criminal trials, to question a witness on matters the subject of charges, just as now, as I understand it, the chief examiner has that power as a result of amendments, and of course that would normally only be done in private and the evidence could not be used against the person. But sometimes that is necessary in the context of a broader corrupt conduct investigation. As I say, that is a very technical area of the law and we will continue to work with the legislative review team on that.

We have raised before the potential broadening of where protected disclosure complaints can be referred. At the moment it is limited to just the police, the Ombudsman and the Victorian Inspectorate. One of the problems, as the Ombudsman may have told you already, is that the Ombudsman's office can get overloaded by protected disclosure complaints that are referred by us that are not police matters and some of them are just as well suited, it seems to us, going back to the entity from where the complaint emanated. But of course that entity would need to have appropriate procedures and processes in place to respect the confidentiality of the complainant and otherwise to protect the individual, as the act requires.

Finally, it does seem to us that the way we are funded ought to be looked at and perhaps a funding model that respects the independence of IBAC from the executive, a funding model that is direct from the Parliament, perhaps in consultation with this committee, concurrently with looking at our annual plans. That would ensure that there is no perception that at ministerial whim the funding base could be increased or decreased. It seems to us that change will not happen unless we have at least the committee's support on that.

I understand that the committee would be assisted were I to address some specific questions which I have been supplied with. I can briefly go through those. Firstly, a suggestion by the Victorian Ombudsman that

a single complaints portal for all complaints about public bodies be set up. We are generally supportive of this. We see the potential benefits, although at this stage it seems to us more work needs to be done to establish the benefits and, importantly, the costs of doing that.

The next matter is whether we should be required to notify the Victorian Inspectorate about why we might not give an individual information about what they are to be examined about when they receive a witness summons. I am not aware that that has come up. Normally witnesses are told the subject matter of the examination in advance, sometimes in more detail, sometimes in less detail. The degree of detail is very much a discretionary matter and takes into account operational considerations. There already is a lot of paper shuffling that goes on between our organisations for, as far as I can see, little or no return, and that involves a drain on the resources of both organisations. If anything, I think we should be examining lessening that drain on resources in order to promote efficiencies in public expenditure.

I would make the same general comment in relation to the next point, which is notifying the reasons every time a confidentiality notice is issued. That is a slightly different situation, in that confidentiality notices are issued routinely for the same reason every time — namely, to avoid prejudice to an investigation in terms of potential witness collusion, cover-up attempts, document destruction and the like. It is also important I think to have confidentiality imposed during investigations, to protect reputations of persons under investigation, not only from gossip but, worse, from media coverage. The only other comment I would wish to make is that the inspectorate can always ask for such information in particular cases, and of course we will provide it.

The next point is on suppression orders. I think that that will assist us. It very much goes to fairness of the process, protecting names of people from publication in a myriad of potential circumstances where that might be fair or to what we call lockdown elements of an otherwise public examination, where the public interest is not served by matters being heard in public. As I say, whilst we have felt that arguably we have that power elsewhere in the act, it is good I think to clarify that in the new legislation.

The next point relates to the changes in section 136 that it is not a reasonable excuse for an individual to fail or refuse to answer questions on the basis that it does not directly involve corrupt conduct. We raised this matter following some challenges in hearings that you can only question witnesses who are involved in corrupt conduct and cannot go beyond that, but of course often witnesses have relevant evidence to give in a broader sense to an investigation. I think this is an important confirmation in the act of our ability to question in a broader sense because it prevents what are largely I think tactical challenges for the purposes of delay to examinations and the amendment should put a stop to that.

The sixth thing that has been raised is something that I raised in our special report after 12 months of operation about the uncertainty in our act and relevant Victoria Police legislation about the relationship between IBAC and police when there has been a notification to IBAC from police about police misconduct, and whether or not police must wait for a referral back to police before they can actually deal with the matter. I think the current legislative position is that it is still not entirely clear that police must wait. However, the issue was solved some time ago by administrative agreement between the two agencies such that Victoria Police has agreed to defer to us after it has notified us of police misconduct.

