



# PARLIAMENT OF VICTORIA

Independent Broad-based Anti-corruption  
Commission Committee

## Strengthening Victoria's key anti-corruption agencies?

Parliament of Victoria  
**Independent Broad-based Anti-corruption Commission Committee**

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# Committee functions

The IBAC Committee is constituted under section 12A of the *Parliamentary Committees Act 2003*.

1. The functions of the Committee are—
  - a. to monitor and review the performance of the duties and functions of the IBAC;
  - b. to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the IBAC that require the attention of the Parliament;
  - c. to examine any reports made by the IBAC;
  - d. to consider any proposed appointment of a Commissioner and to exercise a power of veto in accordance with the *Independent Broad-based Anti-corruption Commission Act 2011*;
  - e. to carry out any other function conferred on the IBAC Committee by or under this Act or the *Independent Broad-based Anti-corruption Commission Act 2011*;
  - f. to monitor and review the performance of the duties and functions of the Victorian Inspectorate, other than those in respect of VAGO officers or Ombudsman officers;
  - g. to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the Victorian Inspectorate that require the attention of the Parliament, other than those in respect of VAGO officers or Ombudsman officers;
  - h. to examine any reports made by the Victorian Inspectorate, other than reports in respect of VAGO officers or Ombudsman officers;
  - i. to consider any proposed appointment of an Inspector and to exercise a power of veto in accordance with the *Victorian Inspectorate Act 2011*.
- 1A. Despite anything to the contrary in subsection (1), the IBAC Committee cannot—
  - a. investigate a matter relating to the particular conduct the subject of—
    - i. a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*; or
    - ii. a particular disclosure determined by the IBAC under section 26 of the *Protected Disclosure Act 2012*, to be a protected disclosure complaint;
  - b. review any decision by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011* to investigate, not to investigate or to discontinue the investigation of a particular complaint or notification or a protected disclosure complaint within the meaning of that Act;
  - c. review any findings, recommendations, determinations or other decisions of the IBAC in relation to—
    - i. a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*; or
    - ii. a particular disclosure determined by the IBAC under section 26 of the *Protected Disclosure Act 2012*, to be a protected disclosure complaint; or

- iii. a particular investigation conducted by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*;
  - ca. review any determination by the IBAC under section 26(3) of the *Protected Disclosure Act 2012*;
  - d. disclose any information relating to the performance of a function or the exercise of a power by the IBAC which may—
    - i. prejudice any criminal investigation or criminal proceedings; or
    - ii. prejudice any investigation being conducted by the IBAC; or
    - iii. contravene any secrecy or confidentiality provision in any relevant Act.
2. Despite anything to the contrary in subsection (1), the IBAC Committee cannot—
- a. investigate a matter relating to particular conduct the subject of any report made by the Victorian Inspectorate;
  - b. review any decision to investigate, not to investigate, or to discontinue the investigation of a particular complaint made to the Victorian Inspectorate in accordance with the *Victorian Inspectorate Act 2011*;
  - c. review any findings, recommendations, determinations or other decisions of the Victorian Inspectorate in relation to a particular complaint made to, or investigation conducted by, the Victorian Inspectorate in accordance with the *Victorian Inspectorate Act 2011*;
  - d. disclose any information relating to the performance of a function or exercise of a power by the Victorian Inspectorate which may —
    - i. prejudice any criminal investigation or criminal proceedings; or
    - ii. prejudice an investigation being conducted by the IBAC; or
    - iii. contravene any secrecy or confidentiality provision in any relevant Act.

# Committee membership



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This report is also available online at the Committee's website.

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# Chair's foreword

I am pleased to present the first report of the Victorian Parliament's Independent Broad-based Anti-corruption Commission Committee (IBACC).

The Committee was established following the creation of the Independent Broad-based Anti-corruption Commission (IBAC) and Victorian Inspectorate (VI) by the Liberal-National Government in 2011. At the time, the creation of IBAC was described by the Government as '[one of] the most far-reaching and fundamental reforms to the anti-corruption and integrity system in Victoria's history'.

There is no doubt that integrity systems are vital in our modern democracy. They serve an important purpose in providing transparency and accountability to government processes and decision-making.

In December 2015, the Victorian Government introduced the Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) into Parliament. The bill aims to strengthen the Victorian integrity system and respond to issues which have been raised about its operation.

This report examines the current Victorian integrity system and considers issues which have been raised by the IBAC, VI and other key stakeholders. The issues canvass a wide range of areas within the legislative framework and offer suggestions about how the system could be improved. This report considers whether the issues raised have been resolved through the introduction of the proposed legislation and areas for further investigation.

The Committee's report is timely considering the recent release of Transparency International's Corruption Perception Index (CPI) for 2016. The CPI ranks each country around the world according to how corrupt their public sector is perceived to be. This year's report identified that Australia had fallen in ranking from 11<sup>th</sup> to 13<sup>th</sup>. This downward trend has continued since 2012, and during this time Australia's position has fallen six places. Australia's ranking reflects the continued importance of battling corruption in the public sector through a strong and effective integrity system.

The IBAC Committee has sought advice from a range of interested parties and experts in relation to this bill. The Committee drew upon the considered advice of agencies operating within the Victorian integrity system, academics, and individuals with practical experience within integrity agencies in other Australian states. The Committee would like to thank the individuals it met for their considered suggestions, evidence and advice.

In seeking evidence from a wide range of individuals, the Committee found that while many issues relating to the IBAC and VI have been satisfactorily addressed by the bill, there are issues which require further attention.

The Committee understands the proposed amendments introduced by the Victorian Government are the first in a series of intended reforms. The recommendations in this report aim to assist the further enhancement and effectiveness of the Victorian integrity system throughout this process. The Committee has also identified a number of issues that it intends to investigate further.

Finally, I would like to thank my Committee colleagues: Hon. Marsha Thomson MP (Deputy Chair), Mr Sam Hibbins MP, Mr Danny O'Brien MP, Mr Simon Ramsay MLC, Mr Tim Richardson MP and Ms Jaclyn Symes MLC for their cooperative and bipartisan approach to the preparation of this report and their involvement in the Committee.

The Committee would also like to express its gratitude to Sandy Cook, Executive Officer, Kirstie Twigg, Research Officer and Stephanie Dodds, Administrative Officer for their hard work.

I commend this report to the Parliament.

A handwritten signature in black ink, appearing to read 'Kim Wells', with a stylized flourish at the end.

**Hon Kim Wells MP**  
**Chair**

# List of recommendations

## Chapter 3

**RECOMMENDATION 3.1:** The Committee recommends that the Victorian Government as a part of its ongoing review should, in conjunction with the Independent Broad-based Anti-corruption Commission, evaluate the power to conduct preliminary inquiries one year after its introduction to assess whether it is appropriate and necessary. . . . . 47

**RECOMMENDATION 3.2:** The Committee recommends that the Victorian Government as a part of its ongoing review should consider expanding the ability of the Independent Broad-based Anti-corruption Commission to serve confidentiality notices on public sector entities to increase efficiency. . . . . 55

## Chapter 4

**RECOMMENDATION 4.1:** The Committee recommends that the Victorian Government as a part of its ongoing review should examine the criteria for the Independent Broad-based Anti-corruption Commission to conduct a public examination contained in section 117 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) following the outcome of the decision by the High Court of Australia. . . . . 61

**RECOMMENDATION 4.2:** The Committee recommends that the Victorian Government as part of its ongoing review should further consider the definition of ‘relevant offence’ within section 3 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic). The review should examine whether any additional criminal offences should be included in the definition of ‘relevant offence’ to ensure clarity of the types of conduct able to be considered and investigated by the Independent Broad-based Anti-corruption Commission. . . . . 65

**RECOMMENDATION 4.3:** The Committee considers there are a number of issues relating to the operation of the *Protected Disclosure Act 2012* (Vic) which require further investigation. The Committee recommends that the Victorian Government as a part of its ongoing review should evaluate the protected disclosure regime. This matter should be prioritised. . . . . 74

**RECOMMENDATION 4.4:** The Committee recommends that the Victorian Government as a part of its ongoing review should consider providing the Independent Broad-based Anti-corruption Commission with greater flexibility to ‘park’ or ‘suspend’ complaints for a reasonable period of time to assist it to deal with complaints consistently and appropriately. . . . . 75

**RECOMMENDATION 4.5:** The Committee recommends that the Victorian Government as a part of its ongoing review should assess section 194 of the *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)* to review any inconsistency in accessing documents between complaints lodged with the Independent Broad-based Anti-corruption Commission and Victoria Police. This matter should be prioritised. .... 78

**RECOMMENDATION 4.6:** The Committee considers that providing a ‘follow the dollar’ power to the Independent Broad-based Anti-corruption Commission requires further consideration and investigation. The Committee recommends that the Victorian Government as a part of its ongoing review should investigate this issue further. .... 81

**RECOMMENDATION 4.7:** The Committee considers that the use of derivative evidence requires further consideration and investigation. The Committee recommends that the Victorian Government as a part of its ongoing review should investigate this issue further. .... 82

**RECOMMENDATION 4.8:** The Committee considers that the ability of the Independent Broad-based Anti-corruption Commission to examine an individual the subject of criminal charges requires further investigation. The Committee recommends that the Victorian Government as a part of its ongoing review should investigate this issue further. .... 83

**RECOMMENDATION 4.9:** The Committee recommends that the Victorian Government as a part of its ongoing review should clarify the responsibility of the Victorian Inspectorate in relation to the oversight of witness summons issued by the Independent Broad-based Anti-corruption Commission. .... 88

**RECOMMENDATION 4.10:** The Committee recommends that the Victorian Government as a part of its ongoing review should examine section 117(5) of the *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)*, to ensure the Victorian Inspectorate has sufficient time to oversight decisions of the Independent Broad-based Anti-corruption Commission to conduct public examinations. This matter should be prioritised. .... 90

**RECOMMENDATION 4.11:** The Committee recommends that the Victorian Government as a part of its ongoing review should assess the consistency of terminology in the *Victorian Inspectorate Act 2011 (Vic)* that relates to the Victorian Inspectorate’s functions. .... 91

# List of acronyms

<b>APSACC</b>	Australian Public Sector Anti-corruption Conference
<b>ART</b>	Accountability Round Table
<b>CCC</b>	Corruption and Crime Commission (WA)
<b>CCC</b>	Crime and Corruption Commission (Qld)
<b>CMC</b>	Crime and Misconduct Commission (Qld)
<b>CPI</b>	Corruption Perception Index
<b>FOI</b>	Freedom of Information
<b>GDP</b>	Gross Domestic Product
<b>IBAC</b>	Independent Broad-based Anti-corruption Commission (Vic)
<b>IBAC Act</b>	<i>Independent Broad-based Anti-corruption Commission Act 2011 (Vic)</i>
<b>IBACC</b>	Independent Broad-based Anti-corruption Commission Committee
<b>IC</b>	Integrity Commission (Tas)
<b>ICAC</b>	Independent Commission Against Corruption (NSW)
<b>ICAC</b>	Independent Commissioner Against Corruption (SA)
<b>ICAC Act</b>	<i>Independent Commission Against Corruption Act 1988 (NSW)</i>
<b>IPAA</b>	Institute of Public Administration Australia
<b>LIV</b>	Law Institute of Victoria
<b>MIPO</b>	misconduct in public office
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OPI</b>	Office for Police Integrity (Vic)
<b>OPI</b>	Office for Public Integrity (SA)
<b>PD Act</b>	<i>Protected Disclosure Act 2012 (Vic)</i>
<b>VAGO</b>	Victorian Auditor-General's Office
<b>VEOHRC</b>	Victorian Equal Opportunity and Human Rights Commission
<b>VI</b>	Victorian Inspectorate
<b>VI Act</b>	<i>Victorian Inspectorate Act 2011 (Vic)</i>
<b>VO</b>	Victorian Ombudsman





## 1.1 Introductory Comments

The development of a robust integrity system is vital to the effective functioning of a modern democracy and encourages community confidence in the administration of government. As researcher Bruce Stone rightly points out, '[c]itizens have a legitimate expectation that conduct within the public sector will be ethical and that the private interest of officials is not being served at the expense of the public interest'.<sup>1</sup>

A starting point in creating such an integrity system is to define the nature of corruption in the context of a modern democracy.

### 1.1.1 Defining corruption

There are numerous definitions of corruption in use, but in general terms corruption can be defined as the exploitation of public or private office for personal gain. Corruption is a universal phenomenon which can be found in the world's wealthiest countries and also amongst the poorest. It 'exists on every continent, across people of all nationalities and religions'.<sup>2</sup> It occurs at all levels of government.

As researchers from the Australian Institute of Criminology have explained, corruption in the public sector can involve many different forms of conduct, including:

- **Bribery:** where an official accepts money or some other consideration to engage in a particular course of action, or inaction.
- **Extortion:** where an official demands money or some other consideration to engage in a particular course of action, or inaction.
- **Embezzlement:** where an official misappropriates public assets for personal use.
- **Fraud:** where an official makes a false claim for benefits for which he or she is not entitled, or in order to avoid liability for payment, such as tax or customs duty.
- **Conflict of interest:** where an official stands to profit incidentally from an official act. This could involve a planning decision which has the effect of increasing the value of property owned by the official, or the awarding of a government contract to a company in which the official has a financial interest.<sup>3</sup>

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1 Bruce Stone (2015), 'Accountability and the design of an anti-corruption agency in a parliamentary democracy' 36 (2) *Policy Studies*, p. 160.

2 Peter Grabosky & Peter Larmour (2000), 'Public sector corruption and its control', *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, p. 1.

3 Peter Grabosky & Peter Larmour (2000), 'Public sector corruption and its control', *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra, p. 1.

It may also, as the Organisation for Economic Co-operation and Development (OECD) highlights, be a component of other illegal activities:

[Corruption] is often associated with and reinforced by other illegal practices, such as bid rigging, fraud or money laundering.<sup>4</sup>

Corruption is often classified into various categories ranging from very serious corruption often referred to as ‘grand scale corruption’ through to ‘petty corruption’. Examples of grand scale corruption include the misappropriation of public assets at the highest levels, ‘police protection of drug importation or illegal gambling, [and] persistent bribery of local government planning officials to approve land zoning and building construction’.<sup>5</sup> Petty corruption may consist of isolated incidents such as the provision of small ‘gifts’, ‘granting a licence in exchange for a bribe, disclosing confidential information, falsifying a record, or turning a blind eye to a criminal breach’.<sup>6</sup>

Other ways of classifying corruption include those that ‘distinguish between incidental, institutional and systemic corruption and between political and bureaucratic corruption’.<sup>7</sup>

While views as to what constitutes examples of corruption may vary, there is little doubt that the cost of corruption can be high.

## 1.1.2 The costs of corruption

Corruption can be extremely costly at a global, national and community level, in both monetary and non-monetary terms. As the OECD has explained:

1. Corruption increases the cost of doing business.
2. Corruption leads to waste or the inefficient use of public resources.
3. Corruption excludes poor people from public services and perpetuates poverty.
4. Corruption corrodes public trust, undermines the rule of law and ultimately delegitimises the state.<sup>8</sup>

In monetary terms, it has been estimated that corruption costs the world economy 2.6 trillion dollars per year, or around five per cent of the world’s gross domestic product (GDP). On average, the extent of corruption across the world also adds an extra ten per cent to the costs of conducting business.<sup>9</sup>

4 Organisation for Economic Co-operation and Development (2014), *The Rationale for Fighting Corruption*, viewed 7 December 2015, <[www.oecd.org/cleangovbiz/49693613.pdf](http://www.oecd.org/cleangovbiz/49693613.pdf)>, p. 1.

5 John McMillan (2008), ‘Introduction to anti-corruption law and policy in Australia’ Address to an Anti-Corruption Seminar, China-Australia Human Rights, Technical Cooperation Program, Tianjin, China, 26-27 May, p. 1.

6 John McMillan (2008), ‘Introduction to anti-corruption law and policy in Australia’ Address to an Anti-Corruption Seminar, China-Australia Human Rights, Technical Cooperation Program, Tianjin, China, 26-27 May, p. 1.

7 Rob McCusker (2006), ‘Review of anti-corruption strategies’, Technical and Background Paper, Australian Institute of Criminology, Canberra, p. 4.

8 Organisation for Economic Cooperation and Development (2014), *The Rationale for Fighting Corruption*, viewed 7 December 2015 <[www.oecd.org/cleangovbiz/49693613.pdf](http://www.oecd.org/cleangovbiz/49693613.pdf)>, pp. 2-4.

9 Organisation for Economic Cooperation and Development (2014), *The Rationale for Fighting Corruption*, viewed 7 December 2015 <[www.oecd.org/cleangovbiz/49693613.pdf](http://www.oecd.org/cleangovbiz/49693613.pdf)>, p. 2.

However, it is widely accepted that measuring the extent and average monetary loss associated with corruption is difficult due to its secretive nature.<sup>10</sup> Accordingly, research has focused on measuring the perception of corruption within society as a ‘proxy measurement’ in order to then estimate its prevalence.

In Victoria, research conducted in 2012 identified that sixty-one per cent of Victorian public servants believed that some level of corruption was present within their Department (although a vast majority of these believed it was a ‘little’ amount of corruption – forty-five per cent). Twenty-two per cent identified that there was no corruption within their agency, and only two per cent identified that there was a ‘lot’ of corruption.<sup>11</sup>

Allegations of significant corrupt behaviour by officials within the Department of Education and Training are currently being investigated by the Independent Broad-based Anti-corruption Commission’s Operation Ord and an investigation has been announced into allegations of corruption by those associated with the Ultranet project. Millions of dollars are involved in these allegations. These examples demonstrate the importance of a robust and effective integrity system in Victoria to combat corrupt conduct.<sup>12</sup>

### 1.1.3 The development of various anti-corruption agencies in Australia

Commencing in 1988, each Australian state has created a specialised broad-based anti-corruption or integrity commission to combat corruption.<sup>13</sup> The first to be established was the Independent Commission Against Corruption (ICAC) in New South Wales. The most recently set up was the Independent Commissioner against Corruption (ICAC) and the Office for Public Integrity (OPI) in South Australia in 2012. While there have been ongoing calls from the community, as well as political pressure, for the Commonwealth, Australian Capital Territory and the Northern Territory to establish similar systems, in 2016 these jurisdictions are still without specialised anti-corruption agencies.

<sup>10</sup> Adam Graycar & Tim Prenzler (2013), *Understanding and Preventing Corruption*, Palgrave Macmillan Ltd, Hampshire, United Kingdom, pp. 34–35.

<sup>11</sup> Adam Graycar (2014), ‘Awareness of corruption in the community and public service: a Victorian Study’ 73 (2) *Australian Journal of Public Administration*, pp. 271–281.

<sup>12</sup> Independent Broad-based Anti-corruption Commission, ‘Operation Dunham public examinations’, Media Release, 17 December 2015; Independent Broad-based Anti-corruption Commission, Operation Ord, Mr Ian Hill QC, Opening Statement, viewed 7 December 2015, <[www.ibac.vic.gov.au/investigating-corruption/current-and-past-investigations/operation-ord-public-examinations](http://www.ibac.vic.gov.au/investigating-corruption/current-and-past-investigations/operation-ord-public-examinations)>, p. 3.

