

# Sharpening the watchdog's teeth

## How to strengthen the Victorian IBAC

Briefing paper

June 2022

The Victorian Independent Broad-based Anti-corruption Commission (*IBAC*) plays an invaluable role in protecting public integrity in Victoria by identifying, exposing and investigating allegations of corrupt conduct. Currently, however, the ability of the IBAC to fulfil its mandated functions is hampered by undue limitations on both its jurisdiction and the use of its investigative powers. In addition, the current process for appointing Commissioners lacks the requisite robustness for such a critical public appointment. In order to redress these deficiencies, the Centre for Public Integrity makes the following recommendations:

- 1) The jurisdiction of the IBAC be expanded, in order to allow it to investigate matters beyond conduct constituting a 'relevant offence';
- 2) The requirement that the IBAC 'suspect on reasonable grounds' that relevant conduct constitute corrupt conduct before it can use its corrupt conduct investigative functions be abolished;
- 3) The requirement that 'exceptional circumstances' exist in order for the IBAC to use public hearings be abolished;
- 4) The process for appointing Commissioners be strengthened by imposing rules preventing executive dominance on the Victorian Parliament's joint investigatory committees; and
- 5) A specific timeframe be imposed within which subjects of adverse findings are required to respond to proposed reports, in order to prevent the protection of procedural fairness being exploited in order to cause delay.

### Limited jurisdiction

The jurisdiction of the IBAC is unduly circumscribed in two ways: firstly, by the requirement that conduct must constitute a relevant offence in order to be able to be investigated, and secondly by the prohibition on the IBAC commencing a corrupt conduct investigation unless it suspects on reasonable grounds that the conduct constitutes corrupt conduct.

*Corrupt conduct limited to 'relevant offences'*

Section 4 of the *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)* (*IBAC Act*) enumerates the kinds of conduct that constitute corrupt conduct. However, any relevant conduct is only capable of being corrupt conduct under the Act if it also constitutes a relevant offence (s 4 (1)(a)). Relevant offence is defined at s 3 of the Act to mean an indictable offence under an Act, as well as the following common law offences:

attempt to pervert the course of justice, bribery of a public official, perverting the course of justice, and misconduct in public office.

This contrasts with the approach taken in New South Wales, where a disciplinary offence, reasonable grounds for terminating a public official's appointment, and substantial breaches of an applicable code of conduct by a Minister or member of parliament are sufficient to attract the ICAC's jurisdiction (so long as such conduct meets the definition of 'corrupt conduct' at s 8 of the *Independent Commission Against Corruption Act 1988 (NSW)*).<sup>1</sup>

One consequence of Victoria's 'relevant offence' requirement is that the enforcement of Victoria's Code of Conduct for Ministers and Parliamentary Secretaries, which is not enshrined in legislation, is effectively left to the Premier rather than an independent oversight body (unless the conduct in question would constitute a relevant criminal offence).

Broadening the kinds of conduct which enliven the IBAC's jurisdiction would ensure that the Commission's work is not unduly limited to cases where the constituent elements of a limited set of offences, which do not capture all forms of corruption, are present.

*'Suspects on reasonable grounds'*

Under s 60(2) of the IBAC Act, the IBAC cannot conduct an investigation in accordance with its corrupt conduct investigative functions unless it suspects on reasonable grounds that the conduct constitutes corrupt conduct.

This effectively operates as a significant limitation on the Commission's vitally important work: frequently, when integrity commissions receive allegations, they have insufficient information to determine whether there would be reasonable grounds to suspect that the conduct constitutes corrupt conduct. Determining this question is precisely the purpose of an investigation, and it should not operate as a precondition to the use of investigative powers.

A further difficulty with this requirement is that it exposes the IBAC's decision to commence an investigation to legal challenge. Such challenges can be exploited by well-resourced litigants to both delay IBAC investigations and gain knowledge of the material that IBAC has against them.

Out of all Australian states and territories, only the Australian Capital Territory's integrity commission is subject to a similar requirement (s 100 of the *Integrity Commission Act 2018 (ACT)*). Jurisdictions with stronger models, such as New South Wales and Queensland, empower their Commissions to commence investigations without any such threshold.

## **Public hearings: the 'exceptional circumstances' requirement**

The IBAC Act prohibits the holding of public hearings unless the IBAC considers, on reasonable grounds, that – amongst other things – 'exceptional circumstances' exist (s 117(1)(a)). What constitutes 'exceptional circumstances' was considered by the Victorian Court of Appeal in *R and M v Independent Broad-based Anti-corruption Commissioner* [2015] VSCA 271, with the Court holding that it requires circumstances that are "clearly

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<sup>1</sup> Section 9 *Independent Commissioner Against Corruption Act 1988 (NSW)*.