We are happy to leave things at that administrative arrangement level. If anything changes, of course we would need to raise it as a matter for legislative change because it has always seemed to us that the intent of Parliament at least is that when we are notified, the notifying body will wait until we have decided what is best to be done — namely, whether we investigate, whether we dismiss or whether we refer it back to that body.

The last matter is the power to revisit decisions to refer or dismiss allegations of corrupt conduct and whether that rectifies our concerns. The amendment does respond to concerns that were raised in an early special report. I think all I can say at the moment is that it will remain to be seen through our practice and experience whether the provision is sufficient. However, at present we are certainly content with its wording.

They are the matters I think that the committee wanted me to specifically address.

The CHAIR — Thanks, Commissioner. We will head into questions. I take it that you are fully supportive of the changes that have been made in the new legislation?

Mr O'BRYAN — Yes, we are supportive and we will work with the changes and of course we will report back, either to this committee or more generally, if we see any problems going forward.

The CHAIR — Of the matters that you refer to that have been left over, the 18 to 20 technical matters, have you been given an assurance that they will be dealt with in the next batch of legislation and have you been given a time line on that?

Mr O'BRYAN — Dr Lynch might be able to supplement anything I say, but my understanding is that these are matters that are on the table, are under discussion. I do not know about assurances.

Dr LYNCH — We have not received assurances, no, but it is certainly part of an ongoing discussion between us and departmental officers at least.

The CHAIR — The obvious question is: if they were important to the IBAC commissioner, why were they not picked up in this tranche of the legislation? Is that being discussed between — —

Dr LYNCH — I think the best explanation would be — I suppose you would really have to ask him about the — —

The CHAIR — Sure; I was just wondering whether it had been part of general discussions between the two?

Dr LYNCH — No, not really. The provisions in the bill, as I understand it, were given priority because of their relative importance.

Mr D. O'BRIEN — Going back to one of the points we just spoke about with respect to reasonable excuse for an individual to fail or refuse to answer questions, on that, pardon my Hollywood understanding of the law, but that does not impinge in any way on the right to silence or the right to say nothing in case you may incriminate yourself?

Mr O'BRYAN — Under the act that is abrogated, so that in a coercive examination you cannot take that as an excuse.

Mr D. O'BRIEN — That is the existing act — there is no right to silence effectively?

Mr O'BRYAN — That is so.

Mr D. O'BRIEN — I wonder whether you could outline in simple terms as best you can how the new threshold will work in practice.

Mr O'BRYAN — In practice, in my experience there have been two or three matters that we have been interested to look at, even by way of preliminary investigation. With the old threshold I felt we could not look at them, and unfortunately a couple of them were ones that we could not refer to another body for operational reasons. Each of those matters we would have been able to delve into with the lower threshold, and it is important that we be able to, at least in a preliminary sense, investigate all complaints of a more serious nature that come to our attention.

I think it will make a practical difference. I think it will also lessen the risk of us ending up in court in connection with what are often tactical challenges to just slow us down and impede us in investigations. That has not happened yet, but it always can happen. The experience in New South Wales is that over the years, after ICAC started to gain traction and become effective, more and more they were landing up in court with those sorts of technical challenges.

Mr D. O'BRIEN — Speaking of which, the term 'suspicion', is that a common term in this sort of legal framework?

Mr O'BRYAN — It is. The distinction that we often see in the statutes and which there is common law around is 'reasonable suspicion' versus the higher level 'reasonable belief'. It is discussed in various cases. I think the most recent discussions are in a case called the Crown against Rockett. Rockett was a policeman trying to get a search warrant — it was about a search warrant. In the search warrant provisions in some spots it was 'reasonable suspicion', some spots 'reasonable belief'. It gave the High Court the chance to confirm what the legal tests are around both of those terms, and, as I say, suspicion is lower than belief. Traditionally search warrant applications of an offence require reasonable suspicion, not reasonable belief.

Mr D. O'BRIEN — And the difference between the two is — still with suspicion you must have some sort of evidence pointing to a — —

Mr O'BRYAN — You have got to have something that a reasonable police mind, and Rockett is a police case, would provoke suspicion in, and as the High Court says and other cases have said over the years, police are often more suspicious than the rest of us, but that is okay. Just because a judge might not be suspicious, the court judges whether it is reasonable for a policeman to be suspicious. It is not for the court to come along and say, 'I'm not that suspicious, so I don't think the test is met'. They say, 'Is it reasonable for a policeman to be suspicious?', and if that is so, then it is okay; it passes the test. It is still a fairly subjective area, but there is case law, including High Court case law, around these tests. It is a lowering of the bar for us — there is no doubt about that — at law.