<sup>13</sup> These are:

- New South Wales – Independent Commission Against Corruption (ICAC) (NSW) 1988
- Queensland – Criminal Justice Commission (CJC) (Qld) 1989 (until 2001)
- Queensland – Crime and Misconduct Commission (CMC) (Qld) 2001 (until 2014)
- Queensland – Crime and Corruption Commission (CCC) (Qld) (since 2014)
- Western Australia – Corruption and Crime Commission (CCC) (WA) 2004
- Tasmania – Integrity Commission (IC) (Tas) 2010.
- Victoria – Independent Broad-based Anti-corruption Commission (IBAC) (Vic) 2012
- South Australia – Independent Commissioner against Corruption (ICAC) and Office of Public Integrity (OPI) (SA) 2012.

### 1.1.4 Tensions arising

Anti-corruption agencies require both substantial investigative powers and a high level of independence if they are to be effective. However, these powers can create tensions:

While most of the integrity agencies have a broad range of powers, the agencies that address corruption have extensive powers to undertake their investigations; these include: covert investigations, telecommunication intercepts, assumed identities, integrity testing and the authority to search public premises (see for example, *The Corruption and Crime Commission Act 2003*). For all integrity and oversight agencies however, these powers can result in tensions between the integrity agency, the Parliament, the public sector and the broader community.<sup>14</sup>

The tensions arising encompass all aspects of the structure, function and powers provided to integrity agencies. They may involve questions relating to the scope of powers provided to integrity bodies proportionately with associated limits on civil liberties, the appropriate scope for an anti-corruption agency having regard to its extraordinary powers, and how the oversight of integrity agencies should be constructed.<sup>15</sup>

### 1.1.5 The Independent Broad-based Anti-corruption Commission

In Victoria, the Independent Broad-based Anti-corruption Commission (IBAC) was formed in 2012 as the key agency responsible for combatting corruption in the public sector. The Victorian Inspectorate (VI) was also established in the same year to provide oversight of Victoria's main integrity agencies including IBAC, the Victorian Ombudsman (VO), and the Victorian Auditor-General's Office (VAGO).<sup>16</sup>

For an anti-corruption agency to be effective, significant investigation powers and a high level of independence are needed. In such circumstances, accountability is both essential and a major challenge to the designers of that organisation.<sup>17</sup>

The IBAC and VI are accountable to Parliament through the Independent Broad-based Anti-corruption Commission Committee (IBACC), established by the *Parliamentary Committees Act 2003* (Vic).<sup>18</sup> The Committee membership consists of Members of Parliament from the Legislative Assembly and Legislative Council, including representatives of each of the major political parties.

<sup>14</sup> Yvonne Haigh (2013), 'Locating the ethical in the integrity branch: Towards a theoretical framework for ethics in oversight bodies' 28 (2) *Australasian Parliamentary Review*, p. 46.

<sup>15</sup> These are just a few examples of the types of tensions arising in integrity systems. Some particular aspects of these tensions will be further discussed in Chapter 2.

<sup>16</sup> See Chapter 2 for discussion of the specific roles and functions of the IBAC and VI.

<sup>17</sup> Bruce Stone (2015), 'Accountability and the design of an anti-corruption agency in a parliamentary democracy' 36 (2) *Policy Studies*, p. 158.

<sup>18</sup> *Parliamentary Committees Act 2003* (Vic) s 12A.

## 1.2 Functions of the IBAC Committee

The Independent Broad-based Anti-corruption Commission Committee is a Joint Investigatory Committee of the Parliament of Victoria. Matters may be referred to the Committee either by resolution of the Legislative Council, Legislative Assembly or by Order of the Governor in Council.<sup>19</sup> The *Parliamentary Committees Act 2003* (Vic) also enables a Joint Investigatory Committee to inquire into and report to Parliament on any annual report or other document relevant to its functions and which have been laid before either House of Parliament.<sup>20</sup>

The powers and responsibilities of the Committee are determined by the *Parliamentary Committees Act 2003* (Vic). Section 12A outlines the Committee's functions:

- (1) The functions of the IBAC Committee are—
  - (a) to monitor and review the performance of the duties and functions of the IBAC;
  - (b) to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the IBAC that require the attention of the Parliament;
  - (c) to examine any reports made by the IBAC;
  - (d) to consider any proposed appointment of a Commissioner and to exercise a power of veto in accordance with the Independent Broad-based Anti-corruption Commission Act 2011;
  - (e) to carry out any other function conferred on the IBAC Committee by or under this Act or the Independent Broad-based Anti-corruption Commission Act 2011;
  - (f) to monitor and review the performance of the duties and functions of the Victorian Inspectorate, other than those in respect of VAGO officers or Ombudsman officers;
  - (g) to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the Victorian Inspectorate that require the attention of the Parliament, other than those in respect of VAGO officers or Ombudsman officers;
  - (h) to examine any reports made by the Victorian Inspectorate, other than reports in respect of VAGO officers or Ombudsman officers;
  - (i) to consider any proposed appointment of an Inspector and to exercise a power of veto in accordance with the Victorian Inspectorate Act 2011.
- (1A) Despite anything to the contrary in subsection (1), the IBAC Committee cannot—
  - (a) investigate a matter relating to the particular conduct the subject of—
    - (i) a particular complaint or notification made to the IBAC under the Independent Broad-based Anti-corruption Commission Act 2011; or

<sup>19</sup> *Parliamentary Committees Act 2003* (Vic) s 33(1).

<sup>20</sup> *Parliamentary Committees Act 2003* (Vic) s 33(3).

- (ii) a particular disclosure determined by the IBAC under section 26 of the Protected Disclosure Act 2012, to be a protected disclosure complaint;
  - (b) review any decision by the IBAC under the Independent Broad-based Anti-corruption Commission Act 2011 to investigate, not to investigate or to discontinue the investigation of a particular complaint or notification or a protected disclosure complaint within the meaning of that Act;
  - (c) review any findings, recommendations, determinations or other decisions of the IBAC in relation to—
    - (i) a particular complaint or notification made to the IBAC under the Independent Broad-based Anti-corruption Commission Act 2011; or
    - (ii) a particular disclosure determined by the IBAC under section 26 of the Protected Disclosure Act 2012, to be a protected disclosure complaint; or
    - (iii) a particular investigation conducted by the IBAC under the Independent Broad-based Anti-corruption Commission Act 2011;
  - (ca) review any determination by the IBAC under section 26(3) of the Protected Disclosure Act 2012;
  - (d) disclose any information relating to the performance of a function or the exercise of a power by the IBAC which may—
    - (i) prejudice any criminal investigation or criminal proceedings; or
    - (ii) prejudice any investigation being conducted by the IBAC; or
    - (iii) contravene any secrecy or confidentiality provision in any relevant Act.
- (2) Despite anything to the contrary in subsection (1), the IBAC Committee cannot—
- (a) investigate a matter relating to particular conduct the subject of any report made by the Victorian Inspectorate;
  - (b) review any decision to investigate, not to investigate, or to discontinue the investigation of a particular complaint made to the Victorian Inspectorate in accordance with the Victorian Inspectorate Act 2011;
  - (c) review any findings, recommendations, determinations or other decisions of the Victorian Inspectorate in relation to a particular complaint made to, or investigation conducted by, the Victorian Inspectorate in accordance with the Victorian Inspectorate Act 2011;
  - (d) disclose any information relating to the performance of a function or exercise of a power by the Victorian Inspectorate which may—
    - (i) prejudice any criminal investigation or criminal proceedings; or
    - (ii) prejudice an investigation being conducted by the IBAC; or
    - (iii) contravene any secrecy or confidentiality provision in any relevant Act.

## **1.3 Scope of the Report**

### **1.3.1 The focus of the Report**

The IBAC and VI have now been in place since 2012, time enough for an initial assessment of the adequacy of the legislation, for key stakeholders' concerns to be identified and amendments to the legislation recommended.

The focus of this first report of the Independent Broad-based Anti-corruption Commission Committee is to examine the issues raised by the IBAC, VI and other key stakeholders, assess if the issues are warranted and the extent to which they prevent IBAC carrying out its functions and the VI from pursuing its oversight role of IBAC.

The Report will examine the Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic), introduced by the Victorian Government in December 2015 which aims to deliver on a 2014 election commitment to strengthen Victoria's integrity system.

The Report will also determine whether the suggested reforms adequately address the concerns raised. The Report will note areas where barriers or gaps identified have not been resolved by the proposed legislation and require attention or further investigation.

### **1.3.2 Limitations of the Report**

This Report will not investigate changes to improve the operation of Victoria's integrity system outside the work of the IBAC or VI. Further, it will not assess the performance of the IBAC or VI, nor will it evaluate their work in undertaking specific functions such as IBAC's role in undertaking corruption prevention and education or the VI's role in monitoring IBAC's use of coercive powers. The Committee will investigate these matters in the future and report to the Parliament.

This Report will focus purely on the adequacy of the legislative framework, the reforms outlined in the proposed legislation and identifying any gaps that require attention or further investigation.

## **1.4 Work of the Committee**

The Committee has embarked upon a comprehensive research process in order to gain a thorough understanding of the function, operation and legislation underpinning the IBAC and VI. Where appropriate, the Committee compared the legislative framework within other states and the challenges those anti-corruption agencies are confronting. It has also sought to gain an understanding of the legislative barriers confronting the effective operation of the IBAC, VI and Victoria's integrity system more generally.

In conducting its work the Committee employed a variety of processes and methodologies, as outlined below.

#### **1.4.1 Literature review, site visits and background briefings**

The Committee commenced its investigations by visiting and receiving informal background briefings from the IBAC, VI, VO and VAGO. The Special Minister of State, the Hon. Gavin Jennings MLC also informally briefed the Committee at the outset of its work and again in November 2015. The Committee also attended public examinations associated with IBAC's investigation, Operation Ord, to gain an insight into how the Commission undertakes its investigations.<sup>21</sup>

A comprehensive review of the academic and policy-relevant literature relating to the development, effectiveness and challenges confronting anti-corruption and integrity agencies around Australia was undertaken and has been constantly updated during the work for this Report.

#### **1.4.2 Closed Hearings in Melbourne**

Closed hearings were held in Melbourne on 12 and 23 November and 7 and 14 December 2015. The Committee also conducted a closed hearing via video conference with an expert witness from NSW.<sup>22</sup>

#### **1.4.3 Closed Hearings and site visits in Brisbane**

The Committee determined that it was important to understand the legal framework, function and operation of equivalent anti-corruption agencies, inspectorates and parliamentary committees in other Australian states and learn from their experience. As Queensland had established an anti-corruption agency in 1989 which has since been the subject of ongoing review and significant change, the Committee considered it appropriate to visit the Crime and Corruption Commission (CCC). In addition, the Committee conducted closed hearings with the Integrity Commissioner and the Parliamentary Crime and Corruption Commissioner.

The Committee also conducted closed hearings with Professor Nicholas Aroney who, in conjunction with the Hon. Ian Callinan QC, conducted a review of the *Crime and Misconduct Act 2001* (Qld) and other issues relating to Queensland integrity agencies in 2012 – 2013. The Committee also conducted a closed hearing with Professor Tim Prenzler from the University of the Sunshine Coast, a key researcher in integrity systems.

<sup>21</sup> For a list of site visits and informal briefings in Melbourne see Appendix 1.

<sup>22</sup> For a list of those who gave evidence to the Committee in Melbourne see Appendix 2.



While in Queensland, the Committee met informally with members and staff from the Queensland Parliamentary Crime and Corruption Committee. This Committee is currently undertaking a review of the CCC. The Terms of Reference for the inquiry are very wide, examining the overall performance, jurisdiction, complaint handling of the CCC and any appropriate legislative amendments.<sup>23</sup>

At the conclusion of the hearings and site visits the Committee also attended the Australian Public Sector Anti-Corruption Conference (APSACC) in Queensland.

#### **1.4.4 Seminar and conference attendance**

The Committee attended APSACC on 18-19 November 2015. This biennial event was hosted by the Crime and Corruption Commission (Queensland), the Independent Commission Against Corruption (NSW) and the Corruption and Crime Commission (Western Australia). The conference focussed on the latest strategies and future directions in preventing and addressing corruption. It provided Members an excellent opportunity to meet key Australian stakeholders and to learn of national and international developments in the area.

The Chair and Executive Officer of the Committee also attended a seminar in Melbourne organised by the Institute of Public Administration Australia (IPAA) on 24 September 2015 – ‘Integrity in the Public Sector.’ The day was attended by leaders from more than 20 Victorian public sector agencies and examined ways that organisations could work to build cultures of integrity and prevent corruption.

#### **1.4.5 Evidence gathering after introduction of the Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic)**

Following the introduction of the Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic), the Committee invited individuals who had given evidence to the Committee to make a written submission commenting on whether the reforms proposed in the bill addressed the concerns they had raised previously and if any of the new reforms presented any additional concerns.<sup>24</sup>

The Committee also conducted closed hearings on 14 December 2015 with the IBAC, VI and representatives from Victoria Police to seek their views on the bill following its tabling in Parliament on 8 December 2015.<sup>25</sup>

<sup>23</sup> For a list of people the Committee met at site visits, informal meetings and in Closed Hearings in Brisbane see Appendix 3.

<sup>24</sup> For a list of those who made a submission to the Committee see Appendix 4.

<sup>25</sup> For a list of those who gave evidence to the Committee see Appendix 2.

### **1.4.6 Stakeholder input into the Report**

In carrying out its work the Committee has drawn upon the views and expertise of a broad range of people. The submissions, closed hearings, briefings, site visits and interstate meetings have provided valuable insights into the work of the IBAC and VI. The insights of anti-corruption and oversight agencies interstate provided significant specialised knowledge into what has turned out to be an extremely complex and challenging study. The Committee is most appreciative of the time, effort and valuable contribution that all the individuals and organisations have made.

## **1.5 Structure of the Report**

This Report is divided into five chapters. This chapter provides an introduction to the Report and discusses the work the Committee has undertaken. Chapter 2 examines some of the key challenges facing integrity systems across Australia, provides an overview of the development of the Victorian integrity system, and outlines the proposed legislative changes introduced into the Victorian Parliament in December 2015.

Chapters 3 and 4 consider whether the proposed amendments address concerns which have been raised regarding the Victorian integrity system as it relates to the IBAC and VI. Chapter 3 outlines how the proposed amendments address the issues raised by stakeholders and Chapter 4 examines areas for consideration and further improvement in the future. Chapter 5 provides concluding comments and outlines the work the Committee intends to undertake throughout the next year.

## **1.6 Conclusion**

During its investigation the Committee has been made aware of the many issues involved in creating an integrity system that addresses the various areas of corruption fearlessly but has minimal intrusion on the human rights of citizens. The next chapter provides an outline of the structure, power and functions of such systems, in particular the Victorian integrity system.

Integrity systems perform a vital function in ensuring public trust and confidence in the administration of government and constitute a key component of Australia's modern democratic system.<sup>26</sup> Another key element of modern democracies is the human rights provided to its citizens.<sup>27</sup> While both are essential parts of modern democracies, their interaction can cause tension and conflict. For example, the powers provided to anti-corruption agencies to carry out their work can impinge upon fundamental human rights, including the right to silence, privacy and reputation.

Over the past three decades governments have sought to reduce the potential for unintended negative outcomes arising from these tensions by reviewing a number of aspects of anti-corruption agencies and considering appropriate amendments.

This chapter outlines some of the key challenges facing integrity systems across Australia, provides an overview of the development of the current Victorian integrity system and the proposed legislative changes introduced in December 2015.

## 2.1 Contemporary challenges confronting integrity systems

The purpose of an integrity system is to scrutinise the behaviour and decisions made by government. In providing transparency to government processes, integrity systems 'constitute a form of accountability that is integral to the processes of modern democratic practice'.<sup>28</sup> Integrity systems also ensure that the public service acts in the best interest of the public at all times.

The importance of integrity systems in modern democracies has been described as follows:

In effect, oversight bodies reinforce the processes of democracy through their power to scrutinise the decisions and actions of the government and the public sector. In undertaking these roles, their practices are informed by the ideals of democratic practice: equality, freedom and accountability.<sup>29</sup>

<sup>26</sup> Professor Tim Prenzler, University of the Sunshine Coast, Closed Hearing, Brisbane, 17 November 2015.

<sup>27</sup> James Prothro & Charles Grigg (1960), 'Fundamental principles of democracy: Bases of agreement and disagreement', 22 *Journal of Politics*, pp. 282–283.

<sup>28</sup> Yvonne Haigh (2013), 'Locating the ethical in the integrity branch: Towards a theoretical framework for ethics in oversight bodies' 28 (2) *Parliamentary Review*, p. 46.

<sup>29</sup> Yvonne Haigh (2013), 'Locating the ethical in the integrity branch: Towards a theoretical framework for ethics in oversight bodies' 28 (2) *Australasian Parliamentary Review*, p. 47.

The first anti-corruption agency in Australia, the Independent Commission Against Corruption (ICAC), was established by New South Wales in 1988. The following areas have been identified by ICAC as being those where public sector corruption can cause significant damage within society:

- undermining public trust in government
- wasting public resources and money
- causing injustice through advantaging some at the expense of others
- inefficiencies in operations, and
- reputational damage which makes it difficult to recruit and retain quality staff or obtain best value in tender processes.<sup>30</sup>

### 2.1.1 Competing considerations striking the balance between powers and rights in integrity frameworks

In seeking to uncover and investigate corruption, integrity agencies are often provided with a broad suite of extraordinary powers.<sup>31</sup> These powers may involve the ability to compel witnesses to give evidence against their own interests, search warrants to seize documents, telephone intercepts and holding public inquiries. The rationale for providing such powers is attributed to a number of unique complexities in detecting and investigating corrupt conduct.

The investigation of corrupt conduct differs from other areas of criminality as victims to the crime are not witnesses, which means that direct evidence is often unavailable. This challenge necessitates the need for different investigative powers and strategies.<sup>32</sup>

Additionally, the individuals involved in or associated with corruption are usually deriving some form of benefit and are therefore not ordinarily motivated to report the conduct.<sup>33</sup> Those involved in corrupt conduct are often highly professional, have familiarity with integrity systems, and develop increasingly sophisticated methods to conceal their conduct. The often close link between organised crime and corruption may also involve sophisticated and large organised crime syndicates – creating an extra layer of complexity.<sup>34</sup>

<sup>30</sup> Independent Commission Against Corruption, 'Why Exposing and Preventing Corruption is Important', viewed 7 December 2015, <[www.icac.nsw.gov.au/about-corruption/why-expose-corruption](http://www.icac.nsw.gov.au/about-corruption/why-expose-corruption)>.

<sup>31</sup> See for example, *Independent Commission Against Corruption Act 1988* (NSW) pt 4 divs 2–5; *Independent Commissioner Against Corruption Act 2012* (SA) pt 4; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) pts 4, 6; *Corruption, Crime and Misconduct Act 2003* (WA) pt 6.

