THE AMENDMENTS RECOMMENDED BY THE ACCOUNTABILITY ROUND TABLE AS NECESSARY FOR THE IBAC LEGISLATION

Introduction – Guiding principle

We submit that the fundamental ethical and legal principle that should guide the assessment of the present legislation, and the formulation of reforms of it, is the " public trust principle" - that those we entrust with power to exercise on our behalf will always give priority to the public interest over their own or others' private interests[1].

IBAC has a critical role to play to minimise breaches of that principle and investigate possible breaches of it.

There are several areas of serious concern which we submit require reform.

The threshold for investigations

1. The decision of the High Court in the Cunneen matter demonstrates the critical importance of the definition of "corrupt conduct" in anti-corruption legislation and in delineating the proper ambit of the investigatory powers of a commission such as the ICAC or the IBAC. Given the extraordinary nature of the powers such a body must

[1] For recent discussion of the principle and the enforcement role of the common law offence of misconduct in pubic office see - http://www.accountabilityrt.org/wp-content/uploads/2015/02/Lusty-Revival-of-the-Common-Law-Offence-of-Misconduct-in-Public-Office-2014-38-Crim-LJ-337.pdf; see also Sir Gerard Brennan, http://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/;

have to be effective against corruption, the High Court has clearly demonstrated that it will give a narrow interpretation to such legislation. It is of the utmost importance that a body such as IBAC be able to use the full range of its powers once it has reason to investigate suspected corruption, and that suspects do not have ready access to a court to stay such an investigation. Experience has shown that well-funded suspects will use any means available to obstruct such investigations, and hide or destroy evidence or otherwise impede an investigation in doing so.

2. The ICAC Act defines “corrupt conduct” very broadly in ss.7, 8 and 9 of the Act, while by s.12A requiring ICAC as far as possible to direct its attention to serious and systemic corrupt conduct. The wording of the sections leaves it to the discretion of ICAC in effect to decide what to investigate.

3. The IBAC Act defines “corrupt conduct” in s.4, a “relevant offence” is defined in s.3 and s.60 (2) prevents IBAC from conducting an investigation unless “it is reasonably satisfied that the conduct is serious corrupt conduct”.

4. The effect of these sections is to limit IBAC’s permitted area of investigation to a very small field, which does not even include misconduct in public office, and IBAC is prevented from commencing an investigation unless it is able to articulate facts which if proved at a trial would amount to one of the very few offences within the definition of a “relevant offence”. IBAC’s officers are told that they cannot commence an investigation unless they have sufficient facts to identify an indictable offence, the effect of which is that they cannot commence an investigation unless they have been given detailed information by a well-informed whistle-blower; that is to say they cannot investigate a matter unless they already know exactly what it is that they wish to investigate, which is obviously absurd.

5. The amending legislation proposed by the Baillieu /Napthine government in 2014 contained proposals to include the offence of misconduct in public office in the

definition of relevant offence, which was clearly necessary. But it then sought to introduce a distinction between preliminary and full investigations, the effect of which was that

(a) IBAC could not use its complete range of investigatory powers in determining whether to investigate a matter in a preliminary investigation;

(b) could still only use its full powers once it was able to articulate a state of facts which would constitute a relevant offence, thus retaining the original absurd threshold.

The proposed amending legislation gave IBAC power (which had not been previously expressed but was properly taken by IBAC's Commissioner and staff as necessarily implied) to conduct preliminary investigations and also introduced mandatory reporting provisions in relation to various investigatory bodies (e.g. the Auditor-General and the Ombudsman) requiring them to report suspected corruption to IBAC.

6. The amendments which, in light of the foregoing, are necessary if the IBAC Act is to give IBAC the necessary legislative basis for its investigations are –

(a) The definition of "corrupt conduct" in s.4 of Act must be changed to give IBAC the proper jurisdictional base for its investigations into possible corruption, while leaving a discretion to the IBAC Commissioner to refuse to investigate matters which in the Commissioner's view are not serious or systemic;

(b) a section such as s.12A of the ICAC Act should be included, and s.60(2) of the present IBAC Act removed;

(c) in any amendments to the definition of "corrupt conduct" the words which presently conclude s.4(1) of the IBAC Act ("being conduct that would, if the facts were found proved ….."") must be removed, and phrases such as "conduct ….. that adversely affect the honest performance by public officers" (see s.4(1)(a) of the IBAC Act) must be amended to ensure that the decision of the High Court in the Cunneen matter cannot be replicated against Victoria's IBAC;

(d) if the expression "relevant offence" is to be retained in the IBAC legislation, its definition must be substantially enlarged to include "misconduct in public office", and also at least a number of the offences included in ss.8(1) and (2) of the ICAC Act.