*unusual and distinctly out of the ordinary*":<sup>2</sup> determining whether such circumstances exist requires "both a qualitative distinction between the circumstances which might ordinarily be inquired of by the respondent, and, in addition, an assessment that those circumstances might be reasonably rare".<sup>3</sup>

It would be preferable if this bar to the use of public hearings were removed in Victoria, insofar as it risks exploitation by persons under investigation in order to cause delay and potentially interfere with investigations (in much the same way as the 'suspect on reasonable grounds' threshold).

## **Appointment of Commissioner**

The appointment of the Commissioner is provided for at ss 20 and 21 of the IBAC Act. While s 20 empowers the Governor in Council on recommendation of the Minister to appoint an eligible Commissioner, s 21 prevents such a recommendation from being made unless the Parliament's Integrity and Oversight Committee does not veto the recommendation (or fails to respond).

Such a veto would be a robust protection against the potential politicisation of Commissioner appointments if the Integrity and Oversight Committee were non-executive dominated. In Victoria, however, the Committee is currently composed of four members of the Labor Party, two members of the Liberal party and one member of Derryn Hinch's Justice Party. It is chaired by a government member.

The committee is one of the Victorian Parliament's five joint investigatory committees, upon which important oversight functions are conferred under the *Parliamentary Committees Act 2003* (Vic). The composition of these committees is critically important to their ability to fulfil their functions.

Currently, out of all of the Victorian Parliament's joint investigatory committees, the only committee which is not executive dominated and not chaired by the Government is the Pandemic Declaration Accountability and Oversight Committee. This is a direct consequence of amendments made to the *Parliamentary Committees Act 2003* (Vic) as part of the negotiations to pass the Public Health and Wellbeing Amendment (Pandemic Management) Bill 2021.

Pursuant to those amendments, subsection 22(1A) of the *Parliamentary Committees Act* provides that "*The chairperson of the Pandemic Declaration Accountability and Oversight Committee must not be a member of a political party forming the Government*". Otherwise, election of committee chairpersons is governed by subsection 22(1) of the Act, which simply stipulates that joint investigatory committees must elect a member as chairperson. No more than half of the members of the Pandemic Declaration Accountability and Oversight Committee can be drawn from the a party forming the Government: s 21A(5) of the Act.

These provisions should be extended to all joint investigatory committees, and would contribute to ensuring that a robust process is in place for the appointment of the State's IBAC Commissioner.

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<sup>2</sup> *R and M v Independent Broad-based Anti-corruption Commissioner* [2015] VSCA 271, [71].

<sup>3</sup> *Ibid*, [67].

## Timely reporting

If the Commission intends to include an adverse finding in a report to the Parliament, it is required to provide the person who is the subject of the finding (or the relevant principal officer of the public body, where the subject is a public body) with a reasonable opportunity to respond (ss 162(1)-(3) *IBAC Act*). The use of the qualifier "reasonable" means that any person who is the subject of such a finding has a right to appeal to the Supreme Court in respect of whether the opportunity provided was "reasonable". Protection of procedural fairness is inarguably of utmost importance; it should not, however, be able to be used by well-resourced parties as a tactic to delay the release of Commission reports. For this reason, the Centre for Public Integrity supports the adoption of measures designed to impose a specific timeframe within which subjects are required to respond, as long as the IBAC retains discretion to extend that timeframe where appropriate.

## Conclusion

In order to ensure that the Victorian IBAC has the powers it needs to fulfil its statutory mandate, the Centre for Public Integrity recommends that:

- 1) The jurisdiction of the IBAC be expanded, in order to allow it to investigate matters beyond conduct constituting a 'relevant offence';
- 2) The requirement that the IBAC 'suspect on reasonable grounds' that relevant conduct constitute corrupt conduct before it can use its corrupt conduct investigative functions be abolished;
- 3) The requirement that 'exceptional circumstances' exist in order for the IBAC to use public hearings be abolished;
- 4) The process for appointing Commissioners be strengthened by imposing rules preventing executive dominance on the Victorian Parliament's joint investigatory committees; and
- 5) A specific timeframe be imposed within which subjects of adverse findings are required to respond to proposed reports, in order to prevent the protection of procedural fairness being exploited in order to cause delay.

## About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham, Geoffrey Watson SC and Professor Gabrielle Appleby. Former directors include the Hon Tony Fitzgerald AC QC and the Hon David Ipp AO QC. More information at [www.publicintegrity.org.au](http://www.publicintegrity.org.au).<sup>4</sup>

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<sup>4</sup> Research Methodology for this briefing note can be found [here](#).