

# **REVIEW OF THE INSPECTOR'S REPORT TO THE PREMIER: THE INSPECTOR'S REVIEW OF THE ICAC**

**Organisation:** Victorian Inspectorate  
**Name:** Mr Robin Brett QC  
**Position:** Inspector  
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Mr D Tudehope MP  
Chair  
Parliamentary Committee on the ICAC  
Parliament of New South Wales  
Macquarie Street  
Sydney NSW 2000  
[icaccommittee@parliament.nsw.gov.au](mailto:icaccommittee@parliament.nsw.gov.au)

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Dear Chairman,

**Inquiry into Inspector's Report on his Review of the ICAC**

I refer to your letter of 6 June 2016 inviting me to make a submission to the above inquiry.

I am somewhat hesitant about offering my views as the Inspector of a different body in a different state, governed by different legislation. I have therefore decided to respond to your Committee's invitation by commenting on those recommendations about which I believe that the experience in Victoria may offer some insight or assistance to the Committee in its deliberations.

The two principal pieces of applicable legislation in Victoria are the *Independent Broad-based Anti-corruption Commission Act 2011* and the *Victorian Inspectorate Act 2011*, which I shall refer to as the IBAC Act and the VI Act respectively. Both have been the subject of substantial amendments that came into force on 1 July 2016; part of the IBAC Act amendments, dealing with mandatory reporting of suspected corrupt conduct by government bodies, will not come into force until December this year.

I should say at the outset that the Victorian Inspectorate has substantial functions in relation to a number of other persons and bodies than the IBAC, including the Victorian Ombudsman and the Chief Examiner (who investigates serious organised crime). I shall not mention them further and shall instead refer only to the Inspectorate's functions in relation to the IBAC.

The principal functions of the IBAC are to identify, expose and investigate corrupt conduct and police personnel misconduct, and it is directed to prioritise its attention to the investigation and exposure of conduct which the IBAC considers may constitute serious or systemic corrupt conduct (IBAC Act s 15). The term "corrupt conduct" has an extensive definition in section 4 of the IBAC Act, and "police personnel misconduct" is extensively defined in section 5 of that Act. The terms "serious" and "systemic" are not defined in the statute.

The principal functions of the Inspectorate in relation to the IBAC are to monitor the compliance of the IBAC and IBAC personnel with applicable legislation and to investigate and assess the conduct of the IBAC and IBAC personnel in the performance of their functions and exercise of their powers (VI Act s 11(2)). The Inspectorate may also receive complaints about the IBAC and IBAC personnel, and in the investigation of those complaints the Inspectorate is able to use coercive powers to summon a person to give evidence on oath or produce documents or things, and a person summoned by the Inspectorate is not excused from answering a question on the ground that to do so may incriminate the person. The IBAC of course itself also has coercive powers of a similar nature.

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As a matter of fact I have found it necessary to use my statutory powers very rarely, and I prefer to take a cooperative approach to the performance of the Inspectorate's functions. I enjoy a good relationship with the IBAC, and when information or access to records is necessary, a simple request is almost invariably sufficient.

I turn now to the recommendations made by the Parliamentary Inspector in his Review

#### **Recommendations 1 and 4**

In Victoria the very great majority of IBAC examinations are conducted in private. Only four sets of examinations have been held in public in the more than three years that the IBAC has been in existence. Section 117 of the IBAC Act is headed "Examinations generally to be held in private", and section 117(1) provides that an examination is not open to the public unless the IBAC considers on reasonable grounds –

- (a) that there are exceptional circumstances; and
- (b) that it is in the public interest to hold a public examination; and
- (c) that a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing.

These conditions have recently been the subject of litigation in the Supreme Court of Victoria in the context of the IBAC's decision to hold examinations in public in relation to its investigation of police personnel misconduct at Ballarat police station in "Operation Ross": *R and M v IBAC* [2015] VSC 374; [2015] VSCA 271. (The case went on appeal to the High Court, but on a different ground: [2016] HCA 8.) In the Court of Appeal it was made clear that each of the three conditions had to be considered separately by the IBAC. The IBAC Commissioner had supplied a statement of his reasons for considering that it was appropriate to hold the examinations in public, and it was held both at first instance and on appeal that those reasons demonstrated that proper consideration had been given to each of the three conditions, so that the decision was valid.