7. It is unnecessary to introduce into the IBAC legislation the concept of preliminary investigations, or to authorise in the limited manner proposed an entitlement for IBAC to conduct such preliminary investigations. The ICAC has never been given or needed such an authority. Introducing such a distinction would merely create another threshold for IBAC to overcome, and would provide a suspect with another avenue for obtaining judicial intervention to delay or prevent an investigation.

Encouraging the reporting of corrupt conduct

8. We submit that two issues require attention – providing whistle-blowers with adequate protection and extending the mandatory reporting to IBAC.

9. The present Victorian whistle-blower protection legislation does not provide adequate protection. We appreciate that this legislation is relatively new. But enough time has passed to warrant a review of its operation. We submit that it should be given priority and dealt with as soon as possible because it is critical to the effectiveness of IBAC in addressing the risk of corruption. We submit that what is currently in place falls

well short of what is required and below what is found in a number of other Australian jurisdictions .

10. We recommend that the services of Dr AJ Brown of Griffith University be sought. He is the universally highly regarded expert in the field and has extensive experience in the review and drafting of such legislation. In 2013 he was engaged by the then Commonwealth Government to address the serious deficiencies in the departmental Whistle-blower Bill that had been presented to it. The Dr Brown's amendments to the Bill were accepted by the Government and Parliamentary Committees and passed. Not long before that, the ACT Parliament had enacted legislation to protect whistle-blowers that Dr. Brown had drafted.

11. The amendments to the IBAC Act should include the mandatory reporting to IBAC of corrupt conduct by the various bodies included in the 2014 amending legislation.

Clarifying the specific investigative powers of IBAC

12. Amendments should be made to clarify the powers of delegation allowing IBAC to appoint suitably qualified persons to preside at an examination and to apply to the Magistrates' Court for a search warrant.

Striking the right balance to protect citizens and enable IBAC to discharge its role

13. The Ombudsman Act contains provisions (in s.29) which protect the Ombudsman from being prevented from continuing an investigation which has been commenced unless there is substantial ground for the contention that the Ombudsman has acted in bad faith. A similar privative condition should be contained in the IBAC Act, the intention again being to limit the avenues of appeal to the court open to those suspected of corrupt conduct.

Public disclosure – complaints and evidence at hearings

14. The conduct of public investigations by IBAC is regulated by s.117 of its Act. IBAC must not conduct an investigation open to the public unless IBAC considers on reasonable grounds that (a) there are exceptional circumstances; (b) it is in the public interest to hold a public examination; and (c) the public examination can be held without causing unreasonable damage to any person's reputation, safety or wellbeing.

15. In considering these requirements, it is relevant to bear in mind, that much, if not most, of the questioning will be of public officers and they will be asked questions about their conduct while they were exercising powers entrusted to them by us. They are not being questioned as ordinary citizens with rights to privacy on such matters. They are being asked to give full and frank information to IBAC and the community which should be part of their duty.

16. The ICAC has approached the question of public hearings with a rule of thumb of holding at least one public hearing a month. The reasons for holding public hearings include, first, the necessity to educate the public as to the nature of corrupt conduct present in the community and to enable the public to be aware of how and in what circumstances the anti-corruption commission exercises its functions; secondly to deter those engaged in or contemplating corrupt activity; and thirdly to flush out more complaints of corruption. It has been repeatedly stressed by investigatory bodies that apparently insignificant complaints can result in uncovering a large body of corruption, and that public hearings will stimulate many complaints of like conduct by others who had never previously thought to raise the problem. The ICAC's rule of thumb to conduct at least one public hearing a month may well be thought unnecessary and inappropriate, and there are good reasons for the IBAC's entitlement to hold a public hearing to be limited to circumstances where it is in the

public interest to do so, and the public examination can be held without causing unreasonable damage. The requirement that there be "exceptional circumstances" before such a public examination can be held is a different matter. If s.117(i)(a) is retained in the IBAC Act, the consequences will be that those to be examined publicly will be given a ready avenue of approach to the courts to stay the public examination at which point IBAC will be obliged to establish the existence of "exceptional circumstances", an undefined phrase of considerable ambiguity. IBAC's prospects of doing so will vary depending on which judge will hear the application.

Accountability Round Table

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