Mr D. O'BRIEN — That police suspicion would apply to you guys, presumably, as well — in a court of law.

Mr O'BRYAN — Yes. We have some ex-police, and naturally some of them are more suspicious than you or I might be about some things.

Mr HIBBINS — In terms of the threshold, it has lowered the bar. Are you satisfied that it has landed in the right spot, because I remember in our very first conversation you spoke of being able to investigate the whiff of corruption? Are you satisfied that the bar has been lowered enough to do that?

Mr O'BRYAN — I think it is fair to say that we could not, and I think that term came, I might have said, from the Hong Kong ICAC, which is very effective. We could not investigate the mere whiff of corruption. We have to have a basis for reasonable suspicion, so the amendments have not gone that low. The point I was trying to make last time was that some people would say it is important in a society like ours that we be able to put to bed, if we think it is important, a whiff of corruption. We cannot do that. It is a higher bar than that, but all I can say is that we will work with that, and I think it definitely is an improvement.

Mr HIBBINS — I also wanted to touch on the funding issue that you raised. Were you suggesting that there be a legislative mechanism for how IBAC is funded?

Mr O'BRYAN — Mr Maclean might be able to be of more assistance.

Mr MacLEAN — We just the note the model elsewhere — for example, in New South Wales, where there is a provision in the legislation which the funding is by way of appropriation through the parliamentary committee by agreement upon the presentation of business plans et cetera. We see that not as a short-term exercise but as a longer term consideration for the committee and for the government, whether or not that is, say, a model that might be looked at.

Mr RAMSAY — My question was in the same vein. Given the opportunity to do more investigative work, I assume then there might be a requirement for additional funding. I cannot remember what you said at the last hearing in relation to the IBAC budget. You might be able to perhaps again — —

Mr MacLEAN — I am not suggesting the funding at the moment is inadequate. We are adequately funded at present. We just got a report as of last Friday, where we have a current underspend of about $4 million. Our year-to-date expenditure as of last week was $13.3 million from a budget of $40 million for the year. Our variance at this stage is about a $4.5 million underspend. Roughly speaking our funding has been around $40 million per annum to date. You will recall that there was the first four-year commitment of 160 or 170 million, and that has basically held up.

We have been underspent each year, but that is not because we have not been active. I just think as we have built the organisation — when you are starting from a small base you are not going to spend against that $40 million from year one, but you might be spending in year three, four or five. The department has been very flexible in enabling us to carry over our underspend against some expected expenditure this year and next year, particularly around our capital expenditure on things like case management systems et cetera. There is no particular problem with our funding base at the moment.

To go back to the earlier suggestion, the broader point is that as an independent body reporting directly to Parliament, then the question of a funding base, whether it should be from appropriation through the Department of Premier and Cabinet or through a direct appropriation through the parliamentary committee, I think is something worth considering in the longer term.

Mr D. O'BRIEN — So would you expect your expenditure to go up considerably as a result of these changes?

The CHAIR — the lowering of the threshold.

Mr RAMSAY — Which was my question.

The CHAIR — Can we give Simon credit for that question?

Mr MacLEAN — Our expectation is that to the extent that there is any additional expenditure it will be through mandatory reporting. At the moment of course the legislation provides for public sector body heads may report suspected corrupt conduct to IBAC, and the change is to must report. We are at the beginning of designing a regime, if you like, around that provision, but you would have to assume that will increase the reports and notifications et cetera that we get from public sector bodies. Someone will have to assess those and then go through a process of dismissing, referring or investigating ourselves.

At this stage it is a bit difficult to know just how much additional expenditure that will entail. We are discussing the experience with ICAC in New South Wales and the Crime and Corruption Commission in Queensland — they have got similar provisions — and what happened to them after they had mandatory reporting introduced. They said that yes, the expenditure went up but not immediately. We may have to recruit a couple more FTE, for example, against our assessments area initially, just to be able to handle the increased notifications, and then that may flow through to additional investigations load or referrals load, but it is very difficult to estimate at this stage.