<sup>32</sup> Moshe Maor (2004), 'Feeling the heat? Anticorruption mechanisms in comparative perspective' 17 (1) *Governance: An International Journal of Policy Administration and Institutions*, p. 1.

<sup>33</sup> Tony Kwok Man-Wai (2013), 'Effective investigation of corruption cases: The Hong Kong experience', Paper presented at the Seventh Regional Seminar on Good Governance for Southeast Asian Countries, 3–5 December, p. 51.

<sup>34</sup> Tony Kwok Man-Wai (2013), 'Effective investigation of corruption cases: The Hong Kong experience', Paper presented at the Seventh Regional Seminar on Good Governance for Southeast Asian Countries, 3–5 December, p. 51. The link between organised crime and public sector corruption has also recently been outlined by IBAC – see Independent Broad-based Anti-corruption Commission (2015b), *Organised Crime Group Cultivation of Public Sector Employees*, IBAC, Melbourne.

The use of the power to conduct public inquiries, in particular, has been identified as encouraging additional complaints and information to emerge which can assist an investigation. During the NSW ICAC's public inquiries into RailCorp and Wollongong City Council (Operation Monto and Operation Atlas respectively), it was identified that 'complaints against both bodies topped the list of complaints [received by ICAC] over the period of the inquiries'.<sup>35</sup>

These factors formed the arguments in favour of the establishment of ICAC in 1988. In describing why a powerful body to combat corruption was necessary, Premier Greiner stated:

[C]orruption is by its nature secretive and difficult to illicit. It is a crime of the powerful. It is consensual crime, with no obvious victim to complain. If the commission is to be effective, it obviously needs to be able to use the coercive powers of a Royal Commission.<sup>36</sup>

However, determining where the balance lies between the proportionality of the powers provided to integrity bodies and protecting an individual's civil liberties has been a recurring issue across integrity systems in Australia.<sup>37</sup> Despite a number of reviews, inquiries and consideration given to this issue, it has been noted that:

[I]ntegrity agencies require special powers of investigation to expose corruption but how extensive and intrusive those powers should be remains one of the vexed issues concerning any integrity system. In Australia, the debate about where this balance should lie has yet to be resolved.<sup>38</sup>

### Public inquiries and examinations – an example

The most striking example of the tension between the enormous power held by anti-corruption agencies and the associated encroachment on civil liberties involves the power to conduct inquiries or examinations of witnesses in public. The public questioning of a witness carries a significant risk of causing damage to that person's reputation. This risk may arise particularly where the individual's involvement in an inquiry or examination does not result in findings of impropriety or guilt against that individual.<sup>39</sup>

<sup>35</sup> Theresa Hamilton (2008), 'Exposing corruption: Three essentials for an effective anti-corruption body', Paper presented at the International Conference on Anti-corruption in Asia, 9–11 June, p. 11.

<sup>36</sup> The Hon. Nick Greiner, Premier of New South Wales, Independent Commission Against Corruption Bill 1988 (NSW), Second Reading Speech, 26 May 1988, Hansard (Legislative Assembly) p. 675.

<sup>37</sup> See for example, Western Australia Parliamentary Committee on the Corruption and Crime Commission (2012), *The Use of Public Examinations by the Corruption and Crime Commission*, Parliament of Western Australia, Perth; New South Wales Parliamentary Committee on the Independent Commission Against Corruption (2000), *ICAC: Accounting for Extraordinary Powers* Report No 2/52<sup>nd</sup> Parliament, Sydney; Murray Gleeson QC and Bruce McClintock SC (2015), *Independent panel – review of the jurisdiction of the Independent Commission Against Corruption*, Department of Premier and Cabinet (New South Wales); Bruce McClintock SC (2005), *Independent review of the Independent Commission Against Corruption Act 1988 Final Report*, Sydney.

<sup>38</sup> Scott Prasser (2012), 'Australian integrity agencies in critical perspective' 33 (1) *Policy Studies*, p. 28.

<sup>39</sup> Bruce Stone (2015), 'Accountability and the design of an anti-corruption agency in a parliamentary democracy' 36 (2) *Policy Studies*, p. 160.

While conducting public inquiries and examinations has been criticised for the significant reputational damage that can occur, it has also been suggested that the public nature of questioning witnesses can provide important transparency to the work of these commissions.<sup>40</sup>

The possible damage to an individual's reputation through public inquiries and examinations has attracted ongoing attention following the establishment of ICAC. As early as 1990, just one year after ICAC commenced operations, a successful challenge was mounted in the High Court of Australia regarding the power of ICAC to make findings that an individual had engaged in corrupt conduct.

In its decision, the court considered that ICAC's legislative regime did not permit it to make findings that individuals had been involved in conduct that could be criminal in nature.<sup>41</sup> In doing so, the High Court recognised an essential tension existed between undue damage to an individual's reputation and the coercive powers provided to these types of commissions:

The expression of a finding of guilt or innocence of an offence or even of a prima facie case against an individual, in a report which is bound to be made public, must be likely to have a damaging effect on the reputation of the person concerned...<sup>42</sup>

Although the pernicious practices at which the Act is aimed no doubt call for strong measures, it is obvious that the Commission is invested with considerable coercive powers which may be exercised in disregard of basic protections otherwise afforded by the common law.<sup>43</sup>

After the High Court's decision, the New South Wales Government proposed amendments to ICAC's legislation enabling the Commission to make findings of corrupt conduct.<sup>44</sup>

Following this amendment and decision of the High Court, concerns regarding the appropriate balance between the use of public examinations and inquiries and the proportionate incursion on civil liberties have continued across each anti-corruption agency.

In seeking to strike the right balance, each jurisdiction has taken a different legislative approach. For example, the South Australian Independent Commissioner Against Corruption is required to conduct all investigations in private.<sup>45</sup> The Queensland Crime and Corruption Commission, which is permitted to conduct examinations in public in certain circumstances, has not conducted public examinations since 2010.<sup>46</sup>

<sup>40</sup> Bruce Stone (2015), 'Accountability and the design of an anti-corruption agency in a parliamentary democracy' 36 (2) *Policy Studies*, p. 160.

<sup>41</sup> *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, p. 635.

<sup>42</sup> *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, p. 633.

<sup>43</sup> *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, p. 635.

<sup>44</sup> *Independent Commission Against Corruption (Amendment) Act 1990* (NSW) s 7.

<sup>45</sup> *Independent Commissioner Against Corruption Act 2012* (SA) s 55.

<sup>46</sup> Queensland Crime and Corruption Commission, 'Public Hearings', viewed 9 December 2015, <[www.ccc.qld.gov.au/corruption/past-investigations/cmc-public-hearings/cmc-public-hearings](http://www.ccc.qld.gov.au/corruption/past-investigations/cmc-public-hearings/cmc-public-hearings)>

Public examinations and inquiries have been utilised in the work conducted by ICAC in New South Wales and the Independent Broad-based Anti-corruption Commission (IBAC) in Victoria. However, even between these two agencies the threshold test to conduct a public examination differs significantly.

To conduct a public examination, IBAC is required by the legislative framework to consider on reasonable grounds that there are 'exceptional circumstances'. This criterion is in addition to being satisfied that the examination is in the public interest and would not cause undue harm to an individual.<sup>47</sup> By contrast, to conduct a public inquiry, ICAC must be satisfied that it is in the public interest to do so, having regard to a number of factors outlined in the legislation.<sup>48</sup> It is not necessary for ICAC to be satisfied that 'exceptional circumstances' exist.

The divergent approaches taken by each jurisdiction to this issue exemplify the difficult and competing considerations that anti-corruption agencies face in finding an appropriate balance between carrying out their work effectively and encroaching appropriately and proportionately on an individual's civil liberties.

## 2.1.2 Recent changes to anti-corruption agencies in other jurisdictions

While each Australian state has established an anti-corruption agency, the structure, functions and powers provided to each agency vary significantly between each state.

It has been noted that the choices in creating integrity systems involve the consideration of eight intersecting questions which are not easily resolved. The questions have been described as follows:

1. Public versus less public approaches
2. Internal versus external review
3. Reactive versus proactive inquiries
4. Agency-specific versus sector-wide review
5. Limited versus expansive jurisdictions
6. Investigation versus research and policy, and
7. Who guards the guards?<sup>49</sup>

<sup>47</sup> *Independent Commission Against Corruption Act 1988* (NSW) ss 31(1)–(2); *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 117(1)(a)–(c).

<sup>48</sup> Factors include the benefit of exposing the corrupt conduct to the public, the seriousness of the allegations being investigated, any undue risk to an individual's reputation and whether the public interest is outweighed by the public interest in preserving the privacy of the individual involved, see *Independent Commission Against Corruption Act 1988* (NSW) ss 31(1)–(2).

<sup>49</sup> A.J. Brown & Brian Head (2005), 'Institutional capacity and choice in Australia's integrity systems' 64 (2) *Australian Journal of Public Administration*, pp. 91–94.

While each anti-corruption agency across Australia faces these fundamental questions at the time of their initial creation, the experiences of anti-corruption agencies across Australia demonstrate these issues continue throughout their ongoing operation.

### **An example – limited or expansive jurisdiction?**

The question of how expansive the jurisdiction for an agency should be has been considered by a number of independent reviews and inquiries throughout each Australian state.<sup>50</sup>

The most recent review examined the current scope and jurisdiction of the NSW ICAC and whether any reforms were necessary. The review was conducted by the Hon. Murray Gleeson QC and Bruce McClintock SC following the High Court's decision in *Independent Commission Against Corruption v Margaret Cunneen & Ors* (2015) 318 ALR 391.

In examining how to strike an appropriate balance between the considerable powers provided to ICAC and the scope of its ability to investigate corrupt conduct, the review noted:

The question which now arises is whether any aspect of the ICAC's power should be limited so that it can only be exercised in circumstances where, objectively, there has been serious or systemic corrupt conduct. The Panel does not believe it is appropriate to limit the ICAC's general powers to investigate, or the particular power to hold public inquiries, in this manner – the purpose of an investigation, and the public inquiry which is part of the investigation is to determine what happened and it would be wrong to impose any form of *a priori* restraint on the power to investigate.<sup>51</sup>

Accordingly, the review did not recommend any changes be made to the scope of ICAC's jurisdiction to investigate suspected corrupt conduct. However, the review recommended ICAC's power to make findings that an individual had been involved in corrupt conduct be limited to circumstances where the corrupt conduct was 'serious'.<sup>52</sup> The review considered that ICAC's power to investigate and make findings against individuals involved a substantial interference with the rights and freedoms of citizens, and accordingly it would be appropriate that some aspects of its powers should be reserved only for the more serious cases.<sup>53</sup>

<sup>50</sup> See for example, Western Australia Parliamentary Committee on the Corruption and Crime Commission (2015), *Recent amendments to the Corruption and Crime Commission Act 2003: Some implications for Western Australia's integrity framework*, Parliament of Western Australia, Perth; Murray Gleeson QC and Bruce McClintock SC (2015), *Review of the jurisdiction of the Independent Commission Against Corruption*, Department of Premier and Cabinet (New South Wales); Ian Callinan QC and Nicholas Aroney (2013), *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, Independent Advisory Panel, Brisbane, Parliament of Queensland; Parliamentary Joint Standing Committee on Integrity (2015), *Three Year Review-Final Report*, Parliament of Tasmania, Hobart.

<sup>51</sup> Murray Gleeson QC and Bruce McClintock SC (2015), *Review of the jurisdiction of the Independent Commission Against Corruption*, Department of Premier and Cabinet (New South Wales), p. 64.

<sup>52</sup> Murray Gleeson QC and Bruce McClintock SC (2015), *Review of the jurisdiction of the Independent Commission Against Corruption*, Department of Premier and Cabinet (New South Wales), p. 64.

<sup>53</sup> Murray Gleeson QC and Bruce McClintock SC (2015), *Review of the jurisdiction of the Independent Commission Against Corruption*, Department of Premier and Cabinet (New South Wales), p. 65.



In 2012, the Queensland Government commissioned the Hon Ian Callinan QC and Professor Nicholas Aroney to review the legislative framework of the then Crime and Misconduct Commission. A key focus of the review considered whether the definition of ‘official misconduct’ should be changed in order to limit the scope of matters to be dealt with by the Commission. This focus followed criticism that the definition of official misconduct was too wide and led to too many complaints being submitted, resulting in a diversion of resources from the more serious matters.<sup>54</sup>

The review did not support the introduction of a legislative provision requiring the Crime and Misconduct Commission to direct itself to the investigation of serious misconduct, in a similar manner to ICAC.<sup>55</sup> The Advisory Panel preferred an approach of redrafting and narrowing the definition of ‘official misconduct’ to one containing a more specific definition of corrupt conduct which was in part modelled on the definition of corrupt conduct in Victoria.<sup>56</sup>

In Tasmania, a recent review of the Integrity Commission received a number of submissions expressing concern that the legislative framework did not provide specific guidance to the Commission as to what matters it should investigate. The submissions argued this absence could lead the Commission to investigate less serious matters which were not proportionate to its significant coercive powers.<sup>57</sup> The Committee ultimately recommended that this issue should be considered further during an independent statutory review to be conducted in 2016.<sup>58</sup>

The above examples demonstrate the varied and complex questions facing each anti-corruption agency across Australia. Where in some jurisdictions concerns relate to an agency wielding too much power in proportion to the matters it investigates, in others the concern relates to the agency not holding enough power to be effective. Additionally, in each state divergent approaches have been taken to rectify these concerns.

### Court decisions

The scope and jurisdiction of anti-corruption agencies has also been the subject of litigation in superior state courts and the High Court of Australia.

54 Ian Callinan QC and Nicholas Aroney (2013), *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, Independent Advisory Panel, Brisbane, Parliament of Queensland, p. 114

55 Ian Callinan QC and Nicholas Aroney (2013), *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, Independent Advisory Panel, Brisbane, Parliament of Queensland, pp. 119–120

56 Ian Callinan QC and Nicholas Aroney (2013), *Review of the Crime and Misconduct Act and Related Matters: Report of the Independent Advisory Panel*, Independent Advisory Panel, Brisbane, Parliament of Queensland, p. 119.

57 Parliamentary Joint Standing Committee on Integrity (2015), *Three Year Review – Final Report*, Parliament of Tasmania, Hobart, pp. 36–39.

58 Parliamentary Joint Standing Committee on Integrity (2015), *Three Year Review – Final Report*, Parliament of Tasmania, Hobart, pp. 2–3

In April 2015, the High Court considered the scope of the definition of corrupt conduct contained within the *Independent Commission Against Corruption Act 1988* (NSW) ('ICAC Act').<sup>59</sup> The appeal to the High Court related to a decision of ICAC to investigate Deputy Senior Crown Prosecutor Margaret Cunneen SC. It was alleged Ms Cunneen had encouraged a friend of her son's to fake chest pains following a car accident in order to prevent a sample of her breath being taken for the purposes of ascertaining her blood alcohol level. It was alleged this action would amount to a perversion of the course of justice.<sup>60</sup>

The significance of the decision to investigate arose because the alleged actions of Ms Cunneen occurred not in the course of her conduct as a public official, but rather as an individual whose alleged corrupt conduct affected the ability of the police officers to undertake their duties.<sup>61</sup>

The High Court held that the definition of corrupt conduct as contained in the ICAC Act limited its jurisdiction to cover conduct of public officials. That is, if improper or illegal conduct occurs on the part of a private individual and the public official has not acted dishonestly, ICAC's jurisdiction will not be enlivened.<sup>62</sup> If ICAC were permitted to conduct the investigation pursuant to its legislative framework at the time, the High Court noted it:

[W]ould also enable the Independent Commission Against Corruption to exercise its extraordinary powers (with consequent abrogation of fundamental rights and privileges) in areas ranging well beyond the ordinary understanding of corruption in public administration and the principal objects of the ICAC Act.<sup>63</sup>

Throughout the course of their operation, a number of anti-corruption agencies have also faced court challenges within the courts to findings of corrupt conduct made by the agency or uses of its powers, including:

- *D'Amore v Independent Commission Against Corruption* (2013) 303 ALR 242.
- *Duncan v Independent Commission Against Corruption* (2015) 324 ALR 1.
- *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240.
- *Corruption and Crime Commission v Wallace* [2010] WASC 390.

The above cases centred on challenges to the jurisdiction of ICAC to make findings that an individual had engaged in corrupt conduct, that the anti-corruption agency had acted outside of its powers, or challenges to summons for the production of documents or providing evidence.

<sup>59</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 8.

<sup>60</sup> *Independent Commission Against Corruption v Margaret Cunneen & Ors* (2015) 318 ALR 391, p. 398.

<sup>61</sup> *Independent Commission Against Corruption v Margaret Cunneen & Ors* (2015) 318 ALR 391, p. 398.

<sup>62</sup> *Independent Commission Against Corruption v Margaret Cunneen & Ors* (2015) 318 ALR 391, p. 405.

<sup>63</sup> *Independent Commission Against Corruption v Margaret Cunneen & Ors* (2015) 318 ALR 391, p. 398.

In addition, on 13 November 2015, the High Court granted special leave to appeal to two individuals seeking to prevent IBAC from conducting public examinations as a part of Operation Ross. Operation Ross is an investigation currently being conducted by IBAC into allegations of excessive uses of force at Ballarat Police Station.<sup>64</sup> The appeal is to be heard in February 2016.

These examples also demonstrate the questions and issues that have arisen during the ongoing operation of a number of established commissions which have resulted in litigation. It is within this complex context that the current Victorian integrity system operates.

## 2.2 The Victorian Integrity System

The Victorian integrity system is comprised of a number of agencies, the principal ones being:

- IBAC
- The Victorian Ombudsman (VO)
- The Victorian Auditor-General's Office (VAGO)
- The Victorian Inspectorate (VI).

IBAC's primary role is to investigate, prevent and expose serious corrupt conduct within the Victorian public service, and to investigate police misconduct within Victoria Police.<sup>65</sup>

The VO inquires and investigates administrative action by employees of any Victorian government department, statutory body or local council. The focus of the VO is on the lawfulness, reasonableness and fairness of an agency's actions and decisions.<sup>66</sup>

VAGO is responsible for examining the efficiency, effectiveness, economy and accountability of the public sector. To carry out this function, VAGO conducts financial audits to examine whether the information contained in an agency's financial statements are presented fairly and in accordance with appropriate accounting standards. The office also conducts performance audits to assess whether public sector agencies are achieving their objectives efficiently, effectively and in compliance with relevant legislation.<sup>67</sup>

<sup>64</sup> *R & Anor v Independent Broad-based Anti-corruption Commissioner* [2015] HCATrans 293 (13 November 2015).

<sup>65</sup> Independent Broad-based Anti-corruption Commission (2014b), *Safeguarding Integrity – A guide to the integrity system in Victoria*, Melbourne, p. 7.

<sup>66</sup> Independent Broad-based Anti-corruption Commission (2014b), *Safeguarding Integrity – A guide to the integrity system in Victoria*, Melbourne, p. 7.

