



Submission re The
Independent Broad-based
Anti-corruption
Commission – Discussion
Paper March 2016



Integrity Reform Team
Department of Premier and Cabinet
1 Treasury Place
Melbourne
Victoria 3002

Re: The Police Association of Victoria submission to the Integrity Reform Team - Discussion paper regarding Public Hearings conducted by the Independent Broad-based Anti-corruption Commission (the IBAC).

The Police Association of Victoria (the Association) thanks the Integrity Reform Team for the opportunity to make a brief submission in relation to the issue of public hearings conducted by IBAC. The Association does not intend to address each question posed by the discussion paper but will simply voice its opposition to compulsory examinations in public. We submit that serious consideration should be given to either removing that power from the statute or the introduction of certain mandatory considerations which serve to limit its use and/or a robust oversight body that reduces the not insignificant risk of misuse of this coercive power.

The Police Association of Victoria

1. The Police Association of Victoria is an organisation that exists to advance and represent the industrial, legal, professional and welfare interests of its members. The Association's membership of approximately 14,500 is drawn exclusively from sworn Police Officers at any rank, Protective Services Officers, Police Reservists and Police Recruits who serve in the Victoria Police. Membership of the Association is voluntary. By virtue of its constitution, the Association is not affiliated with any political party.

Conduct of Public Hearings

2. The *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (the Act) provides IBAC with the statutory power to conduct examinations¹. Section 117(1) of the Act purports to prohibit such examinations taking place publicly unless the IBAC considers that each criterion of s 117(1) is satisfied, those criterion being:
 - (a) *there are exceptional circumstances; and*
 - (b) *it is in the public interest to hold a public examination; and*
 - (c) *a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing.*²

The Act further provides a non-exhaustive list of matters that may be taken into account by the IBAC for the purpose of determining whether or not it is in the public interest to conduct an examination.³ Finally, it is noted that the IBAC must inform the Victorian Inspectorate⁴ of its intention to conduct a

¹ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 115

² *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 117(1) (a), (b), (c)

³ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 117(4)

⁴ The Victorian Inspectorate is charged with the responsibility of monitoring and overseeing functions of the IBAC

public examination and provide to the Victorian Inspectorate a written report giving reasons for holding the examination in public and how the conjunctive criteria in s 117(1) have been satisfied⁵.

3. The Act also provides, inter alia, that a person under summons to appear as a witness in an examination must not refuse or fail to answer questions⁶, must not fail to produce documents or other things⁷ or fail to take an oath or make an affirmation.⁸ In addition, the examination is not bound by the rules of evidence⁹ and the privilege against self-incrimination is abrogated.¹⁰

Concerns Regarding Public Examinations

4. It is clear that the IBAC has been vested with extensive powers for the purpose of conducting public hearings. The IBAC has articulated its position on what they perceive as the benefits of conducting public examinations. The IBAC is on the record as asserting that public examinations encourage persons with relevant information to come forward, in addition to garnering public acceptance of the role of the IBAC and its use of exceptional investigative powers¹¹. Furthermore, as advanced by the IBAC, the public exposure of those examined serves as a deterrent to those who might be drawn into corrupt conduct¹².
5. Whilst there may be some public benefit associated with public hearings, such benefit should not come at the expense of fairness to the individual being examined. The Association queries the validity of the arguments advanced by the IBAC in support of public examinations, particularly in consideration of the extensive evidence gathering and private examination powers already possessed by the IBAC. There is no evidence, empirical or otherwise, that makes good the arguments raised by the IBAC in support of public hearings which, in our opinion, arguably reduces the claims to mere aspirational statements. Regardless, it is in our submission clear that conducting public examinations carries with it the inherent potential to cause irreparable damage to the reputation of a witness.
6. Concerns harboured by the Association regarding public examinations are succinctly distilled in a submission previously made by the New South Wales Bar Association (the NSW Bar Association) to the Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption¹³ (the Gleeson McClintock report). The NSW Bar Association, accurately in our opinion, make the point that allegations of corruption or misconduct aired during a public hearing;

[M]ay be based upon questions which would not be permissible or upon evidence which would not be admissible in a court of law. There is no presumption of innocence or right of silence in ICAC, nor do the rules of evidence (including various privileges) apply automatically there. People giving evidence, therefore, in a public hearing at ICAC may be subject to a whole series of leading or provocative questions which can be just as damaging as the answers themselves.¹⁴

Even if it were accepted that the IBAC is a body created to investigate certain conduct thereby distinguishing their function from court proceedings (although in practice we believe this difference is illusory) we submit that the distinction should not be conveniently applied to justify engaging in a process whereby a witness can be exposed to such provocative, leading and damaging questioning in a public forum bereft of traditional privileges, rules and safeguards. We submit this offends all accepted notions of fairness.