The CHAIR — Would the committee be able to get an update at some point during 2016 on how that is travelling against: has there been a marked increase or a spike in regard to additional resources or maybe the use of that reserve that you have in underspend against the mandatory reporting of the public service?

Mr MacLEAN — Yes, one thing that we have been arguing — not arguing, but putting the case to Premier and Cabinet is that we expect at least some of that underspend to be now taken up. We do not expect to need to request additional funding, but we do expect the underspend will be soaked up at least to some extent by mandatory reporting in particular. And, yes, of course we would be in a position to report to the committee through the year. We have just set up a team a week or two ago, a small team within the organisation, to implement mandatory reporting, and that will include costings et cetera. We would be pleased to come back to the committee I think, realistically, sometime in the second quarter of the calendar year —

The CHAIR — The calendar year.

Mr MacLEAN — or the final quarter of the financial year to report on where we are at.

Ms SYMES — Thank you for coming along today. In relation to misconduct in public office, and just referring to the second-reading speech, which describes it as a catch-all offence, it is basically saying that it should pick up all offences that do not otherwise constitute an offence currently within IBAC's corrupt conduct jurisdiction — i.e., statutory indictable offences and common-law offences, attempting to pervert the course of justice et cetera, how do you think that introduction of misconduct in public office is going to work? Notwithstanding what you said earlier about criminality of conduct, does that pick up everything that you want it to pick up — i.e., the catch-all?

Dr LYNCH — Misconduct in public office is a pretty broad sort of offence, and I would be surprised if it did not have some impact on the amount of work that we have to do. I think the second-reading speech does correctly refer to it as a kind of catch-all, and there have been situations at present, under the current act, where we have had difficulty identifying an offence that could trigger our jurisdiction to investigate. It will be a really useful tool, I suspect, in terms of actually helping us to fulfil our statutory functions.

Ms SYMES — Do you think it will pick up things like conspiracy to cheat and defraud and matters like that?

Dr LYNCH — It should do, although once again that is a discussion we are having with the department about whether offences of that kind should be added to the list of triggering offences for our jurisdiction, but I would need to go back and look at the books.

Ms SYMES — Yes, but misconduct in public office you can apply to — other specific common-law offences may actually meet the test of misconduct in public office.

Dr LYNCH — They may do.

Ms SYMES — Without having to say that that is a common-law offence.

Dr LYNCH — Yes, there will be overlap between the two sets of offences, sure.

The CHAIR — Is it clear enough to ensure that there is no court challenge, based on what Jaclyn has just asked?

Dr LYNCH — We can never be sure of that. We are currently involved in proceedings in the High Court, and that is a good illustration of how you can never actually predict what an unhappy witness might consider as a possible way of extricating themselves from our proceedings. We worked very hard with the department on this bill, and the drafting is about as good as we can make it.

Mr O'BRYAN — Might I say we are appreciative that the department has been quite flexible, as I understand it, in listening to our suggestions.

The CHAIR — In one of the matters that have been left over, Commissioner, you mentioned the ability to be able to follow the dollar, which the Auditor-General has been lobbying for for a number of years now. Is it your aim that you would have the exact same power, exact same legislative amendment, that the Auditor-General is seeking?

Mr O'BRYAN — I have not yet thought about precisely how you might draft it. My thinking at the moment has been at a higher, more general level. I would have to think about that more, and I could respond to that either the next time I am here or, if the committee was assisted, in writing after today as to more exactly how one might draft it and what the Auditor-General is getting in terms of change to the VAGO legislation. That would be satisfactory for us. I would hesitate to say, 'Yes, that will be what I have in mind', without further reflection on the precise terms of a follow the dollar power for us.

The CHAIR — Putting that aside, in general terms you would be looking at being able to make it mandatory that a private sector company would have to provide documents to IBAC — that is, a contractor, for example, or a road builder who had a contract with VicRoads would be compelled to provide documentation to IBAC?