<sup>67</sup> Independent Broad-based Anti-corruption Commission (2014b), *Safeguarding Integrity – A guide to the integrity system in Victoria*, Melbourne, p. 8.

The VI is the key oversight body of agencies within Victoria’s integrity system. The VI monitors the compliance of the above agencies regarding their record-keeping responsibilities, procedural fairness requirements and monitors the use of coercive powers.<sup>68</sup>

### 2.2.1 Other agencies

Other agencies that are part of the Victorian integrity system and support and complement the work of the above agencies include:

- The Local Government Investigations and Compliance Inspectorate
- The Freedom of Information Commissioner
- The Victorian Public Sector Commission
- The Victorian Equal Opportunity and Human Rights Commission
- The Commissioner for Privacy and Data Protection
- The Chief Examiner, and
- The Public Interest Monitor.

These agencies have specific roles in assisting or monitoring particular sectors of government. Other bodies also assist individuals to obtain documentation from government agencies or receive complaints regarding discrimination or breaches of human rights.<sup>69</sup>

## 2.3 Development of the Victorian Integrity System

Prior to the establishment of the current Victorian integrity system, the responsibility for investigating and combatting corruption in the public sector was dispersed across a number of agencies, including the VO, the Office for Police Integrity (OPI) and the Local Government Investigations and Compliance Inspectorate.<sup>70</sup> The VO operated as a ‘de facto’ anti-corruption commission<sup>71</sup> and the OPI, established in 2004, dealt with complaints of serious misconduct and corruption by members of Victoria Police.

The Local Government Investigations and Compliance Inspectorate was created in 2009 to monitor the compliance of local councils with their obligations under the *Local Government Act 1989* (Vic).

<sup>68</sup> Independent Broad-based Anti-corruption Commission (2014b), *Safeguarding Integrity – A guide to the integrity system in Victoria*, Melbourne, p. 11.

<sup>69</sup> Independent Broad-based Anti-corruption Commission (2014b), *Safeguarding Integrity – A guide to the integrity system in Victoria*, Melbourne, p. 9.

<sup>70</sup> Elizabeth Proust and Peter Allen (2010), *Review of Victoria’s Integrity and Anti-Corruption System*, Public Sector Standards Commissioner, Melbourne, State Services Authority, p. 7.

<sup>71</sup> Elizabeth Proust and Peter Allen (2010), *Review of Victoria’s Integrity and Anti-Corruption System*, Public Sector Standards Commissioner, Melbourne, State Services Authority, p. 17.

During 2004–2009, however, the Liberal National Coalition’s policy position outlined that the Victorian integrity system ought to include a broad-based integrity agency. This agency would be responsible for combatting corrupt conduct in the public sector, rather than dispersing this responsibility through a number of discrete agencies.<sup>72</sup>

### 2.3.1 The Proust Review

In 2009, the former Labor Government initiated a review of Victoria’s integrity system to examine its effectiveness and recommend any necessary reforms. The review was conducted by Elizabeth Proust and the then Public Sector Standards Commissioner Peter Allen (‘Proust Review’). It examined the existing integrity bodies, including VAGO, the Local Government Investigations and Compliance Inspectorate, the OPI, the VO and Victoria Police.<sup>73</sup>

The review found that the integrity system could be strengthened by creating a new Victorian Integrity and Anti-Corruption Commission and extending the powers of existing agencies. The new commission, it was suggested, should have jurisdiction across the public service, police and local government.<sup>74</sup> The review also recommended that a new Parliamentary Integrity Commissioner be established with jurisdiction in relation to Members of Parliament. The Commissioner’s purpose was to receive and investigate complaints about parliamentarians and their staff.<sup>75</sup>

The former Labor Government accepted the recommendations of the Proust Review and indicated that it would introduce the proposed structure in 2011 with a commission commencing operations in 2012.<sup>76</sup> The Liberal National Coalition did not agree with the recommendations of the Proust Review and continued its support for the establishment of a broad-based anti-corruption commission, that would be closely modelled on the NSW Independent Commission Against Corruption (ICAC) with responsibility for all public sector employees.<sup>77</sup>

### 2.3.2 A new integrity system

Following the Liberal National Coalition’s election in November 2010, the Government commenced the establishment of a broad-based anti-corruption agency. The creation of IBAC begun in October 2011 with the introduction of a

<sup>72</sup> See for example, Liberal Victoria (2004), *Anti-corruption Commission Needed Now*, Media Release; Victorian Liberal Nationals Coalition (2010a), *The Victorian Liberal Nationals Coalition Plan for Integrity of Government*, Melbourne, pp. 2–3.

<sup>73</sup> Elizabeth Proust and Peter Allen (2010), *Review of Victoria’s Integrity and Anti-Corruption System*, Public Sector Standards Commissioner, Melbourne, State Services Authority, p. 7.

<sup>74</sup> Elizabeth Proust and Peter Allen (2010), *Review of Victoria’s Integrity and Anti-Corruption System*, Public Sector Standards Commissioner, Melbourne, State Services Authority, p. 27.

<sup>75</sup> Elizabeth Proust and Peter Allen (2010), *Review of Victoria’s Integrity and Anti-Corruption System*, Public Sector Standards Commissioner, Melbourne, State Services Authority, p. 26.

<sup>76</sup> John Brumby (2010), *Government Adopts the Proust Integrity Model*, Media Release, 2 June 2010.

<sup>77</sup> Victorian Liberal Nationals Coalition (2010a), *The Victorian Liberal Nationals Coalition Plan for Integrity of Government*, Melbourne, Liberal Victoria, pp. 2–3.

number of bills<sup>78</sup> the Government described it as '[one of] the most far-reaching and fundamental reforms to the anti-corruption and integrity system in Victoria's history'.<sup>79</sup> Prior to the changes, Victoria was one of the two remaining Australian states without a specific anti-corruption commission.<sup>80</sup>

IBAC commenced operations on 1 July 2012 and was fully operational from 10 February 2013.<sup>81</sup> The current Commissioner, Stephen O'Bryan QC was appointed on 1 January 2013. The VI was established by the *Victorian Inspectorate Act 2011* (Vic) on 1 July 2012, and commenced operations on 10 February 2013.<sup>82</sup> The current Inspector, Robin Brett QC was appointed on 1 January 2013.

In addition to the IBAC and VI, several new agencies were created including the Public Interest Monitor and Freedom of Information Commissioner. As a result, the OPI and Office of the Special Investigations Monitor were abolished, with their functions being distributed to the newly established agencies.<sup>83</sup>

Further changes were also made to the functions and operation of the VO and VAGO, with responsibility for some functions shifting to IBAC.<sup>84</sup> Broader changes to the integrity system also included the repeal of the *Whistleblowers Protection Act 2001* (Vic), which was replaced by the *Protected Disclosure Act 2012* (Vic).

In order to oversight the new integrity system, a number of Parliamentary Committees were provided with powers to monitor, review and report to Parliament on the work of these integrity agencies. These included:

- The Independent Broad-based Anti-corruption Commission Committee
- The Accountability and Oversight Committee, and
- The Public Accounts and Estimates Committee.<sup>85</sup>

## 2.4 Overview of the IBAC and VI

The role, functions and powers of the IBAC and VI are specified across a number of pieces of legislation relevant to the Victorian integrity system. While each agency is responsible for oversight of particular areas, there are interrelated

<sup>78</sup> These included principally, *Independent Broad-based Anti-corruption Commission Act 2011* (Vic); *Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Act 2012* (Vic); *Independent Broad-based Anti-corruption Commission Amendment (Examinations) Act 2012* (Vic).

<sup>79</sup> The Hon. Andrew McIntosh, Minister responsible for the establishment of an anti-corruption commission, *Independent Broad-based Anti-corruption Commission Bill 2011* (Vic), Second Reading Speech, 27 October 2011, Hansard (Legislative Assembly) p. 4974.

<sup>80</sup> Prior to the changes, South Australia and Victoria were the two states without a designated anti-corruption agency. South Australia has subsequently also established the Independent Commissioner Against Corruption and the Office for Public Integrity in 2012.

<sup>81</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2012-2013*, p. 8.

<sup>82</sup> Victorian Inspectorate, *Annual Report 2012-2013*, p. 5.

<sup>83</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2012-2013*, p. 13; Victorian Inspectorate, *Annual Report 2012-2013*, p. 5.

<sup>84</sup> *Protected Disclosure Act 2012* (Vic) s 26(2).

<sup>85</sup> *Parliamentary Committees Act 2003* (Vic) ss 6A, 12A, 14.

referral process and interconnected functions. This complex process is reflected in the number of pieces of legislation relevant to the functions of the IBAC and VI, including (but not limited to):

- *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ('IBAC Act')
- *Victorian Inspectorate Act 2011* (Vic)
- *Protected Disclosure Act 2012* (Vic)
- *Victoria Police Act 2013* (Vic)
- *Crimes Act 1958* (Vic)
- *Surveillance Devices Act 1999* (Vic)
- *Telecommunications (Interception) (State Provisions) Act 1994* (Vic)
- *Crimes (Controlled Operations) Act 2004* (Vic)
- *Public Interest Monitor Act 2011* (Vic)

### 2.4.1 The Independent Broad-based Anti-corruption Commission

IBAC's primary purpose is to 'strengthen the integrity of the Victorian public sector, and to enhance community confidence in public sector accountability'.<sup>86</sup> In carrying out this purpose, IBAC has three major functions:

- to identify and expose serious corrupt conduct within the public sector and police misconduct
- to assist with the education and prevention of corruption across the public service, and
- to assess whether complaints made to IBAC or other public sector agencies amount to protected disclosures in accordance with the *Protected Disclosure Act 2012* (Vic).<sup>87</sup>

#### Corrupt conduct jurisdiction

One of IBAC's primary functions is to investigate and expose 'serious corrupt conduct'.<sup>88</sup> Complaints about suspected corrupt conduct may be made by members of the public or public sector employees.<sup>89</sup> In addition, notifications may be received from the heads of public sector agencies.<sup>90</sup> IBAC may also choose to commence an investigation of its own motion – without a complaint or notification of corrupt conduct.<sup>91</sup>

<sup>86</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2012–2013*, p. 8.

<sup>87</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 15.

<sup>88</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 15(2)(a).

<sup>89</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 51.

<sup>90</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 51–52, 57.

<sup>91</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 60(1)(c).

In order to undertake an investigation, the alleged conduct must amount to an indictable offence within legislation (including such offences as fraud or blackmail) or specified common law indictable offences including perverting the course of justice.<sup>92</sup> Prior to commencing an investigation into allegations of corrupt conduct, IBAC must also be ‘reasonably satisfied’ that the conduct amounts to ‘serious corrupt conduct’.<sup>93</sup>

Once IBAC has received a complaint or notification of corrupt conduct, it may investigate, dismiss or refer the allegation to another body.<sup>94</sup>

### Complaints regarding police

IBAC receives complaints and notifications regarding employees of Victoria Police in respect of a broad range of conduct including:

- failing or refusing to perform duties
- behaving disgracefully or improperly (on or off duty), or
- discrediting Victoria Police or its personnel.<sup>95</sup>

The Chief Commissioner of Police is required to notify IBAC of complaints made regarding police misconduct internally within Victoria Police, the details of the investigation and the outcome.<sup>96</sup>

### What are IBAC’s powers?

If IBAC determines to investigate a complaint, it may utilise a number of powers to assist the investigation, including (but not limited to):

- search warrants to enter premises and seize documents
- telephone intercepts
- summons a witness to appear before the Commission or produce documents
- assumed identities, and
- examinations of witnesses (conducted in public or in private).<sup>97</sup>

After completing an investigation, IBAC may determine to make recommendations to the organisation relevant to the complaint, the responsible Minister, or the Premier.<sup>98</sup> IBAC may make recommendations through either a

<sup>92</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 3.

<sup>93</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 60(2).

<sup>94</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 58.

<sup>95</sup> Independent Broad-based Anti-corruption Commission, ‘What is Police Misconduct’, viewed 15 December 2015, <[www.ibac.vic.gov.au/reporting-corruption/what-can-you-complain-about/what-is-police-misconduct](http://www.ibac.vic.gov.au/reporting-corruption/what-can-you-complain-about/what-is-police-misconduct)> and *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 5.

<sup>96</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 57(2)–(4).

<sup>97</sup> *Telecommunications (Interception and Access) Act 1979* (Cth) s 39(ea); *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 91, 117, 120; *Crimes (Assumed Identities) Act 2004* (Vic) s 4.

<sup>98</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 159(1).



public or private report.<sup>99</sup> Should IBAC provide recommendations, it may also request a response.<sup>100</sup> IBAC may also table a special report in Parliament, or determine to take no further action regarding the investigation.<sup>101</sup>

Should the findings or investigation involve potentially criminal conduct, IBAC may institute criminal proceedings arising from its investigation.<sup>102</sup> It may also refer the allegations to a prosecutorial body including the Director of Public Prosecutions for consideration.<sup>103</sup>

### Education and prevention

IBAC also has a key role in assisting the public sector in preventing corruption through its corruption prevention framework, which outlines three key strategies. They are:

1. Engaging with the community and the public sector to improve understanding of corruption and its harms.
2. Improving reporting of corruption and helping to build the public sector's capacity to address reports.
3. Alerting organisations to the latest information and intelligence to stay ahead of corruption risks.<sup>104</sup>

### Protected disclosures

As a part of the broader integrity reforms in 2011, the *Whistleblowers Protection Act 2001* (Vic) was replaced with the *Protected Disclosure Act 2012* (Vic). The responsibility for assessing such disclosures was transferred from the VO to IBAC.<sup>105</sup> The definition of protected disclosures will be discussed in Chapter 4.

Agencies which receive complaints must assess whether a complaint could amount to a protected disclosure and if so, refer it to IBAC.<sup>106</sup> IBAC then assesses whether the complaint does amount to a protected disclosure.<sup>107</sup> If it determines the allegation amounts to a protected disclosure, IBAC may investigate the allegations if it falls within its jurisdiction or, if appropriate, refer the matter to the VO, VI or Victoria Police.<sup>108</sup>

<sup>99</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 159(1)–(2).

<sup>100</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 159(6).

<sup>101</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 162(1), 164(1)(f).

<sup>102</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 190(a).

<sup>103</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 74.

<sup>104</sup> See IBAC's Corruption Prevention Strategy, viewed 15 December 2015 <[www.ibac.vic.gov.au/docs/default-source/education-resources/external-version-of-strategy\\_eps-version-final.pdf?sfvrsn=4](http://www.ibac.vic.gov.au/docs/default-source/education-resources/external-version-of-strategy_eps-version-final.pdf?sfvrsn=4)>.

<sup>105</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2012–2013*, p. 8.

<sup>106</sup> *Protected Disclosure Act 2012* (Vic) pt 2 div 2.

<sup>107</sup> *Protected Disclosure Act 2012* (Vic) s 26(2).

<sup>108</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 73(3)(a)–(b).

## 2.4.2 Work of the IBAC in 2013 – 2015

IBAC's most recent Annual Report outlined that during 2014/2015, 2,196 complaints and notifications were received which involved 4,443 allegations.<sup>109</sup> Of these allegations, 67 per cent related to Victoria Police and 22 per cent related to state government agencies.<sup>110</sup> Of these matters, 1,206 allegations were referred to other agencies, 38 were investigated by IBAC and the remaining matters were dismissed.<sup>111</sup>

During this period IBAC investigations resulted in:

- two matters where criminal proceedings were instituted or involved a referral to the Director of Public Prosecutions
- three referrals to another entity for disciplinary or other action
- three recommendations to an agency for further action, and
- no further action taken was taken in respect of seven investigations.<sup>112</sup>

IBAC has undertaken a number of activities to assist in educating the community and public officials about corrupt conduct and the role of IBAC. These have included:

- Developing education programs to inform public officials and members of the community about IBAC and its functions.
- Holding forums for public sector staff in relation to particular corruption issues, including fraud and corruption risks in local government.
- Providing training regarding best-practice processes in relation to protected disclosure complaints within the public sector.<sup>113</sup>

To assist in the prevention of corrupt conduct, IBAC has also conducted a number of research projects and intelligence profiles to identify current corruption trends. The research and information published provides suggested processes for public sector agencies to mitigate the risks of corruption. These projects have included:

- A review of complaints regarding predatory behaviour by Victoria Police officers against vulnerable persons.<sup>114</sup>
- An assessment of the risks and common factors leading to organised crime cultivation of public sector employees.<sup>115</sup>

<sup>109</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2014–2015*, p. 17.

<sup>110</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2014–2015*, p. 17.

<sup>111</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2014–2015*, p. 19.

<sup>112</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2014–2015*, p. 13.

<sup>113</sup> Independent Broad-based Anti-corruption Commission, 'Preventing Corrupt Conduct and Police Misconduct', viewed 6 January 2015, <[www.ibac.vic.gov.au/publications-and-resources/annual-report-2013-14/report-of-operations/preventing-corrupt-conduct-and-police-misconduct](http://www.ibac.vic.gov.au/publications-and-resources/annual-report-2013-14/report-of-operations/preventing-corrupt-conduct-and-police-misconduct)>.

<sup>114</sup> Independent Broad-based Anti-corruption Commission (2015d), 'Predatory behaviour by Victoria Police officers against vulnerable persons' Intelligence Report 2, Melbourne.

<sup>115</sup> Independent Broad-based Anti-corruption Commission (2015c), 'Organised Crime Group Cultivation of Public Sector Employees' Intelligence Report 1, Melbourne.

- Research relating to community attitudes and perceptions of the level of corruption in the public sector.<sup>116</sup>

### 2.4.3 IBAC investigations

Following the commencement of operations in February 2013, IBAC has conducted a number of high profile investigations, including:

#### Operation Ord

Operation Ord is currently investigating allegations of the misuse of allocated funds for financial benefit and the systems and practices of the Department of Education and Training in procurement and financial management. Operation Ord is an ongoing investigation, with a report expected to be published in 2016.<sup>117</sup>

#### Operation Fitzroy

Operation Fitzroy examined allegations of serious corruption within the former Department of Transport and Public Transport Victoria. Following IBAC's investigations, nine individuals and one company have been charged with offences which are currently the subject of criminal proceedings.<sup>118</sup>

#### Operation Wyong

Operation Wyong investigated information that an individual had attempted to bribe a public official in order to secure a greater number of grave sites than was ordinarily permitted by the cemetery.

Following IBAC's investigation, charges were brought against the individual who attempted to bribe the public official. This person was later convicted of attempting to bribe a public official and fined \$10,000.<sup>119</sup>

A number of other issues relating to record keeping systems, staff training and internal policies were also identified by IBAC and the relevant public authority was notified.<sup>120</sup>

<sup>116</sup> Adam Graycar (2014), 'Awareness of Corruption in the Community and Public Service: a Victorian Study' 73 (2) *Australian Journal of Public Administration*, pp. 271–281.

<sup>117</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2014–2015*, p. 14.

<sup>118</sup> Independent Broad-based Anti-corruption Commission, 'Operation Fitzroy', viewed 15 December 2015, <[www.ibac.vic.gov.au/investigating-corruption/current-and-past-investigations/operation-fitzroy](http://www.ibac.vic.gov.au/investigating-corruption/current-and-past-investigations/operation-fitzroy)>.

