Current Issues Brief

Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012

No. 2, April 2012
Dr Catriona Ross
Kristin Richardson
Adam Delacorn
Bella Lesman
Bronwen Merner

A discussion of issues relevant to the Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012. The paper includes background information, an overview of the main provisions of the Bill, and information on anti-corruption commissions in other Australian jurisdictions.

For further information on this paper, please contact:

Bella Lesman
bella.lesman@parliament.vic.gov.au
Ph: 8682 2792

This Current Issues Brief is part of a series of papers produced by the DPS Library’s Research Service. Current Issues Briefs seek to provide an overview of a subject for Members, and include information on key issues related to the subject. The views expressed in this paper are those of the authors.
# Contents

- **Introduction** ............................................................................................................. 4
- **1. Second Reading Speech** .......................................................................................... 5
- **2. Background** ........................................................................................................... 6
  - Examination Powers .................................................................................................. 6
    - Compulsory Examinations and Abrogation of the Privilege against Self-incrimination ........................................................................ 8
    - Derivative Use of Coercively Obtained Evidence ......................................................... 9
    - Public Hearings .......................................................................................................... 9
    - Legal Professional Privilege ....................................................................................... 10
    - Public Interest Immunity ............................................................................................ 10
    - Parliamentary Privilege ............................................................................................. 10
    - Right to Legal Representation .................................................................................... 11
    - Stakeholder Arguments against the Abrogation of Individual Rights ....................... 11
  - Referral Powers .......................................................................................................... 12
- **3. Main Provisions of the Bill** ..................................................................................... 13
- **4. Other Jurisdictions** .................................................................................................. 28
  - **New South Wales** ................................................................................................... 28
    - ICAC Receipt of Complaints and Referrals to Other Agencies .............................. 28
    - ICAC Conduct of Examinations ................................................................................. 29
    - PIC Referral Procedures ............................................................................................ 32
    - PIC Investigation Outcomes: Referral of Matters for Prosecution .......................... 32
  - **Queensland** ............................................................................................................. 34
    - CMH Receipt of Complaints and Referrals to Other Agencies ............................ 34
    - CMH Conduct of Examinations ................................................................................. 35
    - CMH Investigation Outcomes: Referral of Matters for Prosecution ..................... 36
  - **Western Australia** .................................................................................................... 37
    - CCC Receipt of Complaints and Referrals to Other Agencies ............................ 37
    - CCC Conduct of Examinations .................................................................................. 38
    - CCC Investigation Outcomes: Referral of Matters for Prosecution ..................... 40
  - **Tasmania** .................................................................................................................. 41
    - Integrity Commission Receipt of Complaints and Referrals to Other Agencies .... 41
    - Integrity Commission Conduct of Examinations ...................................................... 41
    - Integrity Commission Investigation Outcomes: Referral of Matters for Prosecution ........................................................................ 43
- **References** ................................................................................................................. 44
Introduction


The Government is introducing legislation to create the Independent Broad-based Anti-corruption Commission (IBAC) in stages. The first IBAC Bill, which is now the IBAC Act, was introduced into the Victorian Parliament on 26 October 2011 and was passed on 23 November 2011. The first IBAC Bill established the role of the IBAC Commissioner, provided for the IBAC’s educational and corruption prevention functions, and established a Joint House Committee to oversee the IBAC.1

The second IBAC Bill – the Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011 – was introduced into the Victorian Parliament on 8 December 2011 and was passed on 13 March 2012.2 The second IBAC Bill provided for the IBAC’s jurisdiction and investigative functions. It provided the IBAC with powers that included the ability to:

- conduct own motion inquiries;
- require members of the police force to give information, produce documents and answer questions;
- use entry, search and seizure powers in police premises;
- apply to the Supreme Court for search warrants in regard to other premises;
- use firearms;
- use surveillance devices;
- intercept telecommunications (subject to Commonwealth approval).3

This third IBAC Bill provides the IBAC with its examination and referral powers. It deals with how the IBAC can conduct its hearings and examine witnesses, and provides for coercive examination powers. The Bill additionally provides the mechanisms for the IBAC to refer matters to other bodies. The Bill also makes further amendments to the Victorian Inspectorate Act 2011 (the Victorian Inspectorate is the oversight body of the IBAC).

---

1. Second Reading Speech

The Minister responsible for the establishment of an anti-corruption commission, the Hon. Andrew McIntosh, gave the second reading speech for the Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012 on 19 April 2012. Mr McIntosh opened his speech by saying that:

This bill further enhances the legislative structure for Victoria's first-ever anticorruption body with oversight of the entire public sector. The bill forms part of a suite of historic legislation that gives effect to the coalition government's election commitment to create a new integrity framework for Victoria...4

Mr McIntosh said that this Bill gives the IBAC the 'additional functions, duties and powers it needs to undertake examinations' and provided the following overview of key aspects of the legislation:

- witness summons provisions, providing IBAC with the power to issue a witness summons to attend an examination to provide evidence, produce documents or other things or both;
- confidentiality provisions, protecting the confidentiality of IBAC investigations and the safety of persons involved in those investigations;
- jurisdiction provisions, providing IBAC with the power to investigate serious corrupt conduct or police personnel conduct occurring prior to the commencement of the act;
- referral provisions, providing IBAC with the power to refer matters to other bodies and coordinate investigations;
- provisions outlining the application of privileges and statutory secrecy requirements;
- the power to charge a person with contempt where appropriate; and
- provisions clarifying the appointment of acting commissioners and acting deputy commissioners.5

Mr McIntosh explained that these provisions complete the 'IBAC's full suite of investigation, examination and referral powers, with transitional and consequential provisions to follow'.6 He said that these new powers will be subject to the oversight of the Victorian Inspectorate (as provided for in the Victorian Inspectorate Act 2011 and the Victorian Inspectorate Amendment Bill 2012).7 For the remainder of the speech, the Minister elaborated on the details of the key aspects of the Bill summarised above.8

The Minister concluded his speech by saying that 'With this bill, IBAC will be properly equipped to perform its functions and provide the Victorian community with the confidence that corruption and police personnel misconduct will be properly investigated'.9

---

4 Victoria, Legislative Assembly (2012) Debates, Book 5, 19 April, p. 1783.
5 ibid., p. 1784.
6 ibid.
7 ibid.
8 ibid., pp. 1784-1786.
9 ibid., p. 1786.
2. Background

Members are advised that the Parliamentary Library Research Service’s Current Issues Brief on the first IBAC Bill – the Independent Broad-based Anti-corruption Commission Bill (2011) - provides detailed background information on: the definition, effects and control of corruption; the history and current composition of Victoria’s integrity system (including the Proust Review, the Coalition response to the Proust Review and proposal of the IBAC model); and the history and composition of anti-corruption commissions in other Australian jurisdictions.10

The Parliamentary Library Research Service’s Current Issues Brief on the second IBAC Bill provides background information related to the content of the Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011, including the intended jurisdiction (with a focus on police oversight) and investigatory powers of the IBAC.11

This background section for the third IBAC Bill provides a brief summary of the common examination and referral powers of the anti-corruption commissions in other Australian state jurisdictions.12 It firstly provides general information on the examination powers of New South Wales’ Independent Commission Against Corruption (ICAC) and Police Integrity Commission (PIC), Queensland’s Crime and Misconduct Commission (CMC), Western Australia’s Crime and Corruption Commission (CCC) and Tasmania’s Integrity Commission. It secondly provides general information on the referral powers of these commissions.

Examination Powers

The strong examination powers of anti-corruption commissions are provided on the basis that it is in the public interest for public sector corruption to be exposed and addressed. The available scholarship on Australian anti-corruption commissions emphasises that anti-corruption commissions – like royal commissions – are inquisitorial rather than adversarial like the Australian courts. In other words, commissions are intended to find out ‘the truth’ or the facts of a matter, rather than determine which of two litigants has the better case.13 Some jurisdictions expressly require examinations to be conducted with as little emphasis on an adversarial approach as possible.14

The anti-corruption commissions are equipped with coercive examination powers15 and are not bound by the usual rules of evidence that apply in Australian courts. The standard of proof that applies to commissions of inquiry is the civil standard – reasonable satisfaction on the balance of probabilities – rather than the criminal standard which requires satisfaction beyond reasonable doubt.16 Critics argue that the commissions’ use of coercive powers and different standard of evidence can infringe on individual rights.17 The extent to which a commission is required to afford the common law rules of procedural fairness (also known as

---

10 See Ross (2011) op. cit.
11 See Ross (2012) op. cit.
12 Please note that each of these powers is subject to complex variations, and may be subject to exemptions, within each jurisdiction. Readers are advised to refer to the enabling legislation of each anti-corruption commission for more detailed information.
14 See, for example, ICAC Act (NSW) s 17(2); PIC Act (NSW) s 20(2). Queensland’s CMC is required to ‘act quickly’ and with ‘as little formality and technicality’ as possible: CMC Act (Qld) s 180(1)(a).
15 In the case of Tasmania, it should be noted that the Integrity Commission is yet to hold a hearing. Integrity Commission Officer, personal communication with K. Richardson, 27 April 2012.
‘natural justice’) to an individual affected by an inquiry will depend on a range of factors, including the nature of the inquiry, the interests of the individual, and the purpose of the commission legislation.

As Janet Ransley explains ‘commissions are given wide procedural freedom, enabling them to inquire as they see fit, generally not bound by the rules of evidence and procedure applying in courts’. She says that, accordingly, ‘commissions may adopt inquisitorial processes aimed at discovering the truth of a situation, rather than adversarial court processes designed to force the prosecution to establish its case’. She further highlights that it is ‘this procedural flexibility which enables commissions to uncover and receive evidence not available in the usual court system, but which also creates the potential for lack of fairness to affected individuals.’

Importantly, the commissions’ findings have no binding legal effect. Their purpose is to ascertain the facts, expose corruption, and report their findings and ensuing recommendations, most often to Parliament. When a commission uncovers sufficient evidence of criminal offences it may refer the matter to that jurisdiction’s Director of Public Prosecutions.

The anti-corruption commissions have examination powers that include the ability to conduct a public hearing and override the privilege against self-incrimination. In some jurisdictions, public interest immunity and legal professional privilege are also limited. Parliamentary privilege, however, is generally preserved. Further issues raised by the commissions’ coercive examination powers include whether witnesses have the right to legal representation, and the use of evidence obtained via coercive powers. Each of these powers and issues is briefly discussed below. Stakeholder arguments against the commissions’ abrogation of individual rights are outlined at the end of the section.

---

18 The essential requirements of procedural fairness are ‘fairness and detachment’, which are expressed in the two rules of procedural fairness. Firstly, the hearing rule: which requires that a decision-maker must give notice that a decision is to be made to a person whose interests may be affected, to disclose information on which the decision-maker proposes to rely, and to allow the affected person an opportunity to present his or her case. Secondly, the bias rule: which requires that a decision-maker must be free of actual bias, as well as the appearance of bias. Linda Pearson, ‘Procedural Fairness: the hearing rule’ in M. Groves & H.P. Lee (eds) (2007) Australian Administrative Law: Fundamentals, Principles and Doctrines, Port Melbourne, Cambridge University Press, p. 265.


21 See for example: Roberts-Smith (2010) op. cit. p. 11.

22 Ibid, p. 12. See also: Integrity Commission Act (Tas) s 78(3)(d); CMC Act (Qld) s 49; ICAC Act (NSW) ss 53, 74A, PIC Act (NSW) s 15(1)(a); Police Integrity Commission (2011) Annual Report 2010-2011, Sydney, PIC, p. 18, viewed 22 March 2012, <http://www.pic.nsw.gov.au/files/News/PIC_Annual_Report_2011_LR.pdf>; In Western Australia, where there is sufficient evidence, and charges are relatively straightforward, the CCC may prosecute charges itself in the Magistrates Court. It may, alternatively, refer matters on to the DPP for prosecution in the District or Supreme Court. Roberts-Smith (2010) op. cit., p. 12.

23 Tasmania’s Integrity Commission Act states that during an inquiry, a person may claim privilege and refuse to answer a question or produce a record or thing. If the Integrity Tribunal does not accept a claim of privilege, the person claiming it can apply to the Supreme Court to have the privilege determined (see s 92).
Compulsory Examinations and Abrogation of the Privilege against Self-incrimination

The anti-corruption commissions are empowered to conduct compulsory examinations to aid their investigations. A person who is summoned by a commission as a witness must answer the questions asked or provide any required document or thing. If they fail to attend or refuse to provide information as required under the legislation, they may be found to be in contempt of the commission and be subject to fines and/or imprisonment. At common law, the privilege against self-incrimination operates so that a person cannot be compelled to answer any question or produce any document or thing, if to do so may lead to the person being convicted as a criminal. The commissions are able to abrogate the privilege against self-incrimination, however, this power is usually balanced by the fact that answers given, or documents or things produced, cannot be used in evidence against the person in other judicial proceedings, subject to some exceptions.

The available scholarship on anti-corruption commissions emphasises that the ‘secret’ nature of corruption necessitates the use of coercive investigative powers. Michael Symons exemplifies this view in the following statement:

The private nature of corruption makes it difficult to detect, to investigate and to prosecute. This means investigative agencies have to step outside the normal regime of policing methods. The use of coercive powers in both questioning and the production of documents and other evidence is essential in the investigating of corruption because it tears apart the veil of secrecy that is crucial for corruption to succeed.