Mr O'BRYAN — That could be so. Every case is different, and it really depends on the circumstances, but naturally the starting point for us is public sector corrupt conduct, and really this is an adjunct to that starting point. Maybe if we have a reasonable suspicion about public sector corrupt conduct, we might want to start with the private sector because we suspect, as we have already seen with various investigations we have done that have had some prominence both in the department of transport and education, that these things tend to have a lot of deep roots that move out into the private sector and the private sector benefiting from public sector corrupt conduct. That may be so in a given case. It really depends on the circumstances.

Mr D. O'BRIEN — As a point of clarification on that, presumably you have power either under the act or at common law to get subpoenas and to get court orders for certain documents — or not?

Mr O'BRYAN — Yes, we can seek search warrants through the courts and search premises, and I am talking about public sector not police at the moment. We can otherwise summons witnesses to attend, and also in a summons we can require them to produce documents.

Mr D. O'BRIEN — Including the private sector?

Mr O'BRYAN — Yes, if it is relevant to a public sector corrupt conduct investigation. But perhaps what we are getting at is the fact that — and I have said this before — you may find in the context of a legitimate public sector corrupt conduct investigation that there is actually criminal conduct going on branching off from that that, ought to be investigated separately, so to speak. It seems to us it is inefficient that once we are aware of this sort of web of wrongdoing that we might have to hand one part of it over to the police. It seems to us that is inefficient. We would then have to give the police potentially thousands of documents. We would have to brief them in, when we already know about it and can efficiently do that ourselves. So that is one of the efficiencies we are looking for in follow-the-dollar power, and then that might lead to a whole set of criminal charges that are ultimately brought through the DPP in an efficient way. I think going forward, as the years roll on, we will see more of that and that is where a clear follow-the-dollar ability will kick in and be effective and ultimately be beneficial to the public purse, where we can finish it off and not have to just hand it over to the police.

The CHAIR — Yes, so that duplication process in the operational matter.

Mr O'BRYAN — Yes. And sometimes police are not interested in things we are doing. They have enough on their plates, and police like their own cases. You can understand that there might be things that police just say, 'Look, our resources are too drained at the moment. We're too busy doing this, that and the other', and it might just sit around for a year or two. Some of our people have told me that sometimes the fraud squad is just run off its feet and cannot touch something for a year or two. If we are doing it and it is hot at the time, all I am saying is let us finish it. To my mind, that is to the public benefit.

Ms SYMES — Just coming back to the threshold, I am interested in exploring whether it strikes the right balance. You would not want to go too low to have to investigate matters that might be appropriate for other bodies. Would that be correct to say? You have to set a bar somewhere. Presumably you do not want to investigate low-level matters that perhaps someone else can.

Mr O'BRYAN — No, that is right. I have said before that as I see it we should be and would be investigating the most serious things that come to our attention to the extent that our resources allow. Let us say we had a lean period, it seems to me we would not want our investigation teams to be sitting around doing nothing in a lean period. We have not had that; we have been busy, might I say.

Ms THOMSON — You would want a lean period. Sorry. But it is a sign that the system is working.

Mr O'BRYAN — Yes. Our experience is that it is better keeping investigators busy, otherwise they twiddle their thumbs and it is not a happy workplace anyway. They like to investigate and it seems to me that we should keep them busy with the most serious things that come to our attention and that we should not have to be overly troubled about thresholds. But having said that, all of the things that we have been looking at, in my view, are serious and I do not think any reasonable mind would think the matters that we look at are not serious, whether it is in the police space or the public sector space. Of course we do have a more general jurisdiction in the police space so that if there was a quieter period in the public sector space, I would expect that our investigators and their support people would be doing more in the police space to keep them busy. There is always something to do in the police space.

Mr HIBBINS — Just to clarify on that point, it is a new element of the bill proposed that IBAC does prioritise serious cases and serious corruption.

Mr O'BRYAN — Yes.

Mr HIBBINS — In our investigations it has been put to us that expanding the threshold would suddenly result in a flood of work which would essentially make the corruption commission less effective and less able to do its duties. Do you feel that this provision, which, in my view, appears to direct IBAC to prioritise those serious cases ameliorates that possibility of the corruption commission being overwhelmed should the bar be set low?