<sup>119</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2014–2015*, p. 12.

<sup>120</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2013–2014*, p. 20.

### 2.4.4 The Victorian Inspectorate

The VI's primary purpose is to monitor and oversight agencies within Victoria's integrity system. The VI has responsibility for the oversight of:

- IBAC
- VO
- VAGO
- Public Interest Monitor, and
- The Chief Examiner.<sup>121</sup>

The VI also has a monitoring role in respect of the record-keeping compliance of agencies such as Victoria Police, the Public Interest Monitor, the Chief Examiner and some Victorian Government agencies provided with telephone intercept powers.<sup>122</sup>

#### What does the VI oversight?

The VI's oversight role involves auditing records and intelligence held by particular agencies, reviewing uses of coercive powers and receiving complaints about the conduct of the agencies and its officers.<sup>123</sup> It has particular responsibility in respect of overseeing IBAC's use of coercive powers and receiving complaints about IBAC employees.<sup>124</sup>

#### Complaints

The *Victorian Inspectorate Act 2011* (Vic) ('VI Act') provides that an individual may make a complaint to the VI regarding the conduct of IBAC employees in undertaking their duties.<sup>125</sup> The VI Act also describes some of the particular grounds about which a complaint may be made, including that the actions of an IBAC employee were:

- (a) contrary to law
- (b) unreasonable, unjust, oppressive or improperly discriminatory
- (c) based on improper motives
- (d) an abuse of power, or
- (e) otherwise improper.<sup>126</sup>

<sup>121</sup> *Victorian Inspectorate Act 2011* (Vic) s 11.

<sup>122</sup> See for example, *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 11; *Fisheries Act 1995* (Vic) s 131W; *Wildlife Act 1975* (Vic) ss 74S, 74SA.

<sup>123</sup> Victorian Inspectorate, *Annual Report 2014–2015*, pp. 6–7.

<sup>124</sup> *Victorian Inspectorate Act 2011* (Vic) ss 11(2)(a)–(f).

<sup>125</sup> *Victorian Inspectorate Act 2011* (Vic) s 43.

<sup>126</sup> *Victorian Inspectorate Act 2011* (Vic) s 43(4).

### What are the VI's powers?

During an investigation, the VI may summons witnesses to give evidence or produce documents, enter premises and seize documents.<sup>127</sup> However, in contrast to the provisions contained in the IBAC Act, the VI must conduct all examinations of witnesses in private.<sup>128</sup>

In completing an investigation, the VI may make recommendations to IBAC in relation to any action that the VI considers must be taken and may require IBAC to prepare a report outlining its response.<sup>129</sup> The VI may also recommend in private that disciplinary action should be taken in regard of an IBAC officer.<sup>130</sup>

In addition, the VI can table a report in Parliament on any matter relating to the performance of its functions and duties.<sup>131</sup>

#### 2.4.5 Work of the VI in 2014–2015

The majority of the work carried out by the VI relates to IBAC and its use of coercive powers. In 2014/2015, 665 of the total 851 notifications received and considered by the VI related to the work of IBAC.<sup>132</sup>

Throughout 2014/2015, the VI's oversight of IBAC included reviewing and monitoring:

- 162 confidentiality notices and 65 notices of cancellation.
- 335 reports of witness summons and associated justifications.
- 119 notifications relating to the video recording and transcripts of coercive examinations.
- 23 complaints and 25 inquiries relating to IBAC or its personnel.<sup>133</sup>

<sup>127</sup> *Victorian Inspectorate Act 2011* (Vic) ss 51, 53, 63.

<sup>128</sup> *Victorian Inspectorate Act 2011* (Vic) s 51(1).

<sup>129</sup> *Victorian Inspectorate Act 2011* (Vic) ss 78, 78(5).

<sup>130</sup> *Victorian Inspectorate Act 2011* (Vic) s 79.

<sup>131</sup> *Victorian Inspectorate Act 2011* (Vic) s 79(3).

<sup>132</sup> Victorian Inspectorate, *Annual Report 2014–2015*, pp. 7–11.

<sup>133</sup> Victorian Inspectorate, *Annual Report 2014–2015*, pp. 10–11.

## 2.5 Concerns about the Victorian integrity system raised by the IBAC, VI and stakeholders

### 2.5.1 *Special Report Following IBAC's First Year of Being Fully Operational*

In April 2014, IBAC tabled its *Special Report Following IBAC's First Year of Being Fully Operational* ('Special Report') reflecting on its first year of full operation. The report detailed the work it had undertaken, including details of investigations, reviews and the educational activities conducted.<sup>134</sup>

The report also identified a number of areas within the legislative framework of IBAC which would benefit from amendments or greater clarity. It noted that some aspects of its legislation restricted IBAC from completing functions and achieving its objectives.<sup>135</sup>

The recommendations canvassed many areas of IBAC's operations including the threshold for commencing an investigation, limitations on the referrals of protected disclosure complaints and technical issues arising from the legislation, including the issuing of confidentiality notices.<sup>136</sup>

### 2.5.2 Stakeholder concerns about the legislation

During the establishment of the current Victorian integrity system and following IBAC's *Special Report*, the VO and a number of stakeholders also raised concerns regarding aspects of the legislative framework and suggested areas for further improvement.

The issues canvassed wide aspects of the legislation including concerns about the narrow scope of IBAC's jurisdiction, the effectiveness of the new protected disclosure regime and complexity of the referral process between integrity agencies.<sup>137</sup>

The concerns of the IBAC, VI and stakeholders are considered further in Chapters 3 and 4.

<sup>134</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, pp. 17–23.

<sup>135</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, pp. 23–29.

<sup>136</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, pp. 23–29. A complete list of concerns outlined in the *Special Report* is provided in Appendix 5.

<sup>137</sup> See for example, Tim Smith (2012), 'The Victorian Independent Broad-based Anti-Corruption Commission (IBAC): A Toothless Tiger?', Working Paper No. 1, Electoral Regulation Research Network/Democratic Audit of Australia Joint Working Paper Series, Melbourne; Stephen Charles (2013), 'A sheep in wolf's clothing? A look at the Independent Broad-based Anti-corruption Commission (and other commissions of inquiry)', *Victorian Bar News*, no. 153, p. 30; Law Institute of Victoria (2012a), 'Legislation Creating the Independent Broad-based Anti-Corruption Commission', Submission to Members of Parliament, 9 May, Melbourne; Law Institute of Victoria (2012a), 'Independent Broad-based Anti-Corruption Commission- November 2012 Reforms', Letter to Members of Parliament, 6 December, Melbourne; Victorian Ombudsman, *Annual Report 2014–2015*, p. 7; Victorian Ombudsman, *Annual Report 2013–2014*, p. 5; Victorian Inspectorate, *Annual Report 2014–2015*, p. 7; Victorian Ombudsman (2012), *A section 25(2) report to Parliament on the proposed integrity system and its impact on the functions of the Ombudsman*, Melbourne.

### 2.5.3 Integrity Legislation Amendment Bill 2014 (Vic)

In response to IBAC's report and the concerns raised by other integrity agencies and stakeholders, the Integrity Legislation Amendment Bill 2014 (Vic) was introduced in September 2014.<sup>138</sup> The bill proposed a number of changes to IBAC's operations, including:

- Lowering the threshold for investigation to circumstances where the IBAC is 'satisfied that the matter, if established, would constitute serious corrupt conduct and IBAC suspects on reasonable grounds that the conduct involved has in fact occurred and is occurring'.
- Expanding the definition of corrupt conduct to include the criminal offence of misconduct in public office.
- Providing IBAC with a preliminary inquiries power to obtain information about an allegation prior to determining whether to dismiss, investigate or refer the allegations.
- Requiring all public sector heads to notify IBAC where they hold a reasonable suspicion corrupt conduct was occurring.
- A range of other minor technical amendments aimed at easing some practical difficulties with the legislation.<sup>139</sup>

The bill also included a number of other associated amendments to other integrity bodies, including the VO and Public Interest Monitor.<sup>140</sup>

The Victorian State Election was held on 29 November 2014. As the bill had not been passed by the 57<sup>th</sup> Parliament, it lapsed.

## 2.6 The Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic)

The Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) proposing amendments to the operation and function of the Victorian integrity system was introduced into the Legislative Assembly on 8 December 2015. The bill was available publicly on 10 December 2015 following the Minister's second reading speech.

The bill contains 47 clauses containing amendments to the IBAC Act and three clauses amending provisions within the VI Act. The bill also provides a number of amendments to the *Ombudsman Act 1973* (Vic) and the *Audit Act 1994* (Vic).

<sup>138</sup> Denis Napthine & Robert Clark (2014), *Reforms to Further Strengthen Victoria's Integrity Regime*, Media Release, 16 September 2014.

<sup>139</sup> Integrity Legislation Amendment Bill 2014 (Vic) cls 3, 5, 7, 11, 14, 15, 16, 19, 21. The technical amendments also included enabling IBAC to apply to the Magistrates' Court for search warrants and increasing the ability of the Commissioner to delegate his powers.

<sup>140</sup> Integrity Legislation Amendment Bill 2014 (Vic) cls 32–45, 46–49.

In introducing the bill, the Minister explained that the proposed legislation represented the first series of the Government's intended reforms to the Victorian integrity system. The proposed legislation contains significant amendments to IBAC and other integrity agencies and the Minister noted the amendments were designed to provide the agencies with the necessary tools to carry out their functions into the future.<sup>141</sup>

The Minister also announced that a review of the integrity system would be ongoing throughout 2016 and 2017 to identify further opportunities for improvements. To facilitate the review, a discussion paper would be released shortly seeking public comment to assist with 'setting the scene for the future reform program'.<sup>142</sup>

### 2.6.1 Key changes proposed

The key changes proposed to the legislation governing the IBAC and VI include:

- lowering the threshold for investigation of corrupt conduct
- expanding the definition of corrupt conduct to include the offence of misconduct in public office and also capture corrupt conduct by non-public officials which affects public administration
- introducing a mandatory reporting regime for public sector agencies
- providing a preliminary inquiries power for the IBAC and VI
- clarifying the power for IBAC to issue suppression orders during a public examination
- clarification of the powers provided to the VI in its general monitoring and oversight function, and
- a range of minor technical amendments to the practicalities of the IBAC legislative regime.

#### Lowered threshold for investigation – public sector corruption

Under the current legislative regime, in determining whether to conduct an investigation into allegations received, IBAC must satisfy the following criteria:

- there is conduct of a corrupt nature
- there is an existence of facts, which if found proved beyond a reasonable doubt, would constitute a relevant offence, and
- a reasonable satisfaction that the conduct amounts to 'serious corrupt conduct'.<sup>143</sup>

<sup>141</sup> The Hon. Jacinta Allan, Minister for Public Transport, Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic), Second Reading Speech, 10 December 2015, Hansard (Legislative Assembly), pp. 5532–5533.

<sup>142</sup> The Hon. Jacinta Allan, Minister for Public Transport, Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic), Second Reading Speech, 10 December 2015, Hansard (Legislative Assembly), p. 5533.

<sup>143</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 3, 4, 60(2).



The proposed amendments modify the threshold for investigation to require:

- a suspicion on reasonable grounds the allegation constitutes corrupt conduct, and
- the conduct would amount to a relevant offence.<sup>144</sup>

In addition, the bill proposes the inclusion of a provision outlining that ‘IBAC [is] to prioritise the investigation and exposure of serious corrupt conduct or systemic corrupt conduct’.<sup>145</sup>

This proposed threshold for investigation is significantly lower than the current regime. Notably, IBAC will no longer need to be specifically aware of facts which could give rise to a criminal offence. In addition, the requisite state of mind necessary for IBAC to commence an investigation has been lowered from a reasonable ‘satisfaction’ to a reasonable ‘suspicion’.

### **Expanded definition of corrupt conduct**

The proposed amendments also modify the definition of corrupt conduct in three ways, as described below:

#### *Misconduct in public office*

The definition of ‘relevant offence’ which conduct must amount to in order to be considered corrupt conduct, has been expanded to include the offence of misconduct in public office.<sup>146</sup>

Misconduct in public office is a broad offence covering a wide range of conduct. The offence may capture conduct including nepotism, favouritism, wilful neglect of duty or use of information for private benefit.<sup>147</sup>

#### *Conduct involving a non-public official*

The definition of corrupt conduct has also been expanded to capture conduct by a non-public official which adversely affects the effective performance of a public official or public body, and results in that person (or their associate) obtaining a benefit (either financial, through the provision of a service or patronage) that they would not have otherwise obtained.<sup>148</sup>

Accordingly, this provision explicitly provides that should an individual’s actions adversely affect the performance of a public official which leads to a benefit of some nature, IBAC will have jurisdiction to investigate the conduct.

<sup>144</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cls 4, 23.

<sup>145</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 8.

<sup>146</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 3.

<sup>147</sup> See for example, *R v Dytham* [1979] QB 722, *R v Quach* (2010) 27 VR 310; *R v Bunning* [2007] VSCA 205; *Soylomez v R* [2014] VSCA 23.

<sup>148</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 4.

*Requisite state of mind*

The bill also outlines that in determining whether an allegation amounts to a relevant offence, IBAC may assume that the required state of mind to commit the relevant offence can be proven.<sup>149</sup>

**Introduction of mandatory reporting requirements**

Under the current regime, the heads or principal officers of public sector agencies may report to IBAC conduct they believe on reasonable grounds constitutes corrupt conduct. However, it is not a mandatory requirement to do so.<sup>150</sup> The new bill has introduced a requirement that the heads of public sector agencies must report to IBAC conduct that they ‘suspect on reasonable grounds’ involves corrupt conduct.<sup>151</sup>

The bill has also reduced the degree of satisfaction required for a referral to be made – from a reasonable belief to a suspicion on reasonable grounds. In addition, the amendment has reduced the threshold for possible referral as instead of the conduct ‘constituting corrupt conduct’ it may simply ‘involve’ corrupt conduct.<sup>152</sup>

IBAC has also been provided with the power to issue directions about which matters should be notified and how such notifications should be provided. The directions issued by IBAC may also exempt certain types of matters from the regime.<sup>153</sup>

**Power to conduct preliminary inquiries**

The proposed legislation provides IBAC with the power to conduct preliminary inquiries.<sup>154</sup> This power is designed to assist IBAC in determining whether to investigate, dismiss or refer complaints and notifications it receives. IBAC may also conduct preliminary inquiries to determine whether to conduct an own motion investigation.<sup>155</sup>

In conducting preliminary inquiries, the bill permits IBAC to summons witnesses to produce documents or give evidence to the Commission.<sup>156</sup> IBAC may also request the principal officers of public bodies to provide information that may be relevant to an investigation. IBAC can issue confidentiality notices during preliminary inquiries, preventing individuals from discussing certain matters.<sup>157</sup>

<sup>149</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 4.

<sup>150</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 57(1).

<sup>151</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cls 19–20.

<sup>152</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 19.

<sup>153</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 20.

<sup>154</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 22.

<sup>155</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 22.

<sup>156</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 22.

<sup>157</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cls 14, 20.

The bill does not permit any other coercive powers to be used by IBAC in the course of conducting preliminary inquiries, including the use of telephone intercepts, search warrants or assumed identities.

### *Victorian Inspectorate*

The VI has been provided with oversight and monitoring responsibility of the issuing of witness summons during the course of preliminary inquiries conducted by IBAC.<sup>158</sup> This is consistent with its oversight of summons issued during a formal investigation. It has also been provided with a preliminary inquiries power in determining whether to conduct an own motion investigation or investigate a complaint within its own jurisdiction.<sup>159</sup>

### **Clarification of power to issue suppression orders**

The proposed legislation clarifies the power for IBAC to issue suppression orders.<sup>160</sup> A suppression order may either prohibit or restrict the publication of information or evidence given to IBAC during the course of a public examination.

In determining whether to issue a suppression order, IBAC is required to consider whether the order is necessary:

- to prevent prejudice to an individual or their reputation
- to prevent the possibility of prejudice to legal proceedings, or
- for any other reason in all of the circumstances.<sup>161</sup>

If a suppression order is made, the ground upon which it has been issued must be included on the notice, and it must be placed on the door where the examination is being held. In addition, the individual it relates to should be provided with a copy of the notice.<sup>162</sup>

The breach of a suppression order amounts to a criminal offence.<sup>163</sup>

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<sup>158</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 22.

<sup>159</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 76.

<sup>160</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 34.

<sup>161</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 34.

<sup>162</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 34.

<sup>163</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 34.

## 2.6.2 Technical amendments

A number of more minor technical and practical amendments to the legislative scheme have also been proposed in the bill. These amendments include:

- Providing a power for the Commissioner to delegate decisions to a range of individuals.<sup>164</sup>
- Permitting IBAC to apply to the Magistrates' Court in addition to the Supreme Court for a search warrant.<sup>165</sup>
- Permitting IBAC to present an individual arrested pursuant to a warrant to be before a Magistrate in addition to a Justice of the Supreme Court.<sup>166</sup>
- Providing a power for IBAC to review its own prior decisions to dismiss a matter or refer it to another agency.<sup>167</sup>
- Clarifying who may be 'present' at an IBAC examination to include persons viewing the examination remotely.<sup>168</sup>

## 2.7 Conclusion

The development of a robust integrity system is vital to the effective functioning of a modern democracy. However, the experience of anti-corruption agencies across Australia over the past three decades demonstrates the inherent difficulties in balancing an effective integrity system with areas such as the human rights of citizens.

The IBAC and VI have now been in operation for three years and it is timely to consider how the Victorian integrity system could be improved based upon the experiences of these agencies, in conjunction with the criticisms and suggestions provided by stakeholders.

The Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) provides a number of significant changes to the operation of the Victorian integrity system. These amendments are the first in a series of intended reforms. To what extent these amendments address the concerns raised by the IBAC, VI and stakeholders are discussed in further detail in the following chapter.

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<sup>164</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 11.

<sup>165</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 28.

<sup>166</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 38.

<sup>167</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 7.

<sup>168</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 30.

# 3

## Strengthening Victoria's integrity system: Issues addressed

During the establishment of the current integrity system, a number of concerns were raised by stakeholders regarding aspects of the proposed legislative framework. In relation to the Independent Broad-based Anti-corruption Commission (IBAC) and Victorian Inspectorate (VI), a wide range of issues were identified including concerns about the narrow scope of IBAC's jurisdiction, the effectiveness of the new protected disclosure regime, and potential complications arising from the complexity of the referral process between integrity agencies.

After a year of operating within the legislative framework, IBAC tabled a *Special Report Following IBAC's First Year of Being Fully Operational* ('Special Report') outlining potential improvements and raising concerns for further consideration to Parliament.<sup>169</sup> Other agencies including the Victorian Ombudsman (VO) and VI have also identified improvements based on their experiences within the system.<sup>170</sup>

As outlined in Chapter 2, legislation was introduced into Parliament in December 2015 with the purpose of 'implementing a stronger system of integrity and accountability in Victoria'.<sup>171</sup> The bill contains a number of proposed amendments which resolve or partially resolve the concerns raised by stakeholders, the IBAC and VI. These issues will be discussed in further detail below.