The IBAC considers that the holding of examinations in public is of high utility in its performance of its functions of educating the public and preventing corrupt conduct. The public examinations, not only in Operation Ross, have encouraged persons to come forward and make reports to the IBAC of potentially corrupt conduct or police personnel misconduct.

My own view is that the requirement to satisfy strict conditions before an examination may be held in public and the IBAC's conservative approach to holding public examinations have meant that public examinations have been used in Victoria in a way that has been beneficial in exposing corrupt conduct and police personnel misconduct and educating the public about the circumstances in which it may occur and the manner in which it may occur. I do not think that the public examination power in Victoria has been abused.

#### **Recommendations 2 and 3**

In Victoria the IBAC may only issue a summons if satisfied that it is reasonable to do so having regard to the evidentiary or intelligence value of the information sought to be obtained from the person summoned (IBAC Act s 120). A witness summons requiring a person to give evidence (as opposed to only requiring the production of a document or thing) must state –

"the nature of the matters about which the person is to be questioned, except to the extent that the IBAC considers on reasonable grounds that this would be likely to prejudice the conduct of the investigation...": IBAC Act s 121(2).

Whenever the IBAC issues a summons it must give a report to the Inspectorate specifying the name of the person summoned and the reasons why the summons was issued: IBAC Act s 122.

The descriptions in the summonses of the nature of the matters about which the witness is to be questioned are invariably very general. It is very rare for the IBAC to decide not to include such a statement on the ground that it would prejudice the investigation.

### **Recommendation 7**

A summons issued by the IBAC must normally nominate a date at least 7 days after service for the examination to take place, but an "immediate attendance" summons (whether to give evidence or to produce documents or things) may be issued if the IBAC considers on reasonable grounds that a delay in the person's attendance is likely to result in –

- (a) evidence being lost or destroyed;
- (b) the commission of an offence;
- (c) the escape of the person who is summoned; or
- (d) serious prejudice to the conduct of the investigation to which the summons relates.

Immediate attendance summonses have been issued with some frequency by the IBAC in recent months, in the context of certain investigations that are continuing. The circumstances in which they are issued usually come within paragraph (a) or (d) above, where it is feared that witnesses will collude (notwithstanding applicable confidentiality restrictions) and/or that data on mobile phones will be lost if the witness has the opportunity to wipe data before producing the phone.

### **Recommendations 9 and 10**

The Inspectorate receives complaints from persons who are adversely affected by decisions of the IBAC. The Inspectorate has not had a complaint from a person aggrieved by a decision of the IBAC to commence an investigation; most if not all of the complaints received by the IBAC stem from a decision by the IBAC not to conduct an investigation.

The Inspectorate does have general functions of monitoring compliance by the IBAC and IBAC personnel with applicable legislation and assessing the effectiveness and appropriateness of the policies and procedures of the IBAC which relate to the legality and propriety of its activities.

The Inspectorate regards its general monitoring functions as being to consider and assess the processes that the IBAC has adopted for performing its functions, including its function of holding investigations. It regards its complaint function as being to consider, in a case where a person has complained about a decision of the IBAC not to investigate, whether the IBAC made the decision in an appropriate manner; i.e., the Inspectorate looks to see whether the IBAC gave a fair hearing to the complainant, brought an unbiased mind to the making of the decision, took into account only relevant considerations, etc. The Inspectorate does not consider that its functions include "second-guessing" particular decisions of the IBAC.

### **Recommendation 15**

There is no "exoneration protocol" or similar in the Victorian legislation. A person who is to be the subject of adverse comment in an IBAC report must be given notice of the comment and its context, and the substance of the person's reply must be fairly set out in the final report: IBAC Act s 162.

I hope that the above comments are of use to the Committee. I would be pleased to elaborate further on any part of them if the Committee considers that desirable.

Yours sincerely,



**Robin Brett**

Inspector

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