Peter Hall also articulates the view that compulsory examinations and abrogation of the privilege against self-incrimination are necessary for the effective investigation of corruption:

The power of specialist agencies in the nature of anti-corruption commissions to compel testimony and require the production of documents and other records is central to the process of revealing corruption. The power to require a person to give evidence and/or produce documents, records or other things and the abrogation of the privilege of self-incrimination are together designed to ensure the full and effective investigation of possible corruption and other forms of criminality in the public interest. The evidence of conduct of that nature often lies peculiarly within the knowledge of persons who cannot be expected to disclose their knowledge. Abrogation of the privilege against self-incrimination with balancing protective provisions is now widely accepted as essential for commissions of this nature.

Abrogating the privilege against self-incrimination can, however, be seen as incompatible with the compilation of admissible evidence for criminal prosecutions, when coercively obtained evidence is not admissible in judicial proceedings.

---


25 The specific provisions are discussed further in the Other Jurisdictions section of this Current Issues Brief.

26 Donaghue (2001) op. cit., p. 84.

27 Hall explains that ‘In Australia, the privilege against self-incrimination is not protected by the Constitution and may be taken away by legislative action’. Hall (2004) op. cit., p. 596.

28 Hall (2004) op. cit., p. 171; ICAC Act (NSW) s 37; PIC Act (NSW) s 40; CMC Act (Qld) ss 192, 197; CCC Act (WA) ss 145, 160(2).


31 ibid., pp. 160-161. Symons similarly states in regard to the ICAC that: ‘This may lead to a situation where there is a finding of corrupt conduct in accordance with the administrative procedures of the Commission (on the balance of probability using coercive powers) but there is insufficient evidence to convict a person in the criminal court where matters must be proved beyond a reasonable doubt’. Symons (2008) op. cit., p. 14.
**Derivative Use of Coercively Obtained Evidence**

Although coercively obtained evidence can not be used in civil or criminal proceedings against the person, this ‘use immunity’ does not generally restrict the use of derived material. Hall states that this immunity only affords partial protection rather than a comprehensive safeguard. He provides the example that ‘An answer compelled from a witness, although not itself available to be used, may point investigators in a direction or to another source allowing them to obtain admissible evidence against that person’. In addition, Ransley states that ‘the immunity protects only the witness giving the evidence; if it also serves to implicate another person, then the evidence may be used to support charges criminal or otherwise against that other person’. Ransley also states that disciplinary proceedings brought against public servants may be able to use evidence given before commissions. She adds that:

> Finally, the use immunity does not protect reputations: even though witnesses may be protected from having their evidence used against them in a court of law, they are not protected from the use it is put to by the media, except on the rare occasion when a commission imposes a suppression order. Such publicity may cause serious and damaging effects to reputation.

**Public Hearings**

The anti-corruption commissions are empowered to hold public hearings in the course of an investigation if it is deemed to be in the public interest, although the majority of hearings are held in private. Symons explains that ‘As the name implies, a Public Inquiry is open to the public and generally attracts considerable media attention due to the nature of the allegations being canvassed’. The considerations that favour public hearings centre on the public interest in the public exposure of corruption and, according to Hall, include:

- The need for public confidence in the operations of the commission of inquiry.
- The prospect of assistance to the investigative process being gained from the receipt of widespread publicity given to the matters under investigation...
- The need for accountability in relation to alleged illegality or impropriety in government or in public administration and removing unfounded fears of a “whitewash” or cover-up.
- The need to dispel unfounded allegations effectively. A public hearing may provide the only effective means for persons who are the subject of allegations or suspicion to clear themselves...

Conversely, it is also argued that public hearings can cause irreparable damage to the reputation of those investigated, that they pose a risk of prejudicing a fair trial in the event of a criminal prosecution arising from the investigation, and that they can endanger a witness’ personal safety. It is usual for the commissions to take these factors into account when determining whether it is in the public interest to hold a hearing in public or private.

---

33 ibid., p. 599.
36 ibid., p. 27.
37 The use of public hearings by the ICAC, PIC, CMC, CCC and Integrity Commission are further discussed in the Other Jurisdictions section of this Current Issues Brief. Notably, in Tasmania, the Integrity Commission Act does not use the term ‘public interest’ in relation to public hearings, but states that the Integrity Tribunal may make an order that a hearing is to be closed to the public ‘if it considers that there are reasonable grounds for doing so’ (see schedule 6 of the Integrity Commission Act). It can however, prohibit or restrict the public reporting of a hearing if it is satisfied that the public interest in the reporting of that hearing is outweighed by any other consideration (see schedule 6(4)(1)).
38 Symons (2008) op. cit., p. 11.
40 ibid., p. 156; Donaghue (2001) op. cit., p. 156.
41 Donaghue (2001) op. cit.
**Legal Professional Privilege**

Broadly speaking, at common law, legal professional privilege operates to protect confidential information exchanged between clients and their lawyers. It means that lawyers cannot be made to disclose information revealed to them by a client. The rationale being that ‘the public interest in the administration of justice’ is served ‘by encouraging full and frank disclosure by clients to their lawyers’. Legal professional privilege is generally preserved in the enabling legislation of the anti-corruption commissions, subject to exceptions that vary across the jurisdictions.

**Public Interest Immunity**

The term ‘public interest immunity’, also known as ‘Crown privilege’, basically denotes the body of substantive and procedural rules that may allow an executive government to withhold relevant information from court proceedings, on the grounds that its disclosure would harm the public interest. The issue of public interest immunity may affect anti-corruption commissions if they seek to access government communications. In determining whether information is protected by public interest immunity, a commission or court will weigh the public interest in witholding the production of a document against the public interest in ensuring that the commission has access to relevant evidence. Public interest immunity may be claimed in some jurisdictions, but is limited in others.

**Parliamentary Privilege**

Parliamentary privilege can, in very general terms, be understood to mean the protection of freedom of speech in parliamentary proceedings and the provision of immunity from legal process during sitting periods. The historical basis of parliamentary privilege is Article 9 of the English *Bill of Rights 1689* which states: ‘That freedom of speech, and debates and proceedings in Parliament, ought not be impeached or questioned in any court or place out of Parliament’. The enabling legislation of each of the anti-corruption commissions generally preserves the operation of parliamentary privilege.
Right to Legal Representation

The right to legal representation is provided for in each commission’s enabling legislation. A statutory entitlement to legal representation exists in Tasmania, however, in most jurisdictions the right is subject to the commission’s approval.\(^{52}\)

Stakeholder Arguments against the Abrogation of Individual Rights

Liberty Victoria has argued against the conferral of wide-ranging powers – such as the power to compel witnesses to answer questions and the power to abrogate the privilege against self-incrimination – on a Victorian anti-corruption commission. It emphasises that ‘the civil liberties these powers abrogate were hard won over many centuries’ and that ‘normal law enforcement agencies are denied these powers because of their potential for abuse’.\(^{53}\) Liberty Victoria further argues that:

Legislation investing the anti-corruption body with these powers may well be inconsistent with some of the human rights contained in the Charter of Human Rights and Responsibilities, in particular those in s 25(2)(k) (right not to be compelled to testify against oneself), s 24 (right to a fair hearing), s 13 (right to privacy and reputation), and s 8(3) (right to equal protection of the law).\(^{54}\)

The Law Institute of Victoria (LIV) has stated that it recognises that an anti-corruption body requires coercive powers for ‘adequate information gathering’ but emphasises that ‘the exercise of such powers must be accompanied by appropriate safeguards to protect the rights of individuals’.\(^{55}\) The LIV does, however, argue against abrogating the privilege against self incrimination. It states that ‘witnesses appearing before an anti-corruption body for questioning should be able to refuse to answer a question or to provide information to a Commissioner, on the grounds that such information might incriminate the person’.\(^{56}\) The LIV further states that the privilege against self-incrimination in criminal proceedings is ‘a fundamental human right’ as expressed in section 25 of the Victorian Charter of Human Rights.\(^{57}\) The LIV also argues that ‘there should be extreme reluctance to allow abrogation of client legal privilege [legal professional privilege] during anti-corruption investigations’.\(^{58}\)

In regard to public versus private hearings, the LIV has stated that ‘the public interest will usually fall in favour of private hearings’ in order to ‘protect the privacy and reputation of witnesses’.\(^{59}\) The LIV further states that witnesses appearing before an anti-corruption commission should have a guaranteed right to legal representation: ‘The LIV considers that a practice to allow legal representation is insufficient and we strongly recommend that the right to legal representation for witnesses be entrenched and safeguarded under statute…’.\(^{60}\)

\(^{52}\) For example, see: Integrity Commission Act s 66(1); CMC Act, s 181(1); ICAC Act, s 33(1); PIC Act s 35(1); CCC Act, s 142(1).


\(^{54}\) ibid., p. 3. As Members would be aware, the Statement of Compatibility that accompanied the Second Reading Speech of the Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012 addresses compatibility issues with the Charter of Human Rights and Responsibilities.


\(^{56}\) ibid., p. 9.

\(^{57}\) ibid.

\(^{58}\) ibid.

\(^{59}\) ibid.

\(^{60}\) ibid., p. 10.
Referral Powers

Anti-corruption commission legislation generally provides for a commission to investigate a complaint within its jurisdiction, refer a complaint to an appropriate agency for investigation or take no further action. Some jurisdictions additionally provide for an investigation to be carried out in cooperation with an agency and the anti-corruption commission.61

When an anti-corruption commission refers a matter to an agency for investigation, the commission may recommend a course of action to be taken by the agency and the time in which it should be taken,62 adopt a monitoring role in relation to the referred matter,63 and/or require the agency to submit a report on the action taken.64

In most jurisdictions, only a small percentage of complaints receive a full investigation by the anti-corruption commission. The majority of matters are referred to other agencies for action. For example, as noted in the Other Jurisdictions section of this Current Issues Brief, the NSW ICAC initiated a full investigation into three per cent of the matters it assessed in 2010-2011.65 Other jurisdictions discussed in the final section of this paper show similar trends. Whether a commission investigates a complaint will depend on whether the matter falls within the jurisdiction of the commission, which is often defined by both the legislated definition of corruption and the types of agencies and people that can be investigated.

61 For example, see: CMC Act s 46(2)(b); CCC Act s 33(b).
62 For example, see: Integrity Commission Act s 38(1); CCC Act s 37; ICAC Act s 53; PIC Act s 83.
63 For example, see: CMC Act ss 46(2)(b), (d), 47, 48; CCC Act s 40; Integrity Commission Act s 39.
64 For example, see: CCC Act s 40(1); ICAC Act s 54; CMC Act s 48; Integrity Commission Act s 39.
3. Main Provisions of the Bill

This section of the Current Issues Brief provides an overview of the main provisions of the Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012. For a description of the Bill in its entirety readers are directed to consult the Explanatory Memorandum.

Part 1 – Preliminary

Purposes
Clause 1 of the Bill outlines the primary purposes of the Act. They are:

(a) to amend the Independent Broad-based Anti-corruption Commission Act 2011 to provide for examination powers, referral powers and other matters relating to the operation of the IBAC; and
(b) to further amend the Victorian Inspectorate Act 2011.

Commencement
Clause 2 of the Bill states that the Act will commence operation on a day or days to be proclaimed.

Part 2 – Amendment of the Independent Broad-based Anti-corruption Commission Act 2011

Definitions
Clause 3 of the Bill inserts a range of new definitions into section 3(1) of the IBAC Act.

Corrupt conduct
Clause 4 of the Bill amends the definition of ‘corrupt conduct’ under section 3A of the IBAC Act. The clause clarifies that conduct may be corrupt conduct for the purposes of the IBAC Act if:

(a) all or any part of the conduct occurs outside Victoria, including outside Australia; and
(b) the conduct would be corrupt conduct if it occurred in Victoria.

Jurisdiction
Clause 5 of the Bill inserts new section 5B into the IBAC Act. The new section will refer to the ‘investigation of conduct occurring before the commencement of this section’. New section 5B provides that the Act applies to corrupt conduct, as defined in the Act, that occurred before the commencement of the Act.

Deputy Commissioners
Clause 9 amends section 17(2) of the IBAC Act which refers to Deputy Commissioners. The amended section provides that only one Deputy Commissioner is required to be an Australian lawyer. This differs from the current section that requires each Deputy Commissioner be an Australian lawyer.