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169 Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, pp. 23-29.

170 See for example, Victorian Ombudsman, *Annual Report 2014-2015* p. 7; Victorian Ombudsman, *Annual Report 2013-2014*, p. 5; Victorian Inspectorate, *Annual Report 2014-2015*, p. 7.

171 The Hon. Jacinta Allan, Minister for Public Transport, Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic), Second Reading Speech, 10 December 2015, Hansard (Legislative Assembly), p. 5529

### 3.1 The scope of IBAC's jurisdiction to investigate public sector corruption

During the establishment of IBAC, significant criticism was made of the threshold to commence investigations of corrupt conduct in the public sector. Stakeholders expressed concern that the legislation set the threshold for investigation too high, reducing IBAC's capability and effectiveness.<sup>172</sup>

Currently, to conduct an investigation into allegations of corrupt conduct within the public sector, IBAC must identify:

- that the allegations fall within the definition of 'corrupt conduct'
- that facts exist which if they were found proved beyond a reasonable doubt, would constitute a 'relevant offence', and
- that it has a reasonable satisfaction the conduct amounts to 'serious corrupt conduct'.<sup>173</sup>

#### 3.1.1 The need to expand the definition of corrupt conduct

Currently, the first step in commencing an investigation requires IBAC to identify that the allegations amount to 'corrupt conduct'. Corrupt conduct is defined within the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ('IBAC Act') as follows:

##### Section 4 - Corrupt conduct

- (1) For the purposes of this Act, "corrupt conduct" means conduct—
  - (a) of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or
  - (b) of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body; or
  - (c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust; or
  - (d) of a public officer or a public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or

<sup>172</sup> See for example, Tim Smith (2012), 'The Victorian Independent Broad-based Anti-Corruption Commission (IBAC): A Toothless Tiger?', Working Paper No. 1, Electoral Regulation Research Network/Democratic Audit of Australia Joint Working Paper Series, Melbourne; Law Institute of Victoria (2012a), 'Legislation Creating the Independent Broad-based Anti-Corruption Commission', Submission to Members of Parliament, 9 May 2012, Melbourne; Law Institute of Victoria (2012b), 'Independent Broad-based Anti-Corruption Commission - November 2012 Reforms', Letter to Members of Parliament, 6 December 2012, Melbourne.

<sup>173</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 3, 4, 60(2).

- (e) that could constitute a conspiracy or an attempt to engage in any conduct referred to in paragraph (a), (b), (c) or (d)—

being conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a relevant offence.

A 'relevant offence' involves either an indictable offence specified within legislation or a defined common law indictable offence. The common law offences specified within the IBAC Act include bribery, perverting the course of justice and attempting to pervert the course of justice.<sup>174</sup>

A number of stakeholders have criticised the omission of misconduct in public office (MIPO) from the definition of 'relevant offence' and therefore from IBAC's jurisdiction.<sup>175</sup> It was argued that IBAC's ability to combat corruption would be unduly limited if it could not investigate misconduct across the public sector.<sup>176</sup>

In its *Special Report*, IBAC also identified similar concerns:

[A] body like IBAC, whose primary functions include the exposure of serious corrupt conduct within the public sector, should be able to investigate allegations of serious MIPO.<sup>177</sup>

In evidence provided to the Committee, a number of witnesses reiterated the concerns listed above and supported the introduction of MIPO within the definition of corrupt conduct.<sup>178</sup> The Law Institute of Victoria (LIV), for example, stated:

In our view it is important that IBAC has the ability to investigate a wide range of offences where they are linked to corrupt conduct by public officials. One common law offence that we say should be included as a minimum is the offence of misconduct in public office. This offence, where it is serious in nature, is clearly relevant to investigating corrupt conduct of public officials.<sup>179</sup>

<sup>174</sup> *Independent Broad-based Anti-corruption Commission Act 2011 (Vic) s 3.*

<sup>175</sup> See Colleen Lewis (2014), 'IBAC, Victoria's anti-corruption body, cannot investigate corruption in public office', *The Age*, 10 July; Law Institute of Victoria (2012a), 'Legislation Creating the Independent Broad-based Anti-Corruption Commission', Submission to Members of Parliament, 9 May 2012, Melbourne, p. 7; Accountability Round Table (2015b), 'The amendments recommended by the Accountability Round Table necessary for the IBAC legislation' available at <[www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf](http://www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf)>, p. 2.

<sup>176</sup> Law Institute of Victoria (2012a), 'Legislation Creating the Independent Broad-based Anti-Corruption Commission', Submission to Members of Parliament, 9 May 2012, Melbourne, p. 7; Accountability Round Table (2015b), 'The amendments recommended by the Accountability Round Table necessary for the IBAC legislation' available at <[www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf](http://www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf)>, p. 2.

<sup>177</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 26.

<sup>178</sup> The Hon. Tim Smith QC, Closed Hearing, Melbourne, 7 December 2015; Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015.

<sup>179</sup> Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015.

### 3.1.2 Removal of the 'if the facts were proved' requirement

A focus of the criticism relating to IBAC's jurisdiction also centred upon the requirement to identify 'facts [which if] were found proved beyond a reasonable doubt' would constitute a specific indictable offence.

Some stakeholders expressed concern that the ambit of this provision would require IBAC to identify prior to the commencement of an investigation:

- what offence they would be investigating, and
- what facts would support proving that criminal offence.<sup>180</sup>

It was noted that such evidence and information is not routinely available at the start of an investigation, but was more likely to be ascertained during the investigation process.<sup>181</sup>

The Hon. Tim Smith QC suggested that this requirement could extend as far as obliging IBAC to identify the facts supporting proof of the elements of the criminal offence it intends to investigate prior to commencing the investigation.<sup>182</sup>

The Accountability Round Table (ART) also raised concern about this aspect of the provision:

[T]hey cannot commence an investigation unless they have been given detailed information by a well-informed whistle-blower; that is to say they cannot investigate a matter unless they already know exactly what it is that they wish to investigate, which is obviously absurd.<sup>183</sup>

This view was also supported by the LIV. In evidence to the Committee, the LIV expressed the view that the effect of this provision may require IBAC to hold such a significant amount of information prior to commencing an investigation that it may be more appropriate for a law enforcement agency to consider:

It has also been pointed out by many, including some of our members, that if there are sufficient facts to satisfy IBAC that the conduct would, if the facts were proved beyond reasonable doubt at trial, constitute a relevant offence, then it may be more appropriate to refer the matter to police for investigation and prosecution, in which case the question must be asked: what is the role and purpose of IBAC?<sup>184</sup>

<sup>180</sup> Law Institute of Victoria (2015b), *Strengthening Victoria's Integrity Regime – Position Paper*, Melbourne, p. 5; Accountability Round Table (2015b), 'The amendments recommended by the Accountability Round Table necessary for the IBAC legislation' available at <[www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf](http://www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf)>; Tim Smith (2012), 'The Victorian Independent Broad-based Anti-Corruption Commission (IBAC): A Toothless Tiger?', Working Paper No. 1, Electoral Regulation Research Network/Democratic Audit of Australia Joint Working Paper Series, Melbourne, p. 3.

<sup>181</sup> Law Institute of Victoria (2015b), *Strengthening Victoria's Integrity Regime – Position Paper*, Melbourne, p. 5; Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015.

<sup>182</sup> Tim Smith (2012), 'The Victorian Independent Broad-based Anti-Corruption Commission (IBAC): A Toothless Tiger?', Working Paper No. 1, Electoral Regulation Research Network/Democratic Audit of Australia Joint Working Paper Series, Melbourne.

<sup>183</sup> Accountability Round Table (2015b), 'The amendments recommended by the Accountability Round Table necessary for the IBAC legislation' available at <[www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf](http://www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf)>, p. 2.

<sup>184</sup> Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015.



### 3.1.3 Removing the requirement to identify 'serious corrupt conduct'

Another area relating to IBAC's jurisdiction which gave rise to critical comment was the inability to commence an investigation unless the conduct amounted to 'serious corrupt conduct' as outlined in section 60(2) of the IBAC Act:

The IBAC must not conduct an investigation under subsection (1) unless it is reasonably satisfied that the conduct is serious corrupt conduct.

Criticism of the provision focused on two key issues. First, it was identified that the imposition of this threshold was too high and would have the effect of impeding IBAC from functioning effectively to combat public sector corruption.

This view was supported by IBAC in its *Special Report* in 2014:

There have been corrupt conduct allegations where IBAC has not felt able to commence investigations because of the threshold restrictions in the IBAC Act. Not all of these were suitable for referral elsewhere. This constraint has possibly undermined IBAC's ability to perform and achieve its principal objects and functions.<sup>185</sup>

In evidence to the Committee the IBAC Commissioner reiterated the concerns expressed in the *Special Report* and described the impact of the threshold provided in section 60(2) as:

With the old threshold I felt we could not look at them, and unfortunately a couple of them were ones that we could not refer to another body for operational reasons. Each of those matters we would have been able to delve into with the lower threshold, and it is important that we be able to, at least in a preliminary sense, investigate all complaints of a more serious nature that come to our attention.<sup>186</sup>

The LIV also believed that the construction of the threshold for investigation could result in the Victorian integrity system failing to adequately combat corruption:

Essentially what it means is that there are matters that are falling between the cracks of the integrity infrastructure of this state.<sup>187</sup>

Second, criticism focused on difficulties arising from the legislation's lack of definition of the term 'serious corrupt conduct'. It was expressed that such a term involved potentially wide application without legislative parameters defining its ambit. Witnesses outlined the potential difficulties that could arise, leading to the possibility of protracted and resource intensive court challenges.<sup>188</sup>

<sup>185</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 25.

<sup>186</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>187</sup> Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015.

<sup>188</sup> Accountability Round Table (2015a), 'Strengthening the Victorian Government Integrity System — Does Victoria have a government corruption problem?', Correspondence to the Hon. Gavin Jennings, 20 July, p. 7; Mr George Brouwer, former Victorian Ombudsman, Closed Hearing, Melbourne, 23 November 2015.

The Hon. Murray Kellam QC, the former Tasmanian Integrity Commissioner, noted some of the difficulties in interpreting the provision:

'[S]erious' is in the eye of the beholder... I would have thought that it would be better to permit more discretion for the Commissioner or whoever is making the decisions at IBAC about serious — well what is corrupt conduct?<sup>189</sup>

The former Victorian Ombudsman, Mr George Brouwer outlined some of the difficulties in legally interpreting the terms used within the provision:

This is one of the fundamental objections I had to the whole approach, looking from an effectiveness point of view, because the moment you start building in words like 'serious' — the moment you start using adjectives like that — you get the whole question of legal interpretation about, 'Well, what does "serious" mean as opposed to "not so serious"? What does "serious" mean as opposed to "corruption"?' This is one of the fundamental weaknesses that the IBAC legislation introduced. If you want to have an effective body, that ought to be got rid of.<sup>190</sup>

The ART also pointed out the implications of court challenges in relation to evidence obtained through investigations:

Further the elements of the threshold are such that they provide ample opportunity for the corrupt to collaterally legally challenge investigations thereby stopping them and, if charged with offences, to challenge the admissibility of evidence obtained by IBAC.<sup>191</sup>

### 3.1.4 Expanding the definition of corrupt conduct – 'honest performance of duties'

The LIV also raised concerns in respect of the limitation of IBAC's ability to investigate conduct which affects the performance of a public official's duties:

IBAC's investigative powers are also currently limited to conduct affecting only the probity of the performance of a public function, rather than simply the efficacy of its exercise. 'Corrupt conduct' is defined in s4(1)(1)(a) of the IBAC Act to mean conduct of any person that 'adversely affects the *honest performance* by a public officer or public body of his or her or its functions as a public officer or public body'. This definition prevents IBAC from investigating conduct that may not involve any wrong-doing on the part of public officials, but may still lead to serious outcomes for the administration of justice.<sup>192</sup>

189 The Hon. Murray Kellam QC, former Tasmanian Integrity Commissioner, Closed Hearing, Melbourne, 12 November 2015.

190 Mr George Brouwer, former Victorian Ombudsman, Closed Hearing, Melbourne, 23 November 2015.

191 Accountability Round Table (2015a), 'Strengthening the Victorian Government Integrity System – Does Victoria have a government corruption problem?' Correspondence to the Hon. Gavin Jennings, 20 July, p. 8.

192 Law Institute of Victoria (2015b), *Strengthening Victoria's Integrity Regime – Position Paper*, Melbourne, p. 4.

### 3.1.5 Proposed legislative changes

As noted in Chapter 2, the proposed legislation lowers the threshold for investigation from 'serious corrupt conduct' to a 'suspicion on reasonable grounds the allegation constitutes corrupt conduct'.<sup>193</sup> The legislation proposes to widen the jurisdiction of IBAC to investigate misconduct in public office, remove the requirement that IBAC only investigate 'serious' public sector corrupt conduct and remove the requirement that facts supporting the relevant criminal offence be ascertained prior to investigation.<sup>194</sup>

The definition of corrupt conduct has also been expanded to capture conduct by a non-public official which adversely affects the effective performance of a public official or public body, and results in that person (or their associate) obtaining a benefit (either financial, through the provision of a service or patronage) that they would not have otherwise obtained.<sup>195</sup>

In evidence provided to the Committee, the IBAC Commissioner stated that the proposed amendments were satisfactory and would assist the IBAC in conducting investigations:

I think it will make a practical difference. I think it will also lessen the risk of us ending up in court in connection with what are often tactical challenges to just slow us down and impede us in investigations. That has not happened yet, but it always can happen. The experience in New South Wales is that over the years, after [the Independent Commission Against Corruption (ICAC)] started to gain traction and become effective, more and more they were landing up in court with those sorts of technical challenges.<sup>196</sup>

The introduction of the offence of misconduct in public office within IBAC's jurisdiction was also welcomed:

[T]here have been situations at present, under the current act, where we have had difficulty identifying an offence that could trigger our jurisdiction to investigate. It will be a really useful tool, I suspect, in terms of actually helping us to fulfil our statutory functions.<sup>197</sup>

However, the Committee received a submission from the ART expressing concern that the proposed threshold for investigation will continue to present difficulties for IBAC in commencing and conducting investigations. The ART suggested that a threshold for investigation for IBAC should be modelled on the New South Wales ICAC definition, which provides greater discretion to the ICAC Commissioner to determine which matters to investigate. It explained:

<sup>193</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 23.

<sup>194</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cls 3–4, 23.

<sup>195</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 4.

<sup>196</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>197</sup> Dr John Lynch, General Counsel, Independent Broad-based Anti-Corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

[The] ART previously submitted that the present definition of “corrupt conduct” is too narrow and, even after the amendments proposed by the Bill, will remain too narrow. As with ICAC, it should be for the IBAC’s Commissioner to determine what is significant and, if any conduct is “corrupt”, and IBAC should have discretion to investigate it. Similarly, ART submitted that the thresholds that presently prevent IBAC investigating any state of affairs which give rise to a suspicion of corrupt conduct should be removed.<sup>198</sup>

### 3.1.6 Committee Comment

The Committee considers the new threshold for investigation will assist IBAC in conducting investigations and carrying out its function to combat corruption more effectively. The Committee acknowledges the introduction of MIPO is consistent with the mandate and jurisdiction of similar anti-corruption agencies across Australia, including New South Wales, Queensland and Western Australia.<sup>199</sup>

The Committee is satisfied that the proposed legislation resolves the concerns expressed in regard to the threshold for investigation. The amendments are a positive step forward in increasing the effectiveness of IBAC in combatting corruption in the public sector.

The Committee also believes further consideration should be given to whether the jurisdiction of IBAC should be expanded further, as suggested in submissions and evidence it has received.<sup>200</sup> This will be explored further in Chapter 4.

## 3.2 Power to conduct preliminary inquiries

In its *Special Report* in 2014, IBAC identified that the current legislation did not expressly permit it to conduct preliminary inquiries. IBAC stated that such a power ‘[is] often necessary in deciding whether or not a matter should be investigated, referred to another body for investigation, or dismissed’ and are commonly found within legislation of similar bodies across Australia.<sup>201</sup>

IBAC explained that it drew upon legislative provisions in sections 15 and 56 of the IBAC Act which permit it to receive information, in order to conduct preliminary inquiries without the use of coercive powers.<sup>202</sup>

<sup>198</sup> Accountability Round Table, Submission, 13 January 2016.

<sup>199</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 8(2)(a); *Crime and Corruption Act 2001* (Qld) s 15; *Independent Commissioner Against Corruption Act 2012* (SA) s 5(1)(a)(iii); *Corruption, Crime and Misconduct Act 2003* (WA) s 4.

<sup>200</sup> Mr George Brouwer, former Victorian Ombudsman, Submission, 3 January 2016; the Hon. Murray Kellam QC, former Tasmanian Integrity Commissioner, Submission, 5 January 2016; Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015; Accountability Round Table, Submission, 13 January 2016.

<sup>201</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC’s First Year of Being Fully Operational*, IBAC, Melbourne, p. 23.

<sup>202</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC’s First Year of Being Fully Operational*, IBAC, Melbourne, p. 23.

There is not consistent agreement among stakeholders as to whether it is necessary to introduce a specific preliminary inquiries power. For example, the LIV has previously advised that if amendments were made resulting in a significantly lower threshold for investigation, this would resolve a number of the issues relating to IBAC's jurisdiction – potentially without the introduction of an additional power.<sup>203</sup>

In evidence to the Committee, the LIV stated:

The LIV's current position is that preliminary investigatory powers may not be necessary if the jurisdictional thresholds for IBAC to undertake an investigation are lowered, as I have already set out in my early remarks. Ideally, those amendments would provide IBAC with the flexibility to begin an investigation where it thinks it is merited, and then at a later stage make a decision as to whether to continue investigating or whether to refer or dismiss the investigation elsewhere. However, if the jurisdictional threshold is not sufficiently lowered, then a preliminary investigatory power would be a useful addition to IBAC's powers.<sup>204</sup>

In its submission to the Committee, the ART outlined its view:

[T]he creation of a power to make preliminary inquiries with limited assistance raises a further threshold for IBAC to cross, and a further opportunity for a suspect to seek a court injunction...it will also create opportunities in subsequent criminal proceedings for arguments to be raised challenging the admissibility of evidence obtained as a result of the use of these powers in preliminary inquiries. In ART's view, IBAC should have the same untrammelled discretion and opportunity at the outset to commence an investigation.<sup>205</sup>

In his evidence to the Committee, the Commissioner said a preliminary inquiries power had not actively been sought by IBAC, but it was 'not unwelcome':

Regarding the preliminary investigation power that is in the bill, it is not something that I raised; however, it is not unwelcome. We will work with the new power when it becomes available, and I can report on its utility after 12 months or so of the act's commencement.<sup>206</sup>

Later, he explained that the introduction of the new power will 'remove any doubt' about IBAC's ability to conduct these types of inquiries before commencing a formal investigation. He explained that the introduction of such a power will:

[E]nsure pre-investigation information can be lawfully obtained before IBAC decides to investigate a complaint or notification, and can be used to inform that decision.<sup>207</sup>

<sup>203</sup> Law Institute of Victoria (2015b), *Strengthening Victoria's Integrity Regime – Position Paper*, Melbourne, p. 6.