⁵ *Independent Broad –based Anti-corruption Commission Act 2011* (Vic) s 117(5)

⁶ *Independent Broad –based Anti-corruption Commission Act 2011* (Vic) s 136

⁷ *Independent Broad –based Anti-corruption Commission Act 2011* (Vic) s 137

⁸ *Independent Broad –based Anti-corruption Commission Act 2011* (Vic) s 137

⁹ *Independent Broad –based Anti-corruption Commission Act 2011* (Vic) s 116

¹⁰ *Independent Broad –based Anti-corruption Commission Act 2011* (Vic) s 144

¹¹ *Reasons for decision concerning two applications principally seeking a reversal of a decision under s 117(1) of the Independent Broad-based Anti-corruption Act 2011 that certain witness examinations be open to the public* (Unreported, the IBAC, Stephen O'Bryan QC, 17 April 2015), [11]

¹² *Ibid*

¹³ Murray Gleeson, Bruce McClintock, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption – Report*, 30 July 2015

¹⁴ *Ibid*, [9.4.6] 20.

7. The manner in which the Commissioner informs himself or herself to enliven the public hearings provisions in s. 117(1) of the Act is also a significant area of concern for the Association. The ambit of s 117(1) of the Act was recently explored by the Association in the matter of *R & M v IBAC*¹⁵ (*R & M v IBAC*) where the plaintiffs sought to resist their examination in public by the IBAC on the grounds, inter alia, that the IBAC Commissioner (the Commissioner) had erred in being satisfied of the existence of each of the preconditions contained within s 117(1) of the Act.
8. Whilst the plaintiffs were ultimately unsuccessful it is incorrect and somewhat misleading for the IBAC to now infer that the law in relation to the ambit of s 117(1) is now firmly settled by virtue of the decision of the High Court.¹⁶ Arguments around the criteria that must be satisfied before a public examination can be conducted were not pressed by the plaintiffs before the High Court and will, in our submission, continue to be a source of legal argument and controversy in the future. Indeed, the very investigation that gave rise to the plaintiffs' legal challenge in *R & M v IBAC* and events that transpired during litigation serves to underscore the inherent problems of s 117 of the Act, the operation of which relies on the subjective opinion and state of mind of the Commissioner.
9. During the course of litigation the Commissioner in his reasons for decision¹⁷ to invoke the provisions of s 117(1) of the Act described, inter alia, the conduct of both plaintiffs as bordering on 'gratuitous brutality'¹⁸. This of itself, the Commissioner asserted, was 'exceptional'¹⁹ such that s 117(1)(a) was satisfied. In addition the Commissioner was of the opinion that the allegations were 'very serious in nature'²⁰ thereby satisfying s 117(4)(c) of the Act and its intersection with s 117(1)(b).
10. Three significant events, however, occurred since the IBAC first sought to publicly examine the plaintiffs. Firstly, in late December 2015, the IBAC remitted the investigation relating to the impugned conduct back to Victoria Police for investigation. Secondly, upon receipt of the investigation file the Assistant Commissioner of Professional Standards Command (PSC) reviewed the CCTV footage that the IBAC claimed depicted 'gratuitous brutality' and determined that both plaintiffs would be returned to work, rescinding previously issued suspension notices that asserted they were reasonably believed to have committed an offence punishable by imprisonment. Finally, the 'vulnerable female'²¹ referred to as 'person A' in the Commissioner's reasons for decision and upon whom it is alleged the plaintiffs engaged in 'gratuitous brutality' was charged with a number of criminal offences relating to her time in custody on the night in question.
11. Without foreshadowing any legal arguments that may or may not be advanced when public examination of the plaintiffs and others finally commence in Ballarat on 23 May 2016, questions regarding the manner and form by which the Commissioner informed himself (and indeed the Victorian Inspectorate) to satisfy the public hearing preconditions must surely arise. Even accepting that views regarding the conduct of the plaintiffs might differ between the Assistant Commissioner of PSC and the IBAC the gulf like divergence of opinion, assessed on what we believe to be the precise same material, is difficult to reconcile. Regardless, we submit this matter serves to highlight the ease in which an entirely subjective opinion can result in enlivening a public examination where the presumption of innocence is displaced along with a right to silence and associated common law privileges.