Acting appointments
Clause 10 amends section 24 of the IBAC Act which refers to ‘acting appointments’. The amendment to section 24(1)(a) specifies that an acting appointment can be made during an initial vacancy. According to the Explanatory Memorandum, new section 24(4) provides that, in addition to Deputy Commissioners, the following persons may be appointed as an Acting Commissioner:
persons who are eligible for appointment as Commissioner (under section 14 of the IBACA); and

other persons who, in the opinion of the Minister-

- have the experience and qualifications necessary to enable the IBAC to achieve the objects of the IBACA [IBAC Act] and perform its duties and functions; and
- have prior experience in a senior role in a body with investigative functions, intelligence gathering functions or substantially similar functions.\(^{66}\)

**New Divisions 2 to 4 inserted into Part 2**

Clause 13 inserts three new divisions into Part 2. These are:

- Division 2 – Disclosure by the IBAC
- Division 3 – Confidentiality notices
- Division 4 – Protection of persons and documents

**Division 2 – Disclosure by the IBAC**

Section 33A creates an offence for unauthorised disclosures by IBAC Officers. The new section specifies that a person who is or was an IBAC Officer must not directly or indirectly disclose any information acquired in the course of their duties except: for the performance of their duties as an IBAC Officer; for the purpose of proceedings for an offence or a disciplinary process resulting from an IBAC or Victorian Inspectorate investigation; or as otherwise authorised or required by the Act. The maximum penalty for unauthorised disclosure is 12 months imprisonment and/or 120 penalty units (approximately $15,000).\(^{67}\)

Section 33B(1) specifies the circumstances in which the IBAC may disclose information. The IBAC may, if it considers it appropriate, release information acquired by reason of, or during the course of, the performance of its duties under the IBAC Act to:

- an integrity body;
- a prosecutorial body;
- a law enforcement agency;
- the relevant principal officer.

**Division 3 - Confidentiality notices**

Section 33C provides that the IBAC may issue a confidentiality notice in respect of an investigation to a person (other than an IBAC Officer or Victorian Inspectorate Officer) if, during an investigation, the IBAC considers that the disclosure of 'restricted matters', as defined in clause 3 of the Bill, would be likely to prejudice:

- (a) that investigation; or
- (b) the safety or reputation of a person; or
- (c) the fair trial of a person who has been, or may be charged with an offence.

A confidentiality notice must be in the prescribed form and specify the restricted matter/s for which it has been issued (s 33C(2)). In circumstances where the restricted matter is the fact that the person has been, or is proposed to be, examined by the IBAC or has produced or is required to produce documents or things for the IBAC, the confidentiality notice must specify that the person can disclose the restricted matter to the person's spouse or domestic partner and the person's employer (for the purpose of enabling the person to take appropriate leave). However, this is excepted to the extent that the IBAC considers the disclosure would likely


prejudice the investigation, the safety or reputation of a person or the fair trial of a person who has been, or may be, charged with an offence.

A copy of sections 33C(3) to 33C(8) must be included in the confidentiality notice, which outline the procedure and circumstances whereby a confidentiality notice can be modified, cancelled, or otherwise ceases to have effect.

Under section 33D, the IBAC will be required to provide the Victorian Inspectorate with copies of: all confidentiality notices issued; all notices cancelling confidentiality notices; each application to the Supreme Court by the IBAC to extend a confidentiality notice; and each order made by the Supreme Court extending a confidentiality notice.

Section 33E outlines certain offences for disclosure that is subject to a confidentiality notice, and the circumstances where disclosure is permitted, such as: in accordance with a direction given by IBAC; where it is necessary in order to comply with a witness summons or confidentiality notice, or to obtain legal advice; or as otherwise authorised under the Act or the Victorian Inspectorate Act. The maximum penalty for an offence is 120 penalty units (approximately $15,000) and/or 12 months imprisonment.

Division 4 - Protection of persons and documents

Section 33F provides a definition of ‘protected persons’ for the purposes of Division 4. As proposed in the Bill, a protected person includes: an IBAC officer; a body, engaged by the IBAC as a consultant under section 30, if an employee of the body has taken an oath; and any member of a body employed under section 30.

Section 33G specifies that a ‘protected document or other thing’ for the purposes of the Division includes a document or other thing, which if disclosed, is likely to reveal the identity of, or put at risk the safety of: an informer; a witness; a person supplying the IBAC with information; a person identified by name in certain evidence, or a person that is subject to an investigation. In addition to these specific protections, a document or thing is protected if it ‘is not otherwise in the public interest’ to disclose it.

Section 33H states that a protected person is not compellable in any proceeding, other than a criminal proceeding, to produce a document or thing that came into their possession in the performance of their statutory functions or powers, if the IBAC certifies in writing that the document or thing is protected.

If the hearing is a criminal proceeding, then new sections 33I through to 33J will apply, which outline the procedure for handling the item and having the issue determined by the court.

Section 33K pertains to the compellability of protected persons as witnesses. The section states that protected persons are not compellable to disclose any matter or thing obtained as a result of their functions and powers under the IBAC Act or other Act, unless the IBAC certifies that it is in the public interest to do so. The section does not apply to proceedings conducted by the Victorian Inspectorate.

New Division 2A of Part 3 inserted

Clause 14 inserts new Division 2A of Part 3 regarding IBAC obligations in relation to complaints and notifications to the IBAC.

Division 2A – IBAC obligations in relation to complaints and notifications to the IBAC

In relation to a complaint or notification, the IBAC must either dismiss, investigate, or make a referral (s 40A). As provided in new section 40B, the IBAC may notify the person of the outcome, except if it would:
Conducting investigations about corrupt conduct

Clause 15 inserts three new sections (s 41(3), s 41(4) and s 41(5)) into the IBAC Act, under the section that deals with conducting investigations about corrupt conduct. The Minister referred to this new section in his second reading as “investigating conduct occurring prior to the commencement of this Act.”

Essentially these provisions provide that the IBAC may conduct an investigation in relation to serious corrupt conduct or police personnel conduct of a person or body who was a public officer, or a body that was a public body, at the time of the conduct, even if the person or body is no longer a public officer or public body, or in the case of a public body, has ceased to exist as a body or as a public body. This includes a person who is, or was, a corporation, even if that corporation has been deregistered.

As explained in the second reading, with regard to an investigation into corrupt conduct occurring entirely before the commencement of the new section 5B of the Act, IBAC must be reasonably satisfied that:

- it is in the public interest for the IBAC to investigate that conduct; and
- in all the circumstances, it is appropriate for the IBAC to investigate that conduct, having regard to its functions of identifying and exposing serious corrupt conduct; and
- in the case of conduct that another investigatory body has already investigated or decided not to investigate, there is reliable, substantial and highly probative evidence that was not considered by the investigatory body; or there is reliable, substantial and highly probative evidence that the investigation or decision not to investigate was materially affected by error.

In this section, an investigatory body is defined as an integrity body or any other person or body, whether or not still in existence, with the power to require the production of documents or the answering of questions.

Complaints and notifications

Clause 18 inserts a new section 47A into the IBAC Act, in the area of complaints or notifications to the IBAC that do not warrant investigation. The new section provides that a complaint or notification is dismissed if the IBAC determines under sections 46(2) or 47(1) that it does not warrant investigation, or if it decides not to investigate in accordance with section 47(3).

Notifications to the Victorian Inspectorate and coordinated investigations

Clause 19 inserts new section 49A into the IBAC Act which provides that the IBAC notify the Victorian Inspectorate of any complaint or notification to the IBAC that involves the conduct of the IBAC, or any person who is, or was at the time of the conduct, an IBAC officer.

This clause also inserts new section 49B into the IBAC Act which provides for the IBAC’s power to conduct an investigation in coordination with any integrity body or law enforcement agency.

---

69 ibid.
An investigation conducted in coordination with an integrity body or a law enforcement agency must be conducted by the IBAC as an exercise of the duties, functions and powers of the IBAC. The coordinated investigation may otherwise be conducted in any way the IBAC sees fit (s 49B(2)(b)).

Section 49B(3) then provides that the IBAC may:

(a) consult, coordinate and cooperate with any integrity body or law enforcement agency which is, in accordance with that body's or agency's own duties, functions and powers, conducting an investigation in respect of the same matter or similar or related subject matter;
(b) in accordance with section 33B, provide or disclose information to an integrity body or a law enforcement agency with which the IBAC is conducting a coordinated investigation;
(c) in accordance with Part 3, receive information from an integrity body or a law enforcement agency with which the IBAC is conducting a coordinated investigation;
(d) enter into a memorandum of understanding or an agreement with any integrity body or law enforcement agency in relation to the conduct of coordinated investigations with that integrity body or law enforcement agency.

New Division 4 of Part 3 inserted
Clause 20 inserts a new Division 4—Referrals, into Part 3 of the IBAC Act.

Division 4 – Referrals
Section 49C outlines the referral of complaints or notifications for investigation by another person or body.

The Minister commented on the new referral powers provided by this section in his second reading. He stated that the IBAC must refer a complaint or notification to a specified list of persons or bodies if the IBAC considers at any time that the subject matter of the complaint or notification is relevant to the performance of the duties and functions or exercise of powers of that person or body, and it would be more appropriate for the complaint or notification to be investigated by that person or body.\footnote{ibid.}

The specified list of persons or bodies the Minister was referring to, is set out in section 49C(2) of the Bill, and consists of:

- the Chief Commissioner of Police;
- the Ombudsman;
- the Auditor-General;
- the Victorian WorkCover Authority;
- the Environment Protection Authority;
- the relevant principal officer;
- any other prescribed person or body which has a law enforcement function or an integrity function.

The IBAC must not, however, refer a complaint or notification relating to the Chief Commissioner of Police, Deputy Commissioner of Police or Assistant Commissioner of Police, to the Chief Commissioner of Police (s 49C(3)). If the IBAC refers a complaint or notification relating to the conduct of a member of the police force to the Chief Commissioner of Police, the Chief Commissioner must investigate the complaint or notification under Division 2 of Part IVA of the \textit{Police Regulation Act 1958} (which deals with complaints and investigations) (s 49C(4)).
Referrals to prosecutorial bodies
Section 49D(1) states that the IBAC may at any time, refer a matter to a prosecutorial body, if it considers it is relevant to the performance of the prosecutorial duties and functions or the exercise of prosecutorial powers of that body.

Section 49D(2) specifies that the IBAC may refer any matter under investigation by the IBAC and any matter raised in a report of the Chief Commissioner of Police.

Referrals to prosecutorial bodies for advice
Section 49E sets out the process whereby, after receiving a report of the Chief Commissioner of Police, the IBAC may refer to a prosecutorial body for advice any matter that the IBAC considers relevant to the performance of the prosecutorial duties and functions or exercise of prosecutorial powers of the prosecutorial body. Upon making such a referral, the IBAC must notify the Chief Commissioner of Police in writing of the referral, in addition to the advice received by the IBAC from the prosecutorial body in respect of the referral. The Chief Commissioner of Police must not conduct any disciplinary process or action against a person who is the subject of a referral until he or she has received notification from the IBAC relating to the advice received by the IBAC from the prosecutorial body (s 49E).

In order to decide whether to make a referral, the IBAC may consult with the relevant person or body (s 49F). In accordance with section 33B, the IBAC may provide or disclose to a person or body to which a referral is made, any information that the IBAC has in relation to the matter referred (s 49G).

Section 49H, according to the Explanatory Memorandum, permits the IBAC to request information about referrals under section 49C, excluding a referral to the Chief Commissioner of Police in relation to the conduct of a person who is not a member of police personnel. Under section 49H, the IBAC may at any time, require the person or body to whom the referral is made to provide the IBAC within a specified reasonable time, with information regarding any investigation of and any action taken in respect of the referred matter. That person or body must provide the information within the specified time.

Withdrawal of referred complaint or notification
Section 49I applies to referrals under section 49C, and excludes a referral to the Chief Commissioner of Police in relation to the conduct of a person who is not a member of police personnel.

Section 49I provides the IBAC with the power at any time, to investigate a complaint or notification under Division 3 and withdraw the referred complaint or notification by notice. The procedure is set out in detail in subsections (2) through (4).

Section 49J pertains to the procedure for notifying relevant parties of the withdrawal under section 49I. However, the IBAC must not notify the person or body if doing so would not be in the public interest or would otherwise prejudice a person or an investigation.

---

71 Explanatory Memorandum, p. 23.
New Part 5A – Examinations

Clause 21 of the Bill inserts new Part 5A into the IBAC Act. Division 1 of the new Part 5A provides the IBAC with the power to conduct examinations and summon witnesses (new sections 82A-82W). Division 2 of the new Part 5A deals with the arrest of a witness who fails to appear in accordance with a witness summons (new sections 82X- 82ZA). Division 3 of the new Part 5A deals with privileges and secrecy provisions applying to examinations (new sections 82ZB-82ZG). Division 4 of the new Part 5A deals with contempt of the IBAC (new sections 82ZJ- 82ZP).

Division 1 – Examinations
Section 82A empowers the IBAC to hold an examination for the purposes of an investigation.

Section 82B relates to the conduct of examinations, and provides that, in holding an examination, the IBAC is not bound by the rules of evidence and may regulate the procedure of the examination as it considers appropriate.

Section 82C(1) provides that an examination is not open to the public unless the IBAC considers on reasonable grounds that there are exceptional circumstances, it is in the public interest to hold a public examination, and a public examination can be held without causing unreasonable damage to a person’s reputation, safety or wellbeing. Section 82C(2) outlines the factors that the IBAC may take into account in determining whether or not it is in the public interest to hold a public examination, including (but not limited to) –

(a) whether the corrupt conduct or the police personnel conduct being investigated is related to an individual and was an isolated incident or systemic in nature;

(b) the benefit of exposing to the public, and making it aware of, corrupt conduct or police personnel misconduct;

(c) in the case of police personnel conduct investigations, the seriousness of the matter being investigated.