<sup>204</sup> Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015.

<sup>205</sup> Accountability Round Table, Submission, 13 January 2016.

<sup>206</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>207</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Correspondence to the Independent Broad-based Anti-corruption Commission Committee, 18 January 2016.

Following the introduction of the proposed legislation, the LIV provided a submission to the Committee and indicated after reviewing the legislation, they welcomed the proposed amendments to provide a preliminary inquiries power. The LIV noted the bill struck an 'appropriate balance in only providing limited investigative powers at the preliminary stage'.<sup>208</sup>

However, the LIV expressed concern that issuing a witness summons at a preliminary stage of investigation could potentially give rise to damage to an individual's reputation 'merely by a witness being summonsed and then exercising their right to remain silent'.<sup>209</sup> As a result, the LIV recommended:

Consideration be given to privacy protections applying to any evidence provided on summons during a preliminary investigation, until it is repeated in an open hearing.<sup>210</sup>

### 3.2.1 Committee Comment

Based on the evidence provided to the Committee, there does not appear to be consistent support for the introduction of a preliminary inquiries power by stakeholders. However, the Committee acknowledges the view of the IBAC Commissioner that the introduction of such a provision is 'not unwelcome'.<sup>211</sup>

The Committee agrees that the proposed legislation does provide a greater scope of powers to assist IBAC in completing preliminary inquiries than at present. Pursuant to the current legislation and as noted in its *Special Report*, IBAC does not currently use coercive powers to conduct preliminary inquiries. The proposed legislation will amend this practice and permit IBAC to use two coercive powers: the ability to compel documentation to be produced from public sector bodies and the ability to compel witnesses to appear and provide evidence.<sup>212</sup>

The ability for IBAC to compel witnesses to appear and provide evidence is more circumscribed for a preliminary inquiry than an ordinary investigation in the proposed legislation. For example, the privilege against self-incrimination is preserved during the course of the preliminary investigation but is not during the course of a formal investigation.<sup>213</sup>

The Committee understands that the VI has been provided with oversight and monitoring responsibility for the issuing of witness summons and confidentiality notices served during the course of preliminary inquiries.<sup>214</sup> This is consistent with its oversight during a formal investigation.<sup>215</sup>

<sup>208</sup> Law Institute of Victoria, Submission, 13 January 2016.

<sup>209</sup> Law Institute of Victoria, Submission, 13 January 2016.

<sup>210</sup> Law Institute of Victoria, Submission, 13 January 2016.

<sup>211</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>212</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 22.

<sup>213</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 22; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 121(3)(h)(i), 144.

<sup>214</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cls 3, 22.

<sup>215</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 43, 122.

While the views of stakeholders are not consistent as to whether a preliminary inquiries power should be introduced, the Committee acknowledges that this power expressly permits a process that is already partially practiced by IBAC. However, as the evidence is not consistent and new powers have been provided to IBAC to conduct preliminary inquiries, the Committee supports the IBAC Commissioner's comments that he could report on the use of the new power in twelve months to assist in considering its utility.

**RECOMMENDATION 3.1:** The Committee recommends that the Victorian Government as a part of its ongoing review should, in conjunction with the Independent Broad-based Anti-corruption Commission, evaluate the power to conduct preliminary inquiries one year after its introduction to assess whether it is appropriate and necessary.

### 3.3 Mandatory reporting of corrupt conduct by public sector agencies

In its *Special Report* in 2014, IBAC suggested that the Victorian integrity system could be improved through the introduction of a mandatory reporting regime of suspected corrupt conduct to IBAC by public sector agencies and local councils.<sup>216</sup> IBAC noted that its experience of a partial mandatory reporting regime which required the VO, VAGO and Victoria Police to report corrupt conduct 'served the system well' and 'assist[ed] IBAC greatly in its role'.<sup>217</sup>

In evidence to the Committee, the IBAC Commissioner reiterated his support for expanding the mandatory reporting regime, stating that it would have a beneficial impact on developing the intelligence capabilities of IBAC:

Mandatory reporting is something I raised and I am pleased with its pending introduction as a way of boosting our intelligence capability in looking for patterns of behaviour that may warrant greater scrutiny either by us or by other appropriate entities.<sup>218</sup>

A number of stakeholders have also expressed this view.

The LIV has supported the creation of a mandatory reporting regime to 'ensure a more coordinated and cohesive approach to targeting corrupt conduct in Victoria'.<sup>219</sup> In evidence provided to the Committee, the LIV reiterated its support for the introduction of such a scheme:

The LIV welcomed the amendment in the 2014 bill to require all public sector heads, including CEOs or mayors of local councils, to notify IBAC of any matter they suspect on reasonable grounds involves corrupt conduct. At the moment section 57 is

<sup>216</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 28.

<sup>217</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 28.

<sup>218</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>219</sup> Law Institute of Victoria (2015b), *Strengthening Victoria's Integrity Regime – Position Paper*, p. 9.

permissive only. It states that public sector heads may notify IBAC of any matter that the person believes on reasonable grounds constitutes corrupt conduct. The LIV's position is that similar amendments to those which were contained in the 2014 bill should be introduced in any new bill to ensure that IBAC is aware of any corrupt conduct that may be occurring in the public sector.<sup>220</sup>

The ART have also identified that implementing a mandatory reporting regime would improve the Victorian integrity system.<sup>221</sup>

Following the introduction of the proposed legislation, the Committee received a submission from VAGO in relation to the current mandatory requirement for VAGO to report suspected corrupt conduct to IBAC. VAGO suggested that the requirements for notification to IBAC pursuant to section 19A of the *Audit Act 1994* (Vic) created 'adverse operational impacts' due to the administrative burden placed on VAGO to notify IBAC of suspected corrupt conduct even where IBAC had already commenced investigating a matter.<sup>222</sup> VAGO also pointed out that such a requirement overlapped with VAGO's responsibility in respect of fraudulent conduct under the Australian Auditing Standards and did not align with the independence of VAGO.<sup>223</sup>

However, VAGO identified that while the proposed legislation did not alter its mandatory reporting requirements, IBAC will be empowered to issue exemption notices which may 'potentially mitigate these issues'.

### 3.3.1 Committee Comment

The Committee is aware that mandatory reporting regimes are a feature of integrity systems across Australia, including in Queensland, Western Australia and New South Wales.<sup>224</sup> The threshold for reporting corrupt conduct ('a suspicion on reasonable grounds') as proposed in the amending legislation is consistent with the current mandatory reporting schemes operating in Queensland, Western Australia and New South Wales which have been established for many years.<sup>225</sup>

As the IBAC Commissioner has remarked, the introduction of a mandatory reporting regime will assist IBAC in conducting its functions through generating intelligence in respect of complaints about misconduct and provide a broader range of information for IBAC to be able to carry out its work.<sup>226</sup>

<sup>220</sup> Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015.

<sup>221</sup> Accountability Round Table (2015b), 'The amendments recommended by the Accountability Round Table necessary for the IBAC legislation' available at <[www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf](http://www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf)>, p. 4.

<sup>222</sup> Dr Peter Frost, Acting Auditor-General, Victorian Auditor-General's Office, Submission, 18 January 2016.

<sup>223</sup> Dr Peter Frost, Acting Auditor-General, Victorian Auditor-General's Office, Submission, 18 January 2016.

<sup>224</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 11; *Crime and Corruption Commission Act 2001* (Qld) s 38; *Corruption, Crime and Misconduct Act 2003* (WA) s 28.

<sup>225</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 11(2); *Crime and Corruption Commission Act 2001* (Qld) s 38; *Corruption, Crime and Misconduct Act 2003* (WA) s 28(2)(a).

<sup>226</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.



The Committee acknowledges the concerns raised by VAGO in respect of the administrative burden of this regime on its office. However, as noted in VAGO's submission, it appears the proposed legislation may mitigate this burden through a greater flexibility of IBAC to issue exemption notices.

Accordingly, the Committee considers the proposed legislation resolves the concerns of IBAC and stakeholders.

### 3.4 Applications for search warrants – expanding to the Magistrates' Court

The proposed legislation provides that IBAC may apply to the Magistrates' Court to obtain a search warrant in addition to the Supreme Court. The IBAC Commissioner said the proposed amendment was welcomed:

I am pleased that we will now have in the near future the flexibility to go to the Magistrates Court where you can get on more quickly. Of course police have always gone to the Magistrates Court for warrants in relation to the most serious of criminal offences.<sup>227</sup>

The Commissioner also outlined that such a power was common across anti-corruption and law enforcement agencies.<sup>228</sup>

The ART has also supported the expansion of the application for search warrants to the Magistrates' Court.<sup>229</sup>

#### 3.4.1 Committee Comment

The Committee notes that the proposed amendments are consistent with the powers provided to similar anti-corruption and law enforcement agencies across Australia.<sup>230</sup> Based on the evidence provided to the Committee, the proposed amendment will have the effect of increasing the efficiency of IBAC in undertaking its functions.

Accordingly, the Committee considers the proposed legislation resolves the concerns of IBAC and stakeholders.

<sup>227</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>228</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>229</sup> Accountability Round Table (2015b), 'The amendments recommended by the Accountability Round Table necessary for the IBAC legislation' available at <[www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf](http://www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf)>, p. 5.

<sup>230</sup> See for example, *Independent Commission Against Corruption Act 1988* (NSW) s 40(1); *Crime and Corruption Act 2001* (Qld) s 86; *Integrity Commission Act 2009* (Tas) s 73; *Victoria Police Act 2013* (Vic) s 267.

## 3.5 Greater flexibility to delegate the use of the Commissioner's powers

The proposed legislation provides an expansion of the Commissioner's delegation powers to devolve particular decisions throughout the organisation.<sup>231</sup> In evidence provided to the Committee, the IBAC Commissioner highlighted the impact this expansion would have:

Presently in the act [the] delegations power is highly prescriptive, and I think the proposed freeing up of a number of the powers in that sense and making them delegable further down the ranks in our organisation will aid the overall efficiency at IBAC.<sup>232</sup>

Providing greater flexibility and clarifying the ability of the Commissioner to delegate aspects of his decision-making has also been supported previously by the ART.<sup>233</sup>

### 3.5.1 Committee Comment

The proposed legislation provides greater flexibility for the IBAC Commissioner to delegate his powers.<sup>234</sup> However, some powers have been reserved for the exercise of the Commissioner only, including the ability to issue arrest warrants, decisions regarding the holding of public examinations, charging an individual with contempt of IBAC and a number of other matters.<sup>235</sup>

The Committee considers that the amendments resolve the issue raised by the IBAC Commissioner while appropriately maintaining the most significant decisions, including the power to determine whether a public examination is necessary, for the Commissioner only. The Committee considers this amendment will assist IBAC in carrying out its functions efficiently and effectively.

## 3.6 Reviewing prior decisions

In its *Special Report* to Parliament in April 2014, IBAC expressed a concern that it did not have a power to review its own prior decisions. The Report noted that such powers are commonly provided to similar bodies across Australia and represented 'good practice'.<sup>236</sup>

<sup>231</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 11.

<sup>232</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>233</sup> Accountability Round Table (2015b), 'The amendments recommended by the Accountability Round Table necessary for the IBAC legislation' available at <[www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf](http://www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf)>, p. 5.

<sup>234</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 11.

<sup>235</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 11.

<sup>236</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 23.

The proposed legislation provides a new power enabling IBAC to investigate any complaint or notification it has previously dismissed or referred to another agency.<sup>237</sup> In evidence to the Committee, the Commissioner stated that the proposed amendment dealt with this concern satisfactorily:

The amendment does respond to concerns that were raised in an early special report. I think all I can say at the moment is that it will remain to be seen through our practice and experience whether the provision is sufficient. However, at present we are certainly content with its wording.<sup>238</sup>

### 3.6.1 Committee Comment

The Committee considers that the amendments appear to resolve the issues raised by the IBAC Commissioner.

## 3.7 Defining the term 'present' in IBAC examinations

Following its first year of operation, IBAC reported that it had experienced difficulties relating to the legislative definition of who may be lawfully 'present' during an IBAC examination.<sup>239</sup>

IBAC explained that while the legislative framework provided a power to issue directions as to who could be 'present' during an examination, it was unclear whether an individual not employed by IBAC viewing an examination live on a monitor would also be deemed 'present'. IBAC said the process of viewing examinations in this manner was commonly conducted by other investigative bodies for 'sound reasons'.<sup>240</sup>

This caused uncertainty about whether it was necessary for IBAC to provide a direction about an individual viewing the examination through a monitor, whether the person the subject of the examination was required to be informed and whether the individual who was viewing the examination needed to be named in any direction provided.<sup>241</sup>

<sup>237</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 7.

<sup>238</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>239</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 24.

<sup>240</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 24.

<sup>241</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 24.

### 3.7.1 Committee Comment

The proposed legislation has provided specifically that the definition of 'present' contained within the IBAC Act includes an individual who is 'remotely present'.<sup>242</sup> The Committee considers that the concerns IBAC expressed have been resolved by the proposed amendments.

## 3.8 Suppression Orders

In evidence to the Committee, the IBAC Commissioner outlined that the proposed legislation will rectify a lack of clarity regarding IBAC's ability to issue suppression orders during the course of a public examination. The Commissioner noted that such a power was important to ensure fairness to the individuals involved in public examinations. He explained:

I think [clarifying the power to issue suppression orders] will assist us. It very much goes to fairness of the process, protecting names of people from publication in a myriad of potential circumstances where that might be fair or to what we call lockdown elements of an otherwise public examination, where the public interest is not served by matters being heard in public. As I say, whilst we have felt that arguably we have that power elsewhere in the act, it is good I think to clarify that in the new legislation.<sup>243</sup>

### 3.8.1 Committee Comment

The Committee is aware that similar powers to restrict the publication of evidence provided in a public examination or inquiry are provided to anti-corruption agencies across Australia.<sup>244</sup>

Based on the evidence received, the Committee considers the legislation will resolve the concerns raised by the IBAC Commissioner and provide greater clarity for IBAC to issue suppression orders. The Committee acknowledges that such powers are essential to ensure fairness and appropriate protection for individuals the subject of IBAC examinations.

## 3.9 Victorian Inspectorate – clarification of powers

In evidence provided to the Committee, the Inspector said he had expressed concern about the form of the legislation relating to the responsibility of the VI in respect of monitoring the performance of IBAC generally.

<sup>242</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 7.

<sup>243</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>244</sup> See for example, *Independent Commission Against Corruption Act 1988* (NSW) s 112; *Crime and Corruption Commission Act 2001* (Qld) s 180.

The Inspector noted pursuant to section 11 of the VI Act, the VI is required to monitor the performance of IBAC, oversee its responsibilities and roles under the *Protected Disclosure Act 2012 (Vic)* and its performance generally. However, the legislation did not provide appropriate powers to facilitate this general oversight function. While the VI was provided with significant powers to undertake investigations, these powers did not expressly extend to the VI's general oversight role. The Inspector outlined the situation as follows:

Under the current legislation the inspectorate has very extensive powers when it is conducting an investigation, but if it is not actually conducting an investigation, its powers are much more limited. So I expressed a desire to have those powers broadened, and what I am able to say is that the bill does contain provisions doing exactly that. They are in proposed section 12A of the inspectorate act as it will be after the act is amended. I am also able to say that the form of those provisions is satisfactory to us.<sup>245</sup>

### 3.9.1 Committee Comment

Based on the evidence provided, the Committee considers that the inclusion of an amendment clarifying the powers available to the VI in carrying out its general oversight function will resolve the concerns raised. The Committee further acknowledges this amendment will assist the VI in effectively carrying out its function with appropriate clarity and powers.

## 3.10 Victorian Inspectorate – preliminary inquiry powers

In his evidence to the Committee, the Inspector outlined a concern that the VI Act in its current form did not expressly permit the VI to conduct preliminary investigation and inquiries in examining complaints. The VI noted that it had been requesting documentation and information from organisations on an informal basis; however, there was not a requirement for the agencies to comply with those requests.

The Inspector explained:

Basically under the current legislation we have power to conduct an investigation but we do not have any express power to require a department or require the Ombudsman or the IBAC or any of the other bodies that we deal with to provide us with information regarding a complaint that we have received from a member of the public. As a matter of fact we do and we have been making preliminary inquiries of those bodies, and they have, as a matter of fact, been responding to them. But I think it is desirable — I have always thought it was desirable — for us to have the express power and to place on the bodies the general obligation to assist us in conducting preliminary inquiries, and that has been included in the draft legislation as well.<sup>246</sup>

<sup>245</sup> Mr Robin Brett QC, Inspector, Victorian Inspectorate, Closed Hearing, Melbourne, 14 December 2015.

<sup>246</sup> Mr Robin Brett QC, Inspector, Victorian Inspectorate, Closed Hearing, Melbourne, 14 December 2015.

### 3.10.1 Committee Comment

Based on the evidence provided, the Committee considers that the inclusion of an amendment in the proposed legislation providing the VI with an express power to conduct preliminary inquiries resolves the concerns raised and will assist the VI in effectively carrying out its function. The Committee further acknowledges that this power expressly permits a process that is already in practice.

## 3.11 Concerns regarding IBAC's function and legislation which are partially addressed by the new legislation

### 3.11.1 Confidentiality Notices

A confidentiality notice may be issued to an individual involved in an investigation by IBAC prohibiting them from discussing information they have provided to or received from IBAC.<sup>247</sup> During the course of an investigation if IBAC determines on reasonable grounds the disclosure of information relating to the investigation would prejudice the investigation, safety or reputation of an individual or any criminal proceedings, it may issue a confidentiality notice.<sup>248</sup>

In its *Special Report* in 2014, IBAC identified that the legislation lacked clarity in regard to whether confidentiality notices could be issued about information that was provided to it voluntarily.<sup>249</sup> IBAC emphasised the importance of dealing consistently and appropriately with all relevant material provided in regard to an investigation. Confidentiality notices were also identified as an important investigative tool to reduce the risk of prejudicing an investigation.<sup>250</sup>

The proposed legislation provides a broader definition in respect of provisions relating to confidentiality notices which includes all evidence or information 'obtained by' IBAC.<sup>251</sup>

During evidence provided to the Committee, IBAC also pointed out that some technical amendments to IBAC's legislation in respect of serving confidentiality notices on public sector entities rather than individuals had not been addressed in the proposed legislation. IBAC suggested this could be an area for further improvement.<sup>252</sup> The Commissioner identified that this issue will be raised during the review process with the Government.

<sup>247</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 42(1).

<sup>248</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 42(1).

<sup>249</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 24.

<sup>250</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 24.

<sup>251</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 3.

<sup>252</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne 14 December 2015.

### 3.11.2 Committee Comment

The Committee considers that the issue raised by IBAC in respect of information provided voluntarily has been resolved by the proposed legislation. However, some areas of technical amendment which would practically assist IBAC in carrying out its work have not yet been resolved.