The Association's Position

12. The Association is opposed to the continued use of compulsory public examinations by the IBAC. We submit that, in its current form at least, the power is susceptible to misuse and carries an inherent danger of the IBAC engaging in 'show trials' and 'trial by media'. The Association is not convinced that the intended aims and functions of the IBAC would be fettered to any extent by removing the

¹⁵ [2015] VSC 374

¹⁶ Refer *The Independent Broad-based Anti-corruption Commission*, Discussion Paper March 2016, p 8, f 04

¹⁷ *Reasons for decision concerning two applications principally seeking a reversal of a decision under s 117(1) of the Independent Broad-based Anti-corruption Act 2011 that certain witness examinations be open to the public* (Unreported, the IBAC, Stephen O'Bryan QC, 17 April 2015)

¹⁸ *Ibid* [7]

¹⁹ *Ibid*

²⁰ *Ibid* [10]

²¹ *Ibid* [7]

power to conduct public examinations and even less convinced that arguments promulgated to support the existence of the power are sound.

13. Should it be that the power to conduct public examinations were to remain we submit serious consideration ought to be given to both significantly limiting the circumstances in which such hearings can be conducted and the introduction of an independent body to review decisions to hold a public examination.
14. In terms of restricting the use of public examinations by the IBAC the Association concurs with the comments ascribed to Mr. Geoffrey Watson SC where he calls for the NSW Independent Commission Against Corruption²² to be subject to a mandatory consideration of alternatives before conducting public examinations.²³ Such alternatives include consideration of whether the matter on foot should simply be referred to the police where the 'task was an ordinary task for police.'²⁴ We submit the IBAC investigation that gave rise to the litigation in *R & M v IBAC* represents a ringing endorsement for this recommendation.
15. A further recommendation by the Association, should the power to conduct public examination be retained, is the establishment of an independent oversight body charged with the specific responsibility of reviewing decisions of the IBAC to conduct public hearings, such reviews to be heard prior to the commencement of the proposed examination. The introduction of the body would, in our submission, provide for an independent and objective assessment of the manner in which the Commissioner purports to have informed himself or herself such that the conjunctive criterion of s. 117 (1) have been met.
16. In respect of the machinations of such a body the Association adopts the recommendations made by the NSW Bar Association as they appear in the Gleeson McClintock report²⁵. A broad, 'in the public interest' criteria in our submission represents an appropriate approach for the review body rather than a prescriptive list of considerations given the myriad of permutations that might form the basis of an application for review. The hearing and determination of any review would necessarily involve strict time frames and expeditious notification of relevant parties of a proposal to conduct a public hearing to ensure they are provided with an opportunity to be heard on the matter. In terms of the composition of an oversight body the Association again adopts the position of the NSW Bar Association in calling for the body to be;

comprised of reputable and reliable individuals, nominated by independent figures or bodies in the community who are not associated with the executive or legislative arms of government.²⁶

In Conclusion

17. The Association believes the IBAC is currently vested with sufficient investigative and examination powers and the removal of the power to conduct examinations in public would have no effect on their capacity to fulfil their statutory objectives. Public examination carries with it the real potential of irreparable harm to an individual's reputation and any question of striking a balance between public interest and the public benefit of fairness must fall, in our opinion, on the side of the latter. We believe that serious consideration must be given to removing the power of the IBAC to conduct public hearings.
18. If the legislature were of a mind to retain the public examination power we recommend the introduction of the measures mentioned above to ensure objective and independent oversight and scrutiny of any proposed public examination by the IBAC.

²² For all intents and purposes the NSW Independent Commission Against Corruption represents the NSW equivalent to the IBAC

²³ Chris Merritt, 'Watson calls for curbs on ICAC's hearing powers', *The Australian*, May 6 2016, page 27

²⁴ *Ibid*

²⁵ Gleeson, McClintock, above n 13, [9.4.6] 22-26

²⁶ *Ibid* [9.4.6.] 26

For consideration of the Integrity Reform Team.

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Secretary

The Police Association Victoria

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