Section 82C(3) requires the IBAC to inform the Victorian Inspectorate that it intends to hold a public examination, and explain in writing its reasons for doing so, no less than seven days before a public examination is to be held.

Section 82C(4) provides that a judicial officer is not required to attend a public examination, but may consent to doing so.

Section 82D provides that it is an offence for a person (other than an IBAC Officer or Victorian Inspectorate Officer) to be present at an examination that is not open to the public unless that person is: attending in accordance with a duly served witness summons; an Australian legal practitioner representing such a person, or assisting the IBAC in the examination; attending as a result of a direction given under section 82E; or any other person authorised to be present by the IBAC or otherwise authorised to be present under the IBAC Act or any other law. The penalty for doing so is 120 penalty units, imprisonment for 12 months, or both.

Section 82E provides for the IBAC to give directions as to who may and may not be present during the whole or part of an examination. Section 82E(2) stipulates that such a direction must not prevent the presence of an Australian legal practitioner representing a witness (subject to 82M(2)), an IBAC Officer, a Victorian Inspectorate Officer, or any other person authorised to be present under the IBAC Act or other law, when evidence is being taken.
Section 82F provides the IBAC with the power to issue witness summonses. Section 82F(1) sets out the witness summonses that the IBAC may issue for the purposes of an investigation as follows—

(a) a summons to attend the IBAC to give evidence at an examination at a specified time and place on a specified date;
(b) a summons to attend at a specified time and place on a specified date to produce documents or other things to the IBAC;
(c) a summons to attend an examination at a specified time and place on a specified date before the IBAC to give evidence and produce documents or other things.

Section 82F(2) provides that the IBAC may issue a witness summons if it is satisfied that it is reasonable to do so, having regard to the person’s age and any known mental impairment, as well as the evidentiary or intelligence value of the information, document or thing sought.

Section 82F(3) provides that the IBAC must not issue a witness summons to a person who is under the age of 18 years, unless it considers on reasonable grounds that the information, document or thing may be compelling and probative evidence, and it is not practicable to obtain it by any other means.

Section 82F(4) allows the IBAC to excuse a person issued with a summons described in section 82F(1)(b) from attendance if that person produces the required documents or things before the time and date specified in the summons.

Section 82F(5) provides that a person issued with a witness summons must, in accordance with the summons, attend from day to day unless excused.

Section 82G sets out the content and form of witness summonses. Section 82G(1) provides that a witness summons must require the person to whom it is directed to attend at a specified time and place on a specified date to: give evidence before the IBAC, produce any documents or other things described in the summons, or both.

Section 82G(2) provides that a witness summons must state the nature of the matters about which the person is to be questioned, except to the extent to which the IBAC reasonably considers this would be likely to prejudice the conduct of the investigation or would be contrary to the public interest.

Section 82G(3) provides that a witness summons must be in the prescribed form, and be accompanied by any relevant confidentiality notice, as well as a statement setting out the following matters (which are specified in subsection (4))—

(a) that failure to comply with the summons may be an offence and penalties may apply;
(b) whether it is intended that the examination is to be held in public or in private;
(c) that if the person summoned is under the age of 16 years at the date of issue of the witness summons, the person need not comply with the witness summons, subject to the requirements of section 82I;
(d) that the person is entitled to seek legal advice in relation to the witness summons and the examination generally;
(e) that the person has a right to legal representation at an examination;
(f) that, if applicable, the person has a right to have an interpreter present at the examination;
(g) that, if applicable, the person is required to have a parent, a guardian or an independent person present at the examination;
(h) that a person may claim a privilege but—
   i. a person is not excused from answering a question or giving information or from producing a document or other thing on the ground that the answer, information, document or other thing may tend to incriminate the person or make the person liable to a penalty;
ii. that if the person is a member of police personnel, the Crown is not entitled to assert any privilege;
   (i) if a person gives any answer, information, document or other thing that may tend to incriminate the person, an immunity as to the use of that evidence may apply;
   (j) that, with limited exceptions in relation to a person who is a member of police personnel, statutory secrecy provisions may apply which prevent the person from answering a question or giving information or producing documents or other things;
   (k) that the person has a right to complain to the Victorian Inspectorate;
   (l) any other prescribed matter.

Section 82H provides that the IBAC must give the Victorian Inspectorate a written report within three days after the issue of a witness summons, specifying the name of the person summoned and the reasons why the summons was issued.

Section 82I provides that a witness summons directed to a person under the age of 16 years has no effect and that a person who claims to be under 16 years must provide proof of age in accordance with the regulations.

Section 82J relates to the service requirements of the witness summons, and provides that a summons must be served no less than seven days before the date on which the person is required to attend or comply with the summons. However, the IBAC may require immediate attendance if it considers on reasonable grounds that a delay is likely to result in evidence being lost or destroyed, the commission of an offence, the escape of the person who is summoned, or serious prejudice to the conduct of the investigation. A summons directed to a natural person must be served personally. A summons directed to a body corporate must be served by leaving a copy of the summons at its registered office or principal place of business.

Section 82K provides for the IBAC to apply to the Supreme Court for an order for service of a summons by other means. The Supreme Court must be satisfied that it is not reasonably practicable to serve a witness summons in accordance with section 82J. According to the Explanatory Memorandum, this will assist with service where, for example, a person may be avoiding service.72

Section 82L outlines the procedure relating to witnesses already held in custody. The IBAC may give a written direction that a person who is in a prison or police gaol be delivered into the custody of a member of the police force for the purpose of bringing that person before the IBAC as required by the witness summons. While absent from a prison or police gaol, the person is in the legal custody of the member of the police force, until excused by the IBAC from attendance.

Section 82M relates to legal representation of witnesses and other persons. Section 82M(1) provides that a witness may be represented by an Australian legal practitioner at an examination. Section 82M(2) outlines the circumstances in which the IBAC may direct a witness not to seek legal advice or representation from a specified legal practitioner. Such a direction will be made if the IBAC considers on reasonable grounds that the examination would be prejudiced because that legal practitioner is –

   (a) a witness in the examination or another examination; or
   (b) the representative of another witness in the examination or another examination; or
   (c) a person involved, or suspected of being involved, in a matter being investigated by the IBAC or the Victorian Inspectorate; or
   (d) the representative of a person involved, or suspected of being involved, in a matter being investigated by the IBAC or the Victorian Inspectorate.

---

72 Explanatory Memorandum, p. 29.
Section 82M(3) provides that such a direction may be made at any time. Subsections (4)-(5) require that the IBAC must advise the witness that the direction has been made, from which time the witness is bound by the direction. Section 82M(6) specifies that the IBAC must then allow that witness at least three days from the date of receipt of the direction to obtain representation by another Australian legal practitioner before the person is required to attend for the purposes of complying with the witness summons (unless section 82J(2) applies).

Section 82M(7) provides that the IBAC may authorise, if there are special circumstances for doing so, a person who is not a witness to have legal representation during the examination of a witness.

Section 82M(8) sets out the circumstances in which the IBAC may direct a person who has received a proposed report, draft of a proposed report, information contained in a report, or a confidentiality notice, not to seek legal advice or representation in relation to that report or notice from a specified legal practitioner, which are similar provisions to those described in section 82M(2)(a)-(d).

Sections 82M(9)-(10) make similar provisions to those in sections 82M(4)-(5).

Section 82N requires the IBAC to inform the Victorian Inspectorate in writing within 24 hours if it makes a direction in relation to a specific legal practitioner under sections 82M(2) or 82M(8), including the reasons for the direction, the specific provisions of the Act relied upon, and the factors taken into consideration in making the direction.

Section 82O outlines specific provisions relating to witnesses. Section 82O(1) provides that if, at any time during an examination, the IBAC becomes aware that a witness is under 16 years of age, it must immediately release that person from compliance with the applicable witness summons.

Section 82O(2) provides for a witness to have a competent interpreter present at an examination if that witness does not have sufficient knowledge of the English language to understand the questions being asked or to answer those questions.

Section 82O(3) provides that a witness under the age of 18 years must be accompanied by a parent, guardian or independent person. Section 82O(4) provides for the IBAC to direct that an independent person be present during the examination of a witness whom the IBAC believes has a mental impairment or a witness who provides the IBAC with reasonably satisfactory medical evidence that he or she has a mental impairment.

Section 82P sets out actions to be taken before a witness is questioned or required to produce a document or other thing. Section 82P(1) requires that the following actions be taken by the IBAC before a witness summoned to attend an examination is asked any questions or is required to produce a document or thing (and is not excused from attendance under section 82F(4)) –

(a) confirm the age of a witness if the IBAC considers that a witness may be under the age of 18 years;
(b) release any witness under the age of 16 years from compliance with any witness summons;
(c) inform the witness orally and in writing of the person's rights and obligations as specified in section 82G(4) unless, prior to the examination—
   i. the witness is represented at the examination by an Australian legal practitioner; and
   ii. the witness informs the IBAC that an Australian legal practitioner has explained the statement referred to in section 82G(3)(c) to the witness;
(d) inform an Australian legal practitioner who is representing a witness or other person at the
examination of any non-disclosure requirements that apply under the Act;
(e) take any other actions prescribed for the purposes of this subsection.

Section 82P(2) provides that prior to questioning, the witness must be advised of the nature
of the matters about which the witness is to be questioned, except to the extent that the IBAC
considers on reasonable grounds that this would prejudice the investigation or would be
counter to the public interest. Section 82P(3) clarifies that the IBAC is not required to give
reasons for forming such an opinion.

Section 82Q relates to the IBAC’s ability to examine a person on oath or affirmation, and
empowers an authorised IBAC Officer to: require a person summoned to attend an
examination to take an oath or make an affirmation; administer the oath or affirmation;
examine the person in accordance with the witness summons; and require the person to
produce documents or things in accordance with the witness summons. Section 82Q(3)
provides that an IBAC Officer may take a statutory declaration from any witness or other
person.

Section 82R relates to the video recording of an examination. Section 82R(1) specifies that if
a person attends the IBAC for an examination in accordance with a witness summons, the
IBAC must ensure that the person’s attendance is video recorded. Section 82R(2) provides
that, subject to subsection (3), evidence of anything said by the person during the attendance
is inadmissible against any person in any court or tribunal proceeding, unless the attendance
was video recorded and the recording is available to be tendered in evidence. However,
subsection (3) provides that a court may admit evidence that is otherwise inadmissible
because of subsection (2), if it is satisfied that there are exceptional circumstances justifying
the admission of the evidence. Subsection (4) requires that a person examined be provided
with a copy of the video recording and any transcript created, unless the IBAC considers on
reasonable grounds that doing so may prejudice an investigation. If so, the IBAC must allow
that person to view the video recording at the IBAC premises at any reasonable time.

Section 82S provides that the IBAC must give the Victorian Inspectorate a copy of the video
recording and any transcript as soon as possible after an examination.

Section 82T, creates two offences for summoned witnesses who fail to attend an
examination. If a person duly served with a witness summons, without reasonable excuse,
fails to attend in accordance with the witness summons, or fails to attend from day to day
unless excused or released from attendance by the IBAC, a penalty of 240 penalty units or
imprisonment for 2 years, or both, applies.

Section 82U makes it an offence for a witness duly served with a witness summons, without
reasonable excuse, to refuse or fail to answer a question that the IBAC requires to be
answered. The penalty for doing so is 240 penalty units or imprisonment for 2 years or both.

Section 82V makes it an offence for a person duly served with a witness summons, without
reasonable excuse, to refuse or fail to produce a document or other thing that he or she was
required to produce by the summons. The penalty for doing so is 240 penalty units or
imprisonment for 2 years or both.

Section 82W makes it an offence for a witness duly served with a witness summons, without
reasonable excuse, to refuse or fail to take an oath or make an affirmation when required.
The penalty for doing so is 240 penalty units or imprisonment for 2 years or both.

---

73 Explanatory Memorandum, p. 33.
74 ibid., p. 34.
Division 2 – Arrest for failure to appear

Section 82X sets out the procedure relating to an arrest warrant for a witness who fails to appear. Section 82X(1) provides that the IBAC may apply to a Supreme Court Judge for the issue of a warrant to arrest a person, if the IBAC believes that the person was duly served with a witness summons and has failed to appear in accordance with that summons. Section 82X(2) provides that the Judge may issue the warrant if satisfied by evidence on oath that there are reasonable grounds for the IBAC's belief. Section 82X(3) provides that the rules to be observed for an arrest warrant under this section are those that apply under the Magistrates Court Act 1989 (except for sections 62, or 64(2), (3) and (4)).

Section 82X(4) provides that a person arrested under an arrest warrant must be brought before the IBAC as soon as practicable and may be detained in police custody until excused by the IBAC from attendance. Section 82X(5) specifies that the issue or arrest of a person under an arrest warrant does not relieve the person from any liability for non-compliance with the witness summons.

Section 82Y relates to bail for persons arrested. Section 82Y(1) provides that a person must be brought before the Supreme Court if it is not practicable for the person to be brought before the IBAC within a reasonable time after the arrest. Section 82Y(2) provides that the court must deal with that person in accordance with the Bail Act 1977 as if he or she had been accused of an offence.