Mr O'BRYAN — We do not have to be overwhelmed because we still have a discretion as to what we investigate and what we refer. There are very few provisions in the act that tell us what we must investigate. An example of must-investigate is any complaint against the Chief Commissioner of Police, deputy commissioners and assistant commissioners. Only we can deal with that, but that is rare. As I say, I do not think we need to be told by the Parliament, 'You must investigate only serious matters', because that is how you would operate anyway as an organisation like us. It does not trouble me that it is there; it is a sensible provision going forward. It was a bit of a trade-off to get the investigatory threshold lowered. It was a bit of a trade-off that, okay, 'serious' comes out of that — as it currently is, it is a reasonable belief in serious corrupt conduct — and that goes down to reasonable suspicion and then serious gets plonked in elsewhere I think. It is a bit like what is in section 12A of the New South Wales act. I suppose in one sense it protects us from those who would argue that we should be looking at a whole lot of less important matters, and at least it is helpful to the extent of being able to say, 'Well, we can't', see 'serious' in the act. I am happy that it has remained there.

Mr D. O'BRIEN — Just a follow up from that. I think we have raised these sorts of questions before where we all have a pecuniary interest. But with the change in respect of misconduct in public office, do you have any concern that that will see IBAC getting dragged into political pointscoring, if you like? I am sure that you are aware that often in Queensland and New South Wales 'Minister so-and-so has used more paper than anyone else this year and he must be siphoning it off', blah, blah, blah. Is that a concern for you at all, or is that dealt with by the serious aspect?

The CHAIR — Especially in the run-up to an election.

Mr O'BRYAN — We might get more complaints in the run-up to an election — we will wait and see in the run-up to the next one I suppose — and we will deal with them on their merits, and every complaint will get the outcome it deserves I would imagine. Misconduct in public office, I think it needs to be borne in mind, is a principled area of law, albeit somewhat nebulous, and it is my intention going forward when that comes into effect to have those principles properly articulated in writing at our place and with a proper understanding, so that we are not going to just say everything might be misconduct in public office. I would want to see that it is looked at in a principled way and that we do not just put all our eggs into that basket, and also if there are other criminal offences that might be relevant, that we focus more on those. I think Australia does have a history, and this has been written about academically, where not a lot of misconduct in public office charges are brought, and convictions are rare in Australia if you look at the history of it. So I think it is not a provision that we should be relying on loosely. To the extent that we rely

upon it, I would want to rely upon it in, as I say, a proper principled way. Whether that generates more complaints, only time will tell. I do not think that it is a recipe for us suddenly looking at a whole lot of lower order political kinds of complaints. I think that is all I can say at the moment.

Ms THOMSON — Just on that, I guess that goes to the point of confidentiality — the notion that nothing is disclosed until something significant has been borne out of any investigation, so that you do not run the risk of playing to someone's agenda rather than to a real risk of corruption within the conduct of anyone in public office?

Mr O'BRYAN — That is right. You may be aware that we have a policy which I think I wrote about in a special report that when the cat is out of the bag, for whatever reason, about us investigating something, particularly in the political space, if it has already been made public that that is happening, our policy is to either give the ability to the person being investigated to make public an outcome in their favour as soon as that outcome is known, or for us to make that known publicly, in fairness to the person being investigated, where, after a period of whatever it is — it might be days, weeks, months — we come to the conclusion that there is nothing in it. I think that is fair and we will continue to operate on that basis, because it is very easy to throw mud and hope a bit of it sticks in the press by making allegations.

Ms THOMSON — It does stick.

Mr O'BRYAN — And of course making it public that, 'I have made the allegation'. We see this all the time around Australia, 'I've reported them to ICAC', and suddenly it is all over the press and it can be very unfair if there is nothing in it. I am very conscious of that and we will continue to operate on that basis where we will prioritise looking into those things as quickly as we can, conscious of the harm it can do to the individuals concerned.

The CHAIR — Stephen O'Bryan, Alistair MacLean and Dr John Lynch, thank you very much for your attendance. A copy of the transcript will be sent to your office for you to make any changes that you see as appropriate. We thank you for your time.

Mr O'BRYAN — Thank you very much, and happy festive season to everybody.

Ms THOMSON — And to you.

The CHAIR — And merry Christmas to you.

Witnesses withdrew.