**RECOMMENDATION 3.2:** The Committee recommends that the Victorian Government as a part of its ongoing review should consider expanding the ability of the Independent Broad-based Anti-corruption Commission to serve confidentiality notices on public sector entities to increase efficiency.

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### 3.12 Conclusion

The proposed Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) provides significant changes and represents a positive step forward in strengthening the Victorian integrity system. As outlined above, throughout the three years of the IBAC and VI's operation, a series of concerns have been raised regarding areas where improvements could be made. A large number of these concerns have been addressed by the proposed amendments.

The Committee also acknowledges the comments of the IBAC Commissioner and Inspector during their evidence to the Committee that they appreciated the consultative process of drafting the proposed bill and that a number of issues they identified were taken on board throughout the legislative review.<sup>253</sup>

However, the Committee is aware that some issues and areas for further improvement have not been addressed in the proposed legislation. These issues will be considered further in Chapter 4.

<sup>253</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015; Mr Robin Brett QC, Inspector, Victorian Inspectorate, Closed Hearing, Melbourne, 14 December 2015.





# 4 Strengthening Victoria's integrity system: Unresolved concerns regarding the IBAC and VI

The proposed legislation provides significant amendments to the Victorian integrity system, which address a number of concerns regarding the effective functioning of the integrity framework as it relates to the work of the Independent Broad-based Anti-corruption Commission (IBAC) and Victorian Inspectorate (VI).

However, some issues remain unresolved. The Committee has received evidence regarding aspects of the current framework which could be improved and assist with the practicalities of operating within the Victorian integrity system. The issues raised with the Committee include the public examination of witnesses, the effectiveness of the protected disclosure regime, expanding the definition of corrupt conduct to include further criminal and non-criminal conduct, providing additional investigation powers to IBAC and additional oversight responsibilities for the VI.

The purpose of this chapter is to highlight areas where further consideration is required. Due to time constraints, the Committee has not undertaken an investigation of all the issues raised. The Committee supports further investigation of the issues raised in this chapter by the Victorian Government as a part of its ongoing review process.

## 4.1 Public Examinations of witnesses

The power to conduct public examinations and inquiries is held by a number of anti-corruption agencies across Australia.<sup>254</sup> Such powers involve the questioning of a witness in public. As the examination is public, the media may report details of the questioning.

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<sup>254</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 31; *Crime and Corruption Act 2001* (Qld) s 177; *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 117(1); *Corruption, Crime and Misconduct Act 2003* (WA) s 140(2).

The use of public examinations has, at times, been the subject of criticism. For example, concerns have been expressed about the benefit to an investigation of such questioning with the associated intrusion on an individual's right to reputation and privacy.<sup>255</sup>

Currently, to conduct a public examination, IBAC must consider on reasonable grounds that:

- there are exceptional circumstances
- there is a public interest in holding a public examination, and
- a public examination can be held without causing unreasonable damage to an individual's reputation, safety and wellbeing.<sup>256</sup>

A number of stakeholders have criticised the inclusion of the 'exceptional circumstances' requirement within the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ('IBAC Act').<sup>257</sup> It is argued that the term 'exceptional circumstances' is vague and a definition not easily determined in the absence of specific legislative guidance.

Concerns regarding the criteria to conduct public examinations were also expressed by the IBAC Commissioner in his recent evidence to the Committee. The Commissioner explained that the current legislation had the potential for litigation as a result of the ambiguity in the 'exceptional circumstances' requirement. The Commissioner stated:

The concern that we still have is that this is a very nebulous concept and will only continue to land us in court with court challenges. It does seem to me that we being the only state with that requirement we should be seriously looking at deleting that as one of the tests for public hearings.<sup>258</sup>

The view that the 'exceptional circumstances' requirement may give rise to court challenges was also expressed by the Accountability Round Table (ART):

<sup>255</sup> Western Australia Parliamentary Committee on the Corruption and Crime Commission (2012), *The Use of Public Examinations by the Corruption and Crime Commission*, Perth; New South Wales Parliamentary Committee on the Independent Commission Against Corruption (2000), *ICAC: Accounting for Extraordinary Powers*, Report No 2, 52<sup>nd</sup> Parliament, Sydney; Murray Gleeson QC and Bruce McClintock SC (2015), *Independent panel – review of the jurisdiction of the Independent Commission Against Corruption*, Department of Premier and Cabinet (New South Wales); Bruce McClintock SC (2005), *Independent review of the Independent Commission Against Corruption Act 1988, Final Report*, Sydney.

<sup>256</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 117(1)(a)–(c).

<sup>257</sup> See for example, Accountability Round Table (2015b), 'The amendments recommended by the Accountability Round Table necessary for the IBAC legislation' available at <<http://www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf>> pp. 6–7; Law Institute of Victoria (2012a), 'Legislation Creating the Independent Broad-based Anti-Corruption Commission', Submission to Members of Parliament, 9 May 2012, p. 5.

<sup>258</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

If s.117 (i)(a) is retained in the IBAC Act, the consequences will be that those to be examined publicly will be given a ready avenue of approach to the courts to stay the public examination at which point IBAC will be obliged to establish the existence of “exceptional circumstances”, an undefined phrase of considerable ambiguity. IBAC’s prospects of doing so will vary depending on which judge will hear the application.<sup>259</sup>

The former Tasmanian Integrity Commissioner, the Hon. Murray Kellam QC highlighted that the current construction of the provision could lead to potential litigation due to the lack of definitional certainty:

[T]he requirement in Section 117 for there to be ‘exceptional circumstances’ before IBAC can conduct a public hearing lacks certainty and creates potential for court challenges which can create delay and significant cost. I would argue that sub-section (a) of Section 117 could be deleted. This would still leave the issues of public interest and damage to reputation as the relevant factors to be considered.<sup>260</sup>

As discussed in Chapter 2, public inquiries and examinations have been identified by other anti-corruption agencies as effective investigation tools.<sup>261</sup> Public examinations can also act as a tool to assist with educating the public service and community through the exposure of corrupt conduct.<sup>262</sup>

Mr Kellam outlined the benefits to an investigation of information being available to the public which could result in further disclosures and evidence of corrupt conduct:

Although the Integrity Commission of Tasmania has never conducted a public hearing, in one case when certain persons were named in a report tabled in Parliament, further information came forward in consequence of the tabling of the report, which information had not become available at the time of the confidential investigation.<sup>263</sup>

However, not all stakeholders share the view that public examinations are appropriate and necessary for an anti-corruption agency to function effectively. The Committee received evidence from the former Victorian Ombudsman, George Brouwer, who argued that public examinations were not a necessary feature of anti-corruption commissions:

The question is of balancing civil liberties in all of this, and I, for one, feel that the bodies equipped with these powers should not be having public hearings. And I am talking here from, basically, experience over my career in the past.

<sup>259</sup> Accountability Round Table (2015b), ‘The amendments recommended by the Accountability Round Table necessary for the IBAC legislation’ available at <<http://www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf>>, p. 7.

<sup>260</sup> The Hon. Murray Kellam QC, former Tasmanian Integrity Commissioner, Submission, 5 January 2016.

<sup>261</sup> Tony Kwok Man-Wai (2013), ‘Effective investigation of corruption cases: The Hong Kong experience’, Paper presented at seventh Regional Seminar on Good Governance for Southeast Asian Countries, 3-5 December, pp. 51-52; Theresa Hamilton (2008), ‘Exposing corruption: Three essentials for an effective anti-corruption body’, Paper presented at the International Conference on Anti-corruption in Asia, 9-11 June, p. 11.

<sup>262</sup> Western Australia Parliamentary Committee on the Corruption and Crime Commission (2012), *The Use of Public Examinations by the Corruption and Crime Commission*, p. 17.

<sup>263</sup> The Hon. Murray Kellam QC, former Tasmanian Integrity Commissioner, Submission, 5 January 2016.

I think you can have a very effective anti-corruption function without necessarily the need for public hearings. To give you a concrete example of that, look at the Ombudsman's jurisdiction in Victoria. As Ombudsman I could not have public hearings, and it never worried me. Instead I was forced to do reports, bring the whole thing to conclusion and, if it was sufficiently important, report it to Parliament or to the minister. I think that worked well because you are enabled to talk to witnesses — it is all done in secret — you were able to write a report, and natural justice is afforded by allowing witnesses who have given evidence and were going to be written up in your final report to have their say in terms of any response or excuse they have. You would be familiar with it; you have seen too many of them. That, I think, is the balance: that the individual can have his say and her say, but it is done in private. It is not that they are having to justify things publicly and then people are prejudging the interpretation of it. I think the civil liberties can be safeguarded in that way.<sup>264</sup>

Dr Simon Longstaff of The Ethics Centre also highlighted the importance of balancing civil liberties with the use of the coercive power to conduct examinations. He explained that legal principles including natural justice ought to operate within anti-corruption agencies when utilising coercive powers:

I think when people enter into public service they do so on a voluntary basis and that we as a society, particularly at this time I think, need to invest quite heavily in rebuilding trust, in general, in the institutions of politics and the public service, and in government as a whole. On that basis I think it is necessary that there be coercive powers for those bodies like IBAC to investigate thoroughly and to call to public attention deficiencies where they might exist.

Equally, I think the basic rights or civil liberties have to be preserved in this. For my part, I think people should not be coerced, in that sense, to give evidence. All the principles of natural justice, if you like, should apply in the way in which a body like IBAC can operate, and there should be a presumption in favour of those. But in special circumstances, this may be a 'rebuttable presumption' where, with adequate consideration and proper oversight, the presumption might be set aside ...<sup>265</sup>

### 4.1.1 Committee Comment

There is a divergence of views about the question of whether examinations of witnesses should be conducted in public, and if so, how the threshold for such examinations should be constructed. It has been identified that the use of public examinations can be an effective tool in conducting investigations into corruption, but whether the associated encroachment upon civil liberties is proportionate to the benefit obtained is a question that remains unresolved.

The Committee has reviewed the statutory tests in other jurisdictions and has found that the requirement that IBAC be satisfied of 'exceptional circumstances' is not replicated in other states that conduct public inquiries or examinations.<sup>266</sup>

<sup>264</sup> Mr George Brouwer, former Victorian Ombudsman, Closed Hearing, Melbourne, 23 November 2015.

<sup>265</sup> Dr Simon Longstaff, The Ethics Centre, Closed Hearing, Melbourne, 7 December 2015.

<sup>266</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 31; *Crime and Corruption Act 2001* (Qld) s 177; *Corruption, Crime and Misconduct Act 2003* (WA) s 140.

However, not every anti-corruption agency across Australia conducts public examinations, for example in South Australia examinations must be conducted in private.<sup>267</sup>

The Committee also understands there is a current appeal before the High Court of Australia relating to the power of IBAC to conduct a public examination in relation to an ongoing investigation, which could impact how this power operates.<sup>268</sup>

The Committee considers the questions surrounding public examinations are complex and require further investigation.

**RECOMMENDATION 4.1:** The Committee recommends that the Victorian Government as a part of its ongoing review should examine the criteria for the Independent Broad-based Anti-corruption Commission to conduct a public examination contained in section 117 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) following the outcome of the decision by the High Court of Australia.

## 4.2 Expanding the definition of 'corrupt conduct'

The amending legislation proposes to broaden the offences which constitute a 'relevant offence' to include the offence of misconduct in public office.<sup>269</sup> The evidence received by the Committee supports this inclusion and indicates that it should have the effect of expanding the jurisdiction of IBAC significantly, as outlined in Chapter 3. However, some stakeholders have suggested that consideration be given to whether the definition of 'corrupt conduct' and the offences that fall within its jurisdiction should be expanded further.

The Committee received evidence involving differing and varied views on how far the definition of corrupt conduct should extend, how many offences should be captured by the provision and whether the definition should expand beyond only criminal conduct.

### 4.2.1 Criminal conduct

The current definition of corrupt conduct specifies a number of indictable criminal offences which fall within IBAC's jurisdiction to investigate. Not all indictable criminal offences are included.<sup>270</sup>

In introducing the Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic), the Minister drew attention to the introduction of misconduct in public office which would provide a 'catch-all' offence that

<sup>267</sup> *Independent Commissioner Against Corruption Act 2012* (SA) s 55(1).

<sup>268</sup> *R & Anor v Independent Broad-based Anti-corruption Commissioner* [2015] HCATrans 293 (13 November 2015).

<sup>269</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cl 3.

<sup>270</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 3.

could be used to start an investigation where the allegations did not otherwise fall within a criminal offence contained in the definition of corrupt conduct.<sup>271</sup> The inclusion of this offence has been welcomed by stakeholders.

General Counsel for IBAC, Dr John Lynch said the introduction of misconduct in public office will be a really useful tool for IBAC to fulfil its statutory functions.<sup>272</sup>

During IBAC's evidence, the Committee inquired whether the offence of misconduct in public office will explicitly cover the range of relevant common law indictable offences with sufficient clarity and whether court challenges to the IBAC jurisdiction could be avoided. Dr John Lynch said the introduction of misconduct in public office should cover other common law indictable offences, but legal challenges can't be completely avoided.

We can never be sure of that. We are currently involved in proceedings in the High Court... We worked very hard with the department on this bill, and the drafting is about as good as we can make it.<sup>273</sup>

Dr Lynch also informed the Committee that IBAC intended to work with the Victorian Government during the ongoing review process to identify whether any additional criminal offences needed to be included within the definition of 'relevant offence' to ensure the intended conduct is appropriately captured.<sup>274</sup>

Some stakeholders also suggested the offences contained within the IBAC Act should be expanded even further to include all indictable criminal offences and potentially other offences.

The Law Institute of Victoria (LIV) supported the inclusion of other indictable common law offences in the definition of 'relevant offence':

[T]he LIV feels that IBAC's jurisdiction should in fact be expanded to include all indictable common-law offences. IBAC's jurisdiction currently includes all statutory offences. In our view, to carve out some common-law offences means that prior to commencing an investigation IBAC has to delineate what type of offence it is and what is its source. The rationale for excluding common-law offences is, in our view, unclear, especially where those offences are clearly relevant to the sort of conduct the integrity framework seeks to address. Some examples of indictable common-law offences that we say should be included but currently cannot be investigated by IBAC include conspiracy to cheat and defraud, false imprisonment and common assault.

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271 The Hon. Jacinta Allan, Minister for Public Transport, Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic), Second Reading Speech, 10 December 2015, Hansard (Legislative Assembly), p. 5533.

272 Dr John Lynch, General Counsel, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

273 Dr John Lynch, General Counsel, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

274 Dr John Lynch, General Counsel, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

At this stage the LIV is not suggesting that disciplinary events should be included in IBAC's jurisdiction, but we do think that IBAC should have the full suite of criminal offences as part of its jurisdiction.<sup>275</sup>

The Hon. Tim Smith QC also supported the inclusion of further criminal offences within the definition of corrupt conduct, including those which are not indictable. Mr Smith suggested that the definition of 'relevant offence' should contain similar provisions to that of Independent Commission Against Corruption (ICAC) in New South Wales. The definition of 'corrupt conduct' within the ICAC Act is not limited to indictable criminal offences, but also includes a number of other offences including tax evasion, bankruptcy and illegal gambling.<sup>276</sup> Mr Smith commented that:

...Victoria should follow the model in other states — my example is section 8 of the ICAC legislation — where there has been a comprehensive list of offences which can be committed by corrupt conduct of people in government. This, I suggest, is a situation where a detailed list is a productive thing.<sup>277</sup>

#### 4.2.2 Extension to non-criminal conduct

The Committee has also received evidence that the definition of corrupt conduct should be expanded to encompass non-criminal corrupt behaviour. The IBAC Commissioner questioned whether IBAC's jurisdiction should remain confined to areas of criminal conduct in the future and suggested this warranted further consideration:

What remains of course is the important issue of whether our corrupt conduct jurisdiction should remain solely in the realm of criminal offending.<sup>278</sup>

Other stakeholders with experience in investigating corrupt conduct also held the view that such conduct could occur outside the realm of criminal conduct.

Mr Kellam stated that his experience was that corrupt conduct may occur in circumstances where no criminal behaviour is present:

[T]he issue remains as to whether the threshold should be extended beyond criminal offending. My experience in Tasmania was that serious misconduct could arise in circumstances whereby there was no breach of the criminal law. Non-disclosure of serious conflicts of interest or of close relationship with a contractor, or providing preferential treatment to friends or relatives in employment by the provision of questions to be asked at interview, which questions are not provided to other

<sup>275</sup> Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015. The Law Institute of Victoria also reiterated this view in a submission to the Committee following the introduction of the proposed legislation; see Law Institute of Victoria, Submission, 13 January 2016.

<sup>276</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 8(2).

<sup>277</sup> The Hon. Tim Smith QC, Closed Hearing, Melbourne, 7 December 2015.

<sup>278</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

applicants, are examples of serious misconduct by senior members of a Department which may not be in breach of the criminal law, but which on any view are clear examples of misconduct deserving of the description of being corrupt.<sup>279</sup>

The former Victorian Ombudsman, George Brouwer was of a similar view and explained that narrowing the definition of 'corrupt conduct' to criminal conduct may have undesirable consequences:

The Act thus fails to recognise that corruption involves abuse of power in a variety of ways that often do not involve *criminal offending as such*. (e.g serious conflicts of interest, nepotism, undue influence etc)

One undesirable consequence of this is that IBAC cannot be seen to be tackling corruption in all its forms and Victoria's anti corruption (sic) arrangements will face ongoing criticism as lacking bite.

Another undesirable consequence is to throw an unfair burden for looking into non-criminal, yet corrupt behaviours onto the lesser resourced Victorian Ombudsman.<sup>280</sup>

As noted above, the LIV specifically outlined they did not suggest disciplinary offences should be included within IBAC's jurisdiction.<sup>281</sup>

### 4.2.3 Committee Comment

As discussed in Chapter 2, the question of how expansive the jurisdiction of an anti-corruption agency should be is a difficult and complicated question – one that is yet to be resolved in any anti-corruption agency in Australia.

The evidence received by the Committee was broadly supportive of the introduction of further indictable criminal offences within the jurisdiction of IBAC. The evidence was less consistent in respect of whether the jurisdiction of IBAC should be expanded to include non-criminal conduct.

Matters of a disciplinary nature (arising in an employment context) do fall within the jurisdiction of a number of anti-corruption agencies in Australia. For example, the definition of corrupt conduct for the Queensland Crime and Corruption Commission includes any criminal offence or disciplinary breach which would lead to a termination of an employee's services.<sup>282</sup> Similarly, in New South Wales, disciplinary breaches which would give rise to the possibility of termination of employment fall within the jurisdiction of ICAC, even in the absence of a criminal offence.<sup>283</sup>

<sup>279</sup> The Hon. Murray Kellam QC, former Tasmanian Integrity Commissioner, Submission, 5 January 2016.

<sup>280</sup> Mr George Brouwer, former Victorian Ombudsman, Submission, 3 January 2016.

<sup>281</sup> Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015.

<sup>282</sup> *Crime and Corruption Commission Act 2001* (Qld) s 15.

<sup>283</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 8.



In contrast, the jurisdiction of the Independent Commissioner Against Corruption in South