Section 82Z gives the IBAC power to direct that a person arrested under an arrest warrant be detained in a prison or police gaol for the purpose of ensuring attendance at an examination if it is satisfied that there are reasonable grounds to believe detention is necessary to prevent the person from escaping from police custody, or to ensure that person's safety. Section 82Z(2) provides for the IBAC to give a written direction that such a person be delivered into the custody of a member of the police force for the purpose of bringing the person before the IBAC.

Section 82ZA provides that the IBAC must give the Victorian Inspectorate a written report within three days after the issue of an arrest warrant, which must specify the name of the person, and the reasons for it.

Division 3 – Privileges and secrecy provisions applying to examinations

Sections 82ZB through to 82ZG apply to persons that are subject to restrictions on the disclosure of information as a result of other Acts or claims of privilege. The Bill makes it clear that any obligation that police personnel have to maintain secrecy or otherwise restrict the disclosure of information is overridden and not applicable with regard to IBAC examinations (s 82ZB).

The privilege against self-incrimination is abrogated for all persons giving evidence in accordance with a witness summons (s 82ZC). Any evidence that might tend to incriminate the person or make a person liable to a penalty is inadmissible for the purposes of a judicial hearing, except for the circumstances set out in section 82ZC(2):

- perjury or giving false information; or
- an offence against this Act; or
- an offence against the Victorian Inspectorate Act 2011; or
- contempt of the IBAC under this Act; or
- a disciplinary process or action.

---

75 ibid., p. 35.
Section 82ZC(3) states that section 30 of the Evidence (Miscellaneous Provisions) Act 1958 does not apply for the purposes of an IBAC examination.\(^{76}\)

The Bill contains a procedure in section 82ZD for determining claims of privilege or a requirement for secrecy. If a person makes such a claim, they must attend the IBAC in accordance with the summons. The IBAC will then decide whether or not to withdraw the requirement to answer. In the case of a document or other thing, if the requirement is not withdrawn then the document is sealed in an envelope or otherwise secured. The IBAC must then apply to the Supreme Court within seven days for a decision according to the procedure set out in section 82ZE and, if relevant, hand over the item to the Court until a decision is made. If no application is made, the item must be returned to the claimant.

In determining the application the Court must first assess whether the person is subject to a secrecy requirement or privilege. The Court may inspect any item subject to a claim and return it to either the claimant or the IBAC depending on the decision.\(^{77}\) If the decision pertains to a requirement to give an answer, the Court can order that the claimant provide an answer (s 82ZF).

Section 82ZG provides legal practitioners and witnesses with the same protections as provided in proceedings in the Supreme Court.

**Division 4 – Assistance for witnesses**
Sections 82ZH and 82ZI outline what assistance is available to witnesses. The Bill specifies that witnesses are entitled to be reimbursed as per the schedule for expenses incurred. Witnesses are also entitled to apply for legal assistance, which may be subject to limits or other conditions on approval (s 82ZI(2)).

**Division 5 – Contempt**
Section 82ZJ outlines the circumstances in which a person may be in contempt of the IBAC. A person is in contempt if they have been served with a witness summons and:

- fail to attend; or
- fail to produce a document or thing as required; or
- refuse to be sworn or make an affirmation; or
- refuse or fail to answer a relevant question; or
- engage in threatening or obstructive behaviour; or
- engage in any conduct that would constitute contempt in the Supreme Court.

If a person appears to be guilty of contempt the IBAC may issue a certificate of charge and an arrest warrant (s 82ZK). The person may then be held in police custody until such time as they are brought before the Supreme Court ‘to be dealt with according to the law’. The IBAC must, within three days of issue, report the details of the arrest warrant to the Victorian Inspectorate (s 82ZL).

Section 82ZM pertains to bail pending a court appearance for contempt. A person may apply for bail and be discharged from custody in accordance with the Bail Act 1977 as if the person

\(^{76}\) Section 30 of the Evidence (Miscellaneous Provisions) Act 1958 provides as follows: ‘No statement made by any person in answer to any question before any board or commission empowered under the provisions of this Act or other like body or person empowered under any other Act to summon witnesses shall (except in case of a charge against such person for perjury committed by him in making such statement) be admissible in evidence in any proceedings civil or criminal against him, nor be made the ground of any prosecution action or suit against him; and a certificate signed by the chairman of such board or commission or body or by the sole commissioner or by such person that such statement was made in answer to any such question or in the course of any inquiry before such board commission body or person shall be conclusive evidence that the same was so made’.

\(^{77}\) Section 87ZF(7) provides for a 120 penalty unit fine or 12 months imprisonment, or both, to apply if a document or thing is inspected without the requisite authority.
had been accused of an offence. The IBAC must be notified if the person elects to apply for bail. Subject to these provisions, the IBAC may apply for a person to be held in custody to either ensure the safety of the person, to prevent them from escaping custody, or to ensure they appear before the Supreme Court. If a person is detained, the Bill states that they must be provided with the same level of accommodation and meals as a juror that is held overnight (s 82ZN).

Section 82ZO specifies that the Supreme Court is to deal with contempt of the IBAC as if it were contempt of an inferior court. Further, the certificate of charge is to be taken as evidence of the matters set out in or attached to it. A person may be charged with either an offence under the Bill or contempt, or both, but may only be punished once for the same act or omission (s 82ZP). This concludes the new sections inserted under the new Part 5A – Examinations.

Outcome of investigation
Clause 23 amends section 88 of the IBAC Act to provide IBAC with the option of making a referral after conducting an investigation. The section currently provides for the IBAC to either: make a recommendation; transmit a special report; advise a complainant; or to initiate any combination of these options.

Persons who receive reports or information prior to publication
Clause 24 inserts new section 89A making it an offence to disclose information contained in an IBAC report before it has been published by the IBAC in accordance with the IBAC Act. A contravention of this section is punishable by a 120 penalty unit fine or 12 months imprisonment, or both. A range of exceptions are available where the disclosure is:

- made in accordance with an IBAC direction or authorisation;
- made by an officer of an entity to other officers in the entity for the purposes of responding to a draft report;
- made for the purposes of obtaining legal advice with regard to a draft report;
- otherwise authorised or required under the Act.

In addition to the above circumstances, a disclosure is permitted if it is made for the purposes of making a complaint to the Victorian Inspectorate, or for the purpose of complying with a witness summons from the Inspectorate. A person may disclose information that has been published by the IBAC and made public in accordance with the Act. However, a person that received information as a result of one of the above exceptions may not disclose the information to other parties except in accordance with the Act.

Power for the IBAC to bring criminal proceedings
Clause 28 inserts new section 106A, which provides for the IBAC to bring criminal proceedings for an offence in relation to a matter arising out of an IBAC investigation. The proceedings may be instigated by the IBAC, a sworn IBAC Officer authorised by the Commissioner, or a member of the police force.

Validity and effect of notices, orders and other documents and deemed service
Clause 29 amends section 108 of the IBAC Act to exclude new Divisions 2 and 3 of Part 2 and new Part 5A. Section 108 provides that notices, orders and other documents or the service of such documents, are not affected by minor errors that are unlikely to mislead.

Immunity of the IBAC and IBAC officers
Clause 30 inserts new section 108A which provides IBAC officers with immunity from personal liability for anything ‘reasonably done or omitted to be done in good faith’ in the performance of a function under the Act, or reasonably thought to be a function under the IBAC Act. Any liability that arises in such circumstances attaches to the State.
Regulations

Clause 31 amends section 111(b) of the IBAC Act, which provides details of the matters that may be subject to Regulations. The following matters are included in the amendment: a person or body for the purposes of the definition of integrity body in section 3; a person or body for the purposes of the definition of law enforcement agency in section 3; a person or body for the purposes of the definition of prosecutorial body in section 3; the content and form of a confidentiality notice; a person or body for the purposes of section 49C(2)(g); the content and form of a witness summons; matters which constitute proof of age for the purposes of section 82I(2); content and form of a direction under section 82M; for the purposes of section 82P(1)(e), actions which the IBAC is to take before questioning a witness at an examination or requiring a witness to produce a document or other thing; scales of expenses payable to witnesses for the purposes of section 82ZH; for the purposes of section 82ZI, persons who can approve legal assistance; a person or body for the purposes of section 82ZI(5).

Part 3 – Amendment of the Victorian Inspectorate Act

New Part 2A inserted

Clause 32 inserts new Part 2A regarding matters to be reported to the Victorian Inspectorate by the IBAC. New section 28G requires the IBAC, when requested by the Victorian Inspectorate, to provide a written report ‘as soon as possible after the request is received’ detailing the examination of a person by the IBAC. Clause 33 and 34 make minor amendments to the Victorian Inspectorate Act 2011.

Part 4 – Amendments to Other Act and Repeal

List of persons who may witness statutory declarations

Clause 35 of the Bill makes an amendment to section 107A of the Evidence (Miscellaneous Provisions) Act 1958 to include IBAC Officers on the list of persons who may witness statutory declarations.

---

78 Referral of complaint or notification for investigation by another person or body (s 49C).
79 Witness summons directed to person under 16 years (s 82I).
80 Legal representation of witnesses and other persons (s 82M).
81 Actions to be taken before questioning of a witness or requiring production of a document or other thing (s 82P).
82 Reimbursement of expenses (s 82ZH).
83 Provision of legal assistance to witnesses (s 82ZI).
84 Section 82ZI(5) provides the following: ‘For the purposes of this section, legal assistance means payment to an Australian legal practitioner or a prescribed person or body for legal advice and representation provided to a person appearing as a witness in an examination’.
4. Other Jurisdictions

This section of the Current Issues Brief provides information about anti-corruption commissions in other Australian jurisdictions that is relevant to the Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012. It looks at New South Wales’ Independent Commission Against Corruption (ICAC) and Police Integrity Commission (PIC), Queensland’s Crime and Misconduct Commission (CMC), Western Australia’s Corruption and Crime Commission (CMC) and Tasmania’s Integrity Commission.

The Parliamentary Library’s Current Issues Brief on the Independent Broad-based Anti-corruption Commission Bill 2011 outlined the history and composition of each Australian anti-corruption commission, including the role of the Commissioner, and the prevention and education functions of each commission. Additionally, the Parliamentary Library’s Current Issues Brief on the Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011 provided information on the jurisdiction, investigative powers, and reporting procedures of the anti-corruption commissions.

This section provides an overview of the procedures of the anti-corruption commissions relating to the receipt of complaints, the conduct of examinations, and the referral of matters post-investigation for prosecution or other action.

New South Wales

The Independent Commission Against Corruption Act 1988 (‘the ICAC Act’) established the NSW Independent Commission Against Corruption (ICAC).

ICAC Receipt of Complaints and Referrals to Other Agencies

The ICAC is required to focus its attention and resources on ‘serious and systemic corrupt conduct’. Only a small number of matters with the potential to expose serious or systemic corrupt conduct will therefore meet the criteria for a full investigation. For example, in 2010-11, three per cent of complaints resulted in a full investigation.

Many matters do not meet the definition of corrupt conduct in the ICAC Act and are therefore accorded no further action by the ICAC. A significant number of these matters are referred on to other oversight agencies such as the NSW Ombudsman, the Division of Local Government, or on to the agency concerned.

Sections 53 and 54 of the ICAC Act empower the ICAC to request an investigation and report to be conducted by an ‘appropriate’ agency or oversight body (‘section 53/54 referrals’). This power is generally exercised with regard to ‘relatively serious matters’. The ICAC may recommend a course of action to be taken by the relevant agency and the time within which it should be taken. Section 53/54 referrals allow the ICAC to oversee an investigation by the agency and require the agency to report its findings to the ICAC. The ICAC will only refer matters under sections 53 and 54 ‘if it considers that the agency will be

---

86 ibid., p. 25.
87 ibid.
88 ibid., p. 24.
89 ibid.
90 ibid.
91 s 53(3).
92 s 54. Also see Independent Commission Against Corruption (2011) op. cit., p. 24.
able to investigate the matter, and will consult with the agency before making a referral. In 2010-11, 36 referrals were made under these provisions.

Table 1, below, provides an overview of the ICAC’s decisions in relation to each matter it received in 2010-2011, compared to the previous two years.

**Table 1: Decisions Made by the ICAC’s Assessment Panel in 2010-2011, Compared to the Previous Two Years**

<table>
<thead>
<tr>
<th>Decisions to act upon a matter</th>
<th>2010–11</th>
<th>2009–10</th>
<th>2008–09</th>
</tr>
</thead>
<tbody>
<tr>
<td>Referred to Assessments Section for further enquiries (includes section 53/54 referrals)</td>
<td>342</td>
<td>13%</td>
<td>312</td>
</tr>
<tr>
<td>Referred to the Corruption Prevention Division for further action</td>
<td>7</td>
<td>0%</td>
<td>18</td>
</tr>
<tr>
<td>Referred for investigation</td>
<td>67*</td>
<td>3%</td>
<td>139</td>
</tr>
<tr>
<td>Total number of decisions to act upon a matter</td>
<td>416</td>
<td>16%</td>
<td>469</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Decisions to decline a matter</th>
<th>2010–11</th>
<th>2009–10</th>
<th>2008–09</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediate referral to another agency or no action taken by the Commission, following initial enquiries or research when needed</td>
<td>2,169**</td>
<td>84%</td>
<td>2,127</td>
</tr>
<tr>
<td>Total number of decisions made</td>
<td>2,585</td>
<td></td>
<td>2,596</td>
</tr>
</tbody>
</table>

* One matter was referred twice for investigation.
** A total of 1,803 were neither acted upon nor referred to another agency.


**ICAC Conduct of Examinations**

The ICAC Act provides the ICAC with a ‘wide range of coercive powers’ in order to investigate alleged corruption, such as the power to conduct compulsory examinations and hold public inquiries.

Section 30 of the ICAC Act provides the ICAC with the power to conduct compulsory examinations, which must be held in private. Before conducting an examination, the ICAC must be satisfied that it is in the public interest to do so. The compulsory examination must be conducted by the Commissioner or Assistant Commissioner. A person required to attend such an examination must be informed of the nature of the complaint being investigated, however, failure to comply with this does not invalidate the examination.

The ICAC Act requires the ICAC to conduct compulsory examinations ‘with as little emphasis on an adversarial approach as is possible’. The Commissioner can give directions as to who may be present at a compulsory examination. The ICAC may advise the person of any findings it has made as a result of the examination, although this is not mandatory.

---

94 ibid.
95 ibid., p. 36.
96 s 30(5).
97 s 30(1).
98 s 30(2).
99 ss 30(3), 30(4).
100 s 17(2).
101 s 31A.
102 s 30(6).
For the purposes of an investigation, the ICAC may conduct a public inquiry if it is satisfied that it is 'in the public interest' to do so. In determining whether it is in the public interest, the ICAC will consider the following:

(a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
(b) the seriousness of the allegation or complaint being investigated,
(c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
(d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

In 2010-11, the ICAC conducted nine public inquiries over 65 days, and 130 compulsory examinations.

A public inquiry must be conducted by the Commissioner or Assistant Commissioner. Section 31(6) of the ICAC Act provides that a person who is required to attend a public inquiry is entitled to be informed of the general scope and purpose of the inquiry, as well as the nature of the complaint being investigated. However, failure to comply with this provision does not invalidate the public inquiry.

An inquiry is to be held in public, although the ICAC may decide to hold part of the inquiry in private if it considers it to be in the public interest to do so. The Commissioner can give directions as to who may be present at any part of a public inquiry that is held in private. Like compulsory examinations, the ICAC Act requires the Commission to conduct public inquiries 'with as little emphasis on an adversarial approach as is possible'.

Section 35 of the ICAC Act empowers the ICAC Commissioner to summon a person to appear before the Commission at a compulsory examination or public inquiry, in order to give evidence, produce a specified document or other thing, or both. If a person served with a summons fails to attend, the Commissioner may issue an arrest warrant for that person. The Act also specifies that under certain circumstances, the Commissioner may issue an arrest warrant even if a person has not yet been issued with a summons to appear.

The ICAC may administer an oath or affirmation to a person appearing at a compulsory examination or public inquiry, and accordingly, may take evidence on oath or affirmation. A person who gives the ICAC false or misleading evidence during a compulsory examination or public inquiry, knowing it to be false or misleading, will be guilty of an indictable offence.

According to section 17(1), the ICAC is not bound by the rules of evidence and can inform itself on any matter in such manner as it considers appropriate.

---

103 See s 31(1).
104 s 31(2).
106 s 31(4).
107 s 31(7).
108 s 31(8), 31(9).
109 s 31A.
110 ss 31(2), 31(9).
111 s 35(1).
112 See s 36.
113 ss 36(2), 36(4). For example, if the Commissioner is satisfied that it is probable that a person whose evidence is desired and necessary for an investigation will not attend before the Commission to give evidence without being compelled to do so, or if about to or is making preparations to leave the State and the person’s evidence will not be obtained by the Commission if the person departs.
114 s 35(3).
115 s 87(1).
Privilege:
When a witness is summoned to appear before the ICAC at a compulsory examination or public inquiry, the ICAC can compel that witness to answer any question relevant to an investigation or to produce any document or thing as required by the summons.116

A witness summoned to appear before the ICAC is not excused from answering any question or producing any document or thing on the ground of self incrimination or on any other ground of privilege (s 37(2)). Therefore, a witness must comply with such a direction, even if the answer or production of the item might incriminate them.117 A witness may object to answering a question or producing an item, however, they must still comply with the direction.118 If a witness objects, the answer or item produced is not admissible as evidence against them in any subsequent criminal, civil or disciplinary proceedings, except for proceedings for an offence against the ICAC Act or proceedings for contempt under the ICAC Act.119

The available scholarship suggests that section 37(2) of the ICAC Act also abrogates legal professional privilege120 and the privilege of public interest immunity for the purposes of ICAC hearings.121 However, section 37(5) preserves legal professional privilege with regard to privileged communication between a lawyer and client if it relates to the appearance of a person at an ICAC hearing. The privilege can be waived by a person with the authority to do so.122

Section 122 of the ICAC Act ‘precludes any action contrary to Article 9 of the Bill of Rights and thus parliamentary privilege’.123 It states:

Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.124

Legal representation during examinations:
The ICAC may authorise a person giving evidence at a compulsory examination or public inquiry to be represented by an Australian legal practitioner.125 The ICAC is required to give such a person a ‘reasonable opportunity’ to be legally represented.126 The ICAC may also appoint a legal practitioner to assist it during a public inquiry or compulsory examination.127 With leave of the ICAC, the person’s legal practitioner, or the legal practitioner appointed by the ICAC to assist it, may examine or cross-examine any witness on ‘any matter that the Commission considers relevant’.128

---

116 See s 37(1); Independent Commission Against Corruption (2011) op. cit., p. 33.
117 See s 37(2); ibid., pp. 33-34.
118 See ss 37(4), 38; ibid., p. 34.
119 See s 37(4); ibid.
120 See, for example, Hall (2004) op. cit., p. 591; Donaghue (2001) op. cit. p. 109.
122 s 37(5).
124 s 122.
125 s 33(1).
126 s 33(2).
127 s 33(3).
128 s 34(1). With leave of the Commission, a person authorised to appear at a compulsory examination or public inquiry, may also examine or cross examine any witness on a relevant matter.
ICAC Investigation Outcomes: Referral of Matters for Prosecution

While the ICAC can investigate alleged corruption and can make findings of corrupt conduct, it is not a court or disciplinary tribunal, so it cannot conduct prosecutions or disciplinary proceedings as a result of its investigations.\(^{129}\)

The ICAC is authorised to include in its investigation reports, statements as to any of its findings, opinions and recommendations, and reasons for such statements.\(^{130}\) Section 74B of the ICAC Act specifies that the ICAC must not include statements as to a finding of guilt, nor recommend prosecution for a criminal or disciplinary offence.\(^{131}\) However, a report can include a statement as to whether the ICAC is of the opinion that consideration be given to: obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of a person for a specified criminal offence, the taking of action against the person for a specified disciplinary offence, or the dismissal of a public official.\(^{132}\)

Following a referral to the DPP for consideration, the DPP advises the Commission whether prosecution proceedings are warranted.\(^{133}\) A list of matters referred to the DPP, and their outcomes, is published in the ICAC’s annual report.\(^{134}\)

Police Integrity Commission

The ICAC’s jurisdiction does not extend to the police force. Rather, the Police Integrity Commission Act 1996 (NSW) (‘the PIC Act’) provides the Police Integrity Commission (PIC) with the power to detect and investigate police misconduct in NSW.

PIC Referral Procedures

Complaints can be made directly to the PIC, referred by another agency such as the NSW police force (NSWPF), extracted from the NSWPF complaints management system, or initiated by the PIC itself.\(^{135}\) In 2010-11, the PIC assessed 1,186 complaints, from which nine full investigations and 47 preliminary investigations were conducted (all of which were in relation to sworn officers).\(^{136}\)

In relation to a police complaint, if the PIC decides not to investigate a matter itself, it may refer the complaint or part of the complaint to the Ombudsman or the Commissioner of Police to be dealt with in accordance with Part 8A of the Police Act 1990 (NSW).\(^{137}\)

PIC Examination Powers

Section 32 of the PIC Act empowers the PIC to conduct hearings for the purposes of an investigation.\(^{138}\) A hearing may be held in private or public, as determined by the Commission.\(^{139}\) The Commission is obliged to ‘have regard to any matters that it considers to be related to the public interest’ when making this decision.\(^{140}\) According to its Annual Report, the PIC conducted 24 private hearings and one public hearing in relation to four investigations in 2010-11.\(^{141}\)

---

\(^{129}\) Independent Commission Against Corruption (2011) op. cit., p. 38.
\(^{130}\) s 74A. See also s 13(5).
\(^{131}\) Section 74B(2) of the ICAC Act states that a finding or opinion that a person has engaged, is engaging or is about to engage in corrupt conduct is not a finding or opinion that the person is guilty of or has committed, is committing or is about to commit a criminal or disciplinary offence.
\(^{132}\) s 74A(2).
\(^{133}\) Independent Commission Against Corruption (2011) op. cit., p. 38.
\(^{134}\) See, for example, ibid., Appendix 3, pp. 110-125.
\(^{135}\) Police Integrity Commission (2011) op. cit., p. 18.
\(^{136}\) ibid., p. 19.
\(^{137}\) Police Integrity Commission Act 1996, s 70(1).
\(^{138}\) s 32(1).
\(^{139}\) s 33(1).
\(^{140}\) s 33(3); see also Police Integrity Commission (2011) op. cit., p. 28.
\(^{141}\) Police Integrity Commission (2011) op. cit., p. 28.
A person appearing before a PIC hearing is ‘entitled to be informed of the general scope and purpose of the hearing’, unless this would ‘seriously prejudice’ the investigation.142

The Commissioner may summon a person to appear at a hearing to give evidence, and/or produce specified documents or other things,143 and can compel witnesses to answer questions and produce required items.144 If a person who is served with a summons fails to attend, the Commissioner may issue an arrest warrant for that person.145 A witness summoned to attend a hearing is not excused from answering a question or producing a document or thing on the ground that it may incriminate them, ‘or on any other ground of privilege’.146 However, if a witness objects to answering a question or producing an item, while they must still comply with the direction, the answer or item is not admissible as evidence against them in any subsequent criminal or civil proceedings, except for an offence against the PIC Act, contempt under the PIC Act, or in any disciplinary proceedings.147 Section 40(5) preserves legal professional privilege with regard to privileged communication between a lawyer and client if it relates to the appearance of a person at a PIC hearing, unless the privilege is waived by a person with the authority to do so.

At a hearing, the PIC may take evidence on oath or affirmation.148 Accordingly, the PIC may require a person appearing at a hearing to take an oath or make an affirmation.149 A person who gives the PIC false or misleading evidence during a hearing, knowing it to be false or misleading, will be guilty of an indictable offence.150

The PIC may authorise a person appearing at a hearing to have legal representation.151 With leave of the Commission, a person appearing at a hearing, or their legal practitioner, may examine or cross-examine any witness on any relevant matter.152

**PIC Investigation Outcomes: Referral of Matters for Prosecution**

At the conclusion of an investigation, the PIC makes a final assessment, which may include (but is not limited to) one of the following outcomes:

- referral to the Office of the Director of Public Prosecutions (ODPP), recommending the consideration of criminal charges;
- referral to NSW Police Force for appropriate managerial action;
- dissemination of relevant information to another agency; or
- no further action.153

In 2010-11, 12.1 per cent of completed investigations by the PIC were referred to the ODPP for consideration of prosecution action.154

The PIC Act also grants the PIC the power, either before or after investigating a matter, to refer the matter for investigation or action to: a police authority, the New South Wales Crime

---

142 s 32(4).
143 ss 38(1), 38(2).
144 s 40(1).
145 s 39(1).
146 s 40(2).
147 See ss 40(3), 40(4). An answer or item produced may also be used in deciding whether to make an order under certain sections of the Police Act 1990 (see s 40(3) of the Police Integrity Commission Act for a list of the relevant sections).
148 s 38(3).
149 s 38(3)(a).
150 s 107(1).
151 s 35.
152 s 37.
153 Police Integrity Commission (2011) op. cit., p. 28.
154 ibid., p. 27.
Commission (if the matter relates to a Crime Commission officer), or any authority that the PIC considers appropriate in the circumstances.155

Queensland

The Crime and Misconduct Act 2001 (Qld) established the Queensland Crime and Misconduct Commission (CMC).

**CMC Receipt of Complaints and Referrals to Other Agencies**

The CMC can investigate misconduct matters that arise through the Commission’s own intelligence work, or complaints made by members of the public, public sector agencies, public officials or official sources.156 Public officials have a statutory duty to report misconduct under section 38 of the CMC Act.

In 2010-2011, the CMC received a total of 5,124 complaints with 65 per cent being referred by public agencies, and 33 per cent made directly to the CMC by members of the public.157 The complaints received contained a total of 11,909 allegations of misconduct with 54 per cent of allegations relating to police, 38 per cent relating to public sector agencies, seven per cent relating to local government and the remainder relating to other agencies (mainly politicians).158

Once received, the CMC assesses the complaints, and investigates ‘the most serious allegations’, as well as matters ‘where the public interest requires an independent investigation to be conducted’.159 Other complaints are referred to an appropriate agency or the Commissioner of Police to investigate, with the CMC adopting a monitoring role.160 The CMC may also refer a complaint to a public official to be dealt with in cooperation with the Commission.161

In 2010-2011, the CMC referred the majority of the complaints (88 per cent) to the appropriate agency to deal with (subject to the CMC’s ‘monitoring role’).162 The remainder were either assessed as warranting no further action (11 per cent), or retained by the CMC for investigation (one per cent).163 Table 2 outlines the CMC’s assessment outcomes in 2009-2010 and 2010-2011:

---

155 See ss 77, 83.
158 ibid., pp. 28-29. For example, alleged misconduct that may be prevalent or systemic, or serious allegations that have ‘the potential to undermine public confidence in an agency and public administration generally’.
159 ibid., pp. 28, 30. Seven per cent of the matters referred to agencies were reviewed by the CMC to ensure ‘that the respective agencies are dealing with the matter appropriately’ (see p. 30).
160 s 46(2); ibid., pp. 28, 30. Seven per cent of the matters referred to agencies were reviewed by the CMC to ensure ‘that the respective agencies are dealing with the matter appropriately’ (see p. 30).
161 ibid.
163 ibid.
Table 2: CMC Assessment Outcomes

<table>
<thead>
<tr>
<th></th>
<th>2010–11total: 5053</th>
<th>2009–10total: 4649</th>
</tr>
</thead>
<tbody>
<tr>
<td>Referred to appropriate agency to deal with</td>
<td>4439</td>
<td>3967</td>
</tr>
<tr>
<td>Retained for CMC investigation</td>
<td>77</td>
<td>110</td>
</tr>
<tr>
<td>No further action warranted</td>
<td>537</td>
<td>572</td>
</tr>
</tbody>
</table>


**CMC Conduct of Examinations**

The CMC has the power to conduct ‘coercive hearings’. Generally, a hearing is not open to the public. The CMC may, however, open a hearing to the public if it considers that closing it would be unfair to a person or contrary to the public interest. For example, if it involves a complaint that includes ‘wide-ranging allegations’ with the ‘potential to reduce public confidence in fundamental systems of public administration and government’.

According to section 178 of the CMC Act, only the CMC Chairperson can conduct a public hearing. However, a closed hearing may be conducted by the Chairperson, an Assistant Commissioner, or ‘another person qualified for appointment as the Chairperson’.

The CMC can compel people to attend hearings to give evidence or produce a stated document or thing, by issuing an attendance notice. When conducting a hearing, the presiding officer ‘must act quickly’, and with ‘as little formality and technicality, as is consistent with a fair and proper consideration of the issues’. The presiding officer is not bound by the rules of evidence when conducting a hearing.

The presiding officer may administer an oath or take a statutory declaration during hearing proceedings. Providing false or misleading statements or documents is an offence under the CMC Act.

---


165 s 177.


168 This must be decided by the Chairperson. See s 178(3).

169 s 82. Notices that require immediate attendance may only be issued with the approval of a Supreme Court Judge (s 85). A notice may be a confidential document (s 84).

170 s 180(1)(a).

171 s 180(1)(b).

172 s 180(2).
Privilege:
Witnesses are compelled to answer questions put to them at a CMC hearing. The person is not entitled to remain silent, or to refuse to answer the question on the ground of the self-incrimination privilege or the ground of confidentiality. However, if a witness objects to answering a question or producing an item on the ground of self-incrimination, the answer given or item produced is not admissible in evidence against the individual in any civil, criminal or administrative proceeding, except in proceedings relating to an offence against the CMC Act or for contempt.

A witness may, however, be entitled to refuse to answer the question on the following grounds of privilege—

- legal professional privilege;
- public interest immunity;
- parliamentary privilege.

Further, if a person is required to produce a document or other item at a CMC hearing under an attendance notice, they are compelled to do so, unless that person has a ‘reasonable excuse’. Self-incrimination is not a reasonable excuse.

Legal Representation:
A witness may be legally represented at a hearing and may be examined, cross-examined or re-examined ‘on any matter the presiding officer considers relevant’ by—

- the presiding officer; or
- counsel assisting the commission at the hearing; or
- a person authorised by the presiding officer; or
- a lawyer representing the witness.

CMC Investigation Outcomes: Referral of Matters for Prosecution
The CMC is not a court, and as such, it can not determine guilt nor discipline a person following a misconduct investigation. However, as a result of an investigation, the CMC can refer a matter to the Director of Public Prosecutions for consideration of criminal prosecution, the Queensland Civil and Administrative Tribunal, or to a relevant CEO in order to consider disciplinary action. According to the CMC’s Annual Report, during 2010-11, 170 charges were recommended, the majority relating to police (164) and the remainder relating to the public sector (excluding local government). Of the 164 charges relating to police, the CMC recommended that 85 criminal charges and 79 disciplinary charges be instituted.

---

173 See ss 217-218.
174 s 192(1).
175 s 192(2).
176 See s 197. Note that s 197(4) states that a document is also admissible in a civil proceeding about a right or liability conferred or imposed by the document.
177 s 192(2A).
178 s 188(2). Note that s 197 does not apply to a document or thing produced under s 188.
179 s 188(3).
180 s 181(1).
181 s 181(2).
183 ibid. See also ss 49 and 50.
184 It should be noted that the significant difference in the number of investigations and charges for police for the reporting year 2010-11, compared to 2009-10, ‘primarily results’ from the ‘completion of Operation Tesco’. Crime and Misconduct Commission (2011) op. cit., pp. 34-35.
185 ibid., p. 34.
186 Crime and Misconduct Commission (2011) op. cit., p. 35.
Western Australia


**CCC Receipt of Complaints and Referrals to Other Agencies**
The CCC can receive allegations about misconduct from a range of sources including: members of the public, Western Australian Police (WAPOL), public sector agencies, and the CCC’s own investigations (‘propositions’).\(^{187}\) In 2010-2011, the CCC received 3,184 reports and notifications of misconduct, which included 11 of the CCC’s ‘own propositions’.\(^{188}\) Following assessment of an allegation, the CCC can either investigate the matter itself, refer it to an ‘appropriate authority’\(^{189}\) to take further action, investigate in cooperation with an appropriate authority, or take no action.\(^{190}\) In 2010-11, one per cent of all matters were investigated by the CCC’s own investigation unit.\(^{191}\) Table 3 below provides an overview of the CCC’s assessment decisions in 2009-2010 and 2010-2011:

<table>
<thead>
<tr>
<th>Commission Assessment Decisions</th>
<th>2009-2010</th>
<th>2010-2011</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>Referred to home agency for investigation and review</td>
<td>1404</td>
<td>43%</td>
</tr>
<tr>
<td>Referred to WAPOL for (external) criminal investigation</td>
<td>16</td>
<td>0%</td>
</tr>
<tr>
<td>Referred to both home agency and WAPOL</td>
<td>122</td>
<td>4%</td>
</tr>
<tr>
<td>Referred to CCC Investigations Unit</td>
<td>29</td>
<td>1%</td>
</tr>
<tr>
<td>Referred to independent authority</td>
<td>7</td>
<td>0%</td>
</tr>
<tr>
<td>Take no action</td>
<td>457</td>
<td>14%</td>
</tr>
<tr>
<td>Referred to agency for Systems-Based Evaluation(^8)</td>
<td>1150</td>
<td>35%</td>
</tr>
<tr>
<td>Referred to appropriate authority other than home agency</td>
<td>43</td>
<td>1%</td>
</tr>
<tr>
<td>Referred to home agency and other appropriate authority</td>
<td>7</td>
<td>0%</td>
</tr>
<tr>
<td>Referred to Commission CCC Investigations Unit in cooperation with appropriate authority</td>
<td>2</td>
<td>0%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>3,237</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>


\(^8\) In 2009-2010 this assessment category only included WAPOL, Department of Education, DCS, Department for Child Protection and the Public Transport Authority. WA Health was included from 1 January 2011. This category of referral commenced 1 January 2008.


\(^{189}\) The CCC’s Annual Report explains that ‘Section 3 of the CCC Act defines “appropriate authority” as “a person, body or organisation who or which is empowered by a law of the state to take investigatory or other action, or both, in relation to misconduct, but does not include an independent agency or either House of Parliament”’. Corruption and Crime Commission (2011) op. cit., p. 19.

\(^{190}\) s 33.

If the CCC refers the matter to an appropriate authority, the CCC may make a recommendation as to the course of action that should be taken and the time in which it should be taken.\textsuperscript{192} When an allegation is referred to an appropriate agency for further investigation, it must prepare and submit a report of the action taken.\textsuperscript{193} In addition, the agency’s progress is monitored by the CCC and may also be reviewed by the CCC on completion to ‘ensure the outcomes are appropriate’.\textsuperscript{194}

**CCC Conduct of Examinations**

The CCC Act grants the Commission a range of coercive powers, including: the ability to hold compulsory private or public examinations and summon witnesses.\textsuperscript{195}

According to section 137 of the CCC Act, the Commission may conduct an examination for the purposes of an investigation. The CCC may issue a summons to a person, which may require that person attend an examination to give evidence, produce a specified record or thing, or both.\textsuperscript{196} The summons may include a notation that prohibits its disclosure.\textsuperscript{197} Non-disclosure notations are primarily used to protect the integrity of ‘covert’ investigations; and disclosure of such notations is a punishable offence.\textsuperscript{198}

Part 7 of the CCC Act outlines the procedure relating to examinations. Before conducting an examination, the Commission must inform the witness of the general scope and purpose of the investigation, unless the Commission considers that in the circumstances it would be undesirable to do so.\textsuperscript{199}

The CCC Act establishes that the default position for an examination is that it be conducted in private.\textsuperscript{200} However, the CCC Act provides that the Commission may open an examination to the public, if ‘having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements it considers that it is in the public interest to do so’.\textsuperscript{201} From its inception in 2004 to 30 June 2011, the CCC has conducted private examinations in respect of 49 matters and public examinations in respect of 15 matters.\textsuperscript{202}

Section 135 makes it clear that the rules of evidence, except as stated in the CCC Act, do not apply to the CCC.\textsuperscript{203}

The CCC may compel witnesses to attend an examination, answer questions under oath, and produce requested items.\textsuperscript{204} The refusal to do so is a contempt of the Commission, which is punishable as a contempt of the Supreme Court.\textsuperscript{205} Providing false and misleading

---

\textsuperscript{192} s 37.
\textsuperscript{193} s 40.
\textsuperscript{194} ss 40, 41; Corruption and Crime Commission (2011) op. cit., p. 19.
\textsuperscript{195} See ss 96, 97, 137, 140.
\textsuperscript{196} s 96.
\textsuperscript{197} s 99. A notice issued under ss 94 or 95 may also include a notation restricting disclosure.
\textsuperscript{198} L. Roberts-Smith (2010) op cit., p. 5.
\textsuperscript{199} ss 138(1), 138(2).
\textsuperscript{201} s 140.
\textsuperscript{202} From its inception in 2004 to 30 June 2011, the CCC has initiated investigations in respect of 283 matters. Joint Standing Committee on the Corruption and Crime Commission (2012) op. cit., p. 3.
\textsuperscript{203} See also ibid., pp. 2, 3.
\textsuperscript{204} ss 96, 141.
\textsuperscript{205} ss 159, 160. See also: Roberts-Smith (2010) op. cit., p. 9.
evidence at an examination, or bribing a witness, are also punishable offences under the
CCC Act.  

Privilege:
A person required by the CCC to answer a question relevant to the investigation is not
excused from answering that question on the ground of self-incrimination, however, the
answer will not be admissible in evidence against that person in any criminal proceedings or
proceedings for the imposition of a penalty, other than for an offence against the CCC Act,
contempt proceedings, or a disciplinary action. Legal professional privilege is expressly
preserved in the CCC Act as a reason for not complying with a CCC request to answer
questions or produce records or things, except for public authorities or public officers in that
capacity.

In determining whether to allow the exercise of public interest immunity, the CCC’s Hearing
Practice Directions state that:

... the Commission must balance the public interest in withholding the production of the
document against the public interest in ensuring that inquisitors should have access to
relevant evidence... The Commission may convene a private examination to determine these
issues.

With respect to Parliamentary Privilege, section 3(2) of the CCC Act provides:

Nothing in this Act affects, or is intended to affect, the operation of the Parliamentary
Privileges Act 1891 or the Parliamentary Papers Act 1891 and a power, right or function
conferred under this Act is not to be exercised if, or to the extent, that the exercise would
relate to a matter determinable exclusively by a House of Parliament, unless that House so
resolves.

The CCC, in its Hearing Practice Directions, notes that ‘where a question of parliamentary
privilege arises during an investigation or Commission examination, the Commission will
invite the Speaker of the Legislative Assembly or the President of the Legislative Council (as
the case may be), to make submissions on the relevant issue and, if need be, to appear at a
private examination to determine the question’.

Legal Representation:
A witness may be legally represented when appearing at a CCC examination. According
to the Hon. Len Roberts-Smith, a former CCC Commissioner, no person appearing before
the CCC who has requested representation by a lawyer, has ever been denied that
request. The CCC may also be assisted by a legal practitioner.

A lawyer or other person assisting the CCC may, ‘so far as the Commission thinks proper’,
examine a witness ‘on any matter that the Commission considers relevant’. Similarly, a
person representing a witness may examine that witness, ‘so far as the Commission thinks
proper,’ on any matter the Commission considers relevant. Lawyers appearing before the

---

206 ss 168, 169.
207 s 160(2).
208 s 145. Also see Roberts-Smith (2010) op. cit., p. 9.
209 s 144. Also see ibid., p. 11.
211 ibid., p. 16.
212 s 142(1).
214 s 142(6).
215 s 143(1).
216 s 143(2).
Commission are subject to the same Professional Conduct Rules which would ordinarily apply to them.\footnote{217} 

**CCC Investigation Outcomes: Referral of Matters for Prosecution**

Assessments or determinations made by the CCC are not legally binding.\footnote{218} As such, section 23 of the CCC Act stipulates that the CCC must not publish or report a finding or opinion that a person has committed, or is about to commit, a criminal or disciplinary offence. However, the Commission can make recommendations as to whether consideration should be given to criminal prosecution, disciplinary action, or other action.\footnote{219}

Section 86 of the CCC Act requires that, before reporting any matters adverse to a person,\footnote{220} the CCC must give the person ‘a reasonable opportunity to make representations to the Commission concerning those matters’.

Where there is sufficient evidence the CCC may prosecute charges itself in the Magistrates Court, or refer matters on to the DPP for prosecution in the District or Supreme Court.\footnote{221} The CCC’s prosecutorial function is not explicitly provided for by the CCC Act but is rather derived from the Act’s conferral of the powers of a police officer on authorised officers of the CCC.\footnote{222} Generally, if the evidence and charges are relatively straightforward, the CCC will lay the charges and a CCC lawyer will conduct the prosecution in the Magistrates Court.\footnote{223} However, if the matter is particularly complex or involves an offence which must be tried in the District or Supreme Court, advice will be sought from the DPP and if charges are laid, the prosecution will usually be conducted by the DPP.\footnote{224}

In 2010-11, five public officers and 21 members of the public were charged with 257 criminal offences, as a result of CCC’s investigations.\footnote{225} Additionally, six public officers and 14 members of the public were convicted of around 152 charges related to Commission activities.\footnote{226}

\footnote{217} Roberts-Smith (2010) op. cit., p. 10.
\footnote{218} ibid., pp. 11-12.
\footnote{219} s 43; see also: ibid., p. 12.
\footnote{220} In a report under ss 84 or 85 of the CCC Act.
\footnote{221} Roberts-Smith (2010) op. cit., pp. 3, 12.
\footnote{222} Section 184 of the CCC Act provides that authorised officers of the CCC may exercise the powers of a police officer set out in s 40 of the Criminal Investigations Act (2006). The Commissioner of the CCC, the Hon. Len Roberts-Smith RFD, QC, explains that ‘if criminal charges have been laid by CCC officers exercising their powers as authorised officers under the CCC Act, just as police would, the CCC may prosecute those charges in the Magistrates Court or refer them to and liaise with the Director of Public Prosecutions, for prosecution on indictment in the District or Supreme Court’. Roberts-Smith (2010) op. cit., p. 3. Also see Western Australia, Legislative Assembly (2010) Debates, 1 June, pp. E125-126.
\footnote{223} Roberts-Smith (2010) op. cit., p.12.
\footnote{224} ibid.
\footnote{225} Corruption and Crime Commission (2011) op. cit., p. xvi.
\footnote{226} ibid. Note that a number of cases are still before the courts.
Tasmania

The Integrity Commission Act 2009 established the Tasmanian Integrity Commission, which became operational in 2010.

**Integrity Commission Receipt of Complaints and Referrals to Other Agencies**

A written complaint can be made to the Integrity Commission by any person. Upon receipt of a complaint, the Integrity Commission's CEO may accept, dismiss or refer the complaint to a relevant public authority, an appropriate integrity entity (such as the Ombudsman), or the police. The Commission may, however, seek progress reports, monitor or audit any action taken in relation to a complaint that has been referred.

According to the Integrity Commission's 2010-11 Annual Report, more than half the complaints received during that period were dismissed after initial assessment due to: lack of evidence, availability of evidence or witness accounts, the nature and seriousness of the alleged misconduct, or the unlikelihood that the matter could be productively investigated. Table 4 outlines the outcomes for complaints lodged with the Integrity Commission during 2010-11.

**Table 4: Outcomes for Complaints in 2010-11:**

<table>
<thead>
<tr>
<th>Outcomes</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismissed after triage</td>
<td>62.6 %</td>
</tr>
<tr>
<td>Referred to another public authority</td>
<td>23.6 %</td>
</tr>
<tr>
<td>Referred to another integrity agency</td>
<td>0.8 %</td>
</tr>
<tr>
<td>Currently under consideration, assessment or investigation</td>
<td>13.8 %</td>
</tr>
</tbody>
</table>


**Integrity Commission Conduct of Examinations**

As previously stated in the Parliamentary Library’s Current Issues Brief on the Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Bill 2011, the Board of the Integrity Commission may determine that an inquiry should be conducted in order to make findings and determinations in respect of a complaint. For the purpose of conducting an inquiry, the Chief Commissioner can convene an ‘Integrity Tribunal’. An Integrity Tribunal may exercise any of the powers conferred on it by the Integrity Commission Act in conducting its inquiry. It may also hold hearings, and receive submissions or evidence.

An Integrity Tribunal must either consist of the Chief Commissioner sitting alone, or the Chief Commissioner and not more than two Board members and other such persons appointed to a Tribunal whom the Commissioner considers to have experience and expertise relevant to a

---

227 s 33.
228 ss 35, 38.
229 s 35.
231 ss 60-61.
232 s 60.
233 s 61(2).
particular inquiry.\textsuperscript{234} An Integrity Tribunal may also appoint a lawyer to assist it in its inquiry, or any other expert to provide it with specialist or technical advice.\textsuperscript{235}

When commencing an inquiry, the Integrity Tribunal must give written notice of the complaint to the person who is subject to that complaint.\textsuperscript{236}

In respect of an inquiry, the Integrity Commission Act empowers an Integrity Tribunal to:

- require any person to appear before the Integrity Tribunal whose evidence is considered to be material to the inquiry;
- administer oaths and affirmations, and take evidence on oath or affirmation;
- require a person to produce any records, information or other relevant material;
- require a person to answer any question that the Tribunal considers material to the inquiry.\textsuperscript{237}

Schedule 6 states that a hearing of an Integrity Tribunal is to be open to the public.\textsuperscript{238} However, if it considers that there are reasonable grounds for doing so, an Integrity Tribunal may make an order that a hearing is to be closed to the public.\textsuperscript{239} In the second reading speech for the Integrity Commission Bill 2009, the then Attorney-General Lara Giddings stated that it is intended that ‘the bulk of the Commissions investigations will be conducted in private.’\textsuperscript{240} An Integrity Tribunal may also restrict or prohibit public reporting of a hearing or the publishing of any evidence with respect to the hearing if it is satisfied that the public interest in the reporting of that information is outweighed by any other consideration, such as: public security, privacy, and the right to a fair trial.\textsuperscript{241} To date, no hearings have been held by the Integrity Commission.\textsuperscript{242}

In respect of any inquiry, an Integrity Tribunal is not bound to observe the rules of law governing the admission of evidence.\textsuperscript{243}

If a person who has been served with a notice to attend a hearing fails to attend the hearing without reasonable excuse, an Integrity Tribunal may apply to a magistrate for a warrant to have the person apprehended and brought before the Tribunal.\textsuperscript{244}

When making a complaint, giving any information or producing any record under the Integrity Commission Act, a person must not make a statement knowing it to be false or misleading.\textsuperscript{245}

\textit{Privilege:}

An Integrity Tribunal may require a person to provide information or to answer a question unless a successful claim of privilege can be made (such as: ‘the privilege against self-incrimination, legal professional privilege, a range of privileges recognised in the Evidence

\textsuperscript{234} s 62. Note that if the Chief Commissioner considers he/she to have a conflict of interest with respect to an inquiry, the Chief Commissioner may nominate another member of the board to convene the Tribunal.

\textsuperscript{235} s 63.

\textsuperscript{236} s 65.

\textsuperscript{237} s 64(1).

\textsuperscript{238} See Schedule 6, s 1(1) – Provisions in Respect of Hearings of Integrity Tribunal, attached to section 76 of the Integrity Commission Act.

\textsuperscript{239} Schedule 6, s 1(2).

\textsuperscript{240} Tasmania, House of Assembly (2009) Debates, 3 November, Part 2, p. 86.

\textsuperscript{241} Schedule 6, s 4(1).

\textsuperscript{242} Integrity Commission Officer, personal communication with K. Richardson, 27 April 2012.

\textsuperscript{243} s 64(3).

\textsuperscript{244} Schedule 6, s 2.

\textsuperscript{245} s 96. With a penalty of a fine not exceeding 5,000 penalty units or imprisonment for a term not exceeding one year.
If the Integrity Tribunal does not accept a claim of privilege, the person claiming it can apply to the Supreme Court to have the privilege determined.\textsuperscript{247}

In regard to parliamentary privilege, section 100 of the Integrity Commission Act states:

Nothing in this Act is taken, or held or construed, directly or indirectly, by implication or otherwise, to affect, in any manner, any power or privilege possessed by either House of Parliament before the passing of this Act.

\textit{Legal representation:}

A person who is subject to a complaint 'is entitled' to be represented by a legal practitioner when appearing before an Integrity Tribunal during an inquiry.\textsuperscript{248} With approval, witnesses appearing before an Integrity Tribunal may also be represented by a legal practitioner.\textsuperscript{249} A legal practitioner representing any person at a hearing may examine or cross-examine witnesses on behalf of the person.\textsuperscript{250}

\textbf{Integrity Commission Investigation Outcomes: Referral of Matters for Prosecution}

After concluding an inquiry, an Integrity Tribunal may make a determination in relation to that complaint. According to the Integrity Commission Act, it may dismiss the complaint or make a finding that misconduct has occurred.\textsuperscript{251} The Tribunal’s determination is a reviewable matter under the \textit{Judicial Review Act 2000 (Tas)}.\textsuperscript{252}

On completion of an investigation, the Integrity Commission’s CEO submits a report of the investigation to the Board.\textsuperscript{253} However, before this submission, the CEO may give a draft of the report to the person subject to the complaint investigated if the CEO considers it appropriate.\textsuperscript{254} That person may give the CEO written comments in relation to the draft report.\textsuperscript{255} The CEO must include any such comments in his or her final report, or ‘a fair summary’ of those comments.\textsuperscript{256}

The Integrity Commission does not have a prosecutorial function, but if it determines that misconduct has occurred, it refers its findings to the ‘principal officer’ of the relevant public authority.\textsuperscript{257} Where the alleged misconduct would amount to criminality, the Integrity Commission will, in most cases, refer the matter to the police or the DPP for action.\textsuperscript{258} Determinations may also be referred to an appropriate integrity entity, or the responsible minister for action.\textsuperscript{259}

\begin{itemize}
\item \textsuperscript{246} Tasmania, House of Assembly (2009) op. cit., p. 84. See also s 92(2).
\item \textsuperscript{247} ibid., p.74. See also s 92(5).
\item \textsuperscript{248} s 66(1).
\item \textsuperscript{249} s 66(2).
\item \textsuperscript{250} s 66(3).
\item \textsuperscript{251} s 78(2).
\item \textsuperscript{252} s 79.
\item \textsuperscript{253} s 55(2).
\item \textsuperscript{254} s 56(1).
\item \textsuperscript{255} s 56(3).
\item \textsuperscript{256} s 56(4).
\item \textsuperscript{257} See s 78(3) and Schedule 1 – Principal Officers, attached to section 4 of the Integrity Commission Act.
\item \textsuperscript{258} Tasmania, House of Assembly (2009) op. cit., p. 82. Also see: s 78(3)(d).
\item \textsuperscript{259} s 78(3).
\end{itemize}
References

Relevant Victorian Legislation
Independent Broad-based Anti-corruption Commission Act 2011
Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Act 2012
Victorian Inspectorate Act 2011

Relevant Legislation from Other Jurisdictions
Independent Commission Against Corruption Act 1988 (NSW)
Police Integrity Commission Act 1996 (NSW)
Crime and Misconduct Act 2001 (Qld)
Corruption and Crime Commission Act 2003 (WA)
Integrity Commission Act 2009 (Tas)

Bibliography


Research Service

This paper has been prepared by the Research Service for use by Members of the Victorian Parliament. The Service prepares briefings and publications for Parliament in response to Members, and in anticipation of their requirements, undertaking research in areas of contemporary concern to the Victorian legislature. While it is intended that all information provided is accurate, it does not represent professional legal opinion.

Research publications present current information as at the time of printing. They should not be considered as complete guides to the particular subject or legislation covered. The views expressed are those of the author(s).

Information about Research Publications is available on the Internet at:
http://www.parliament.vic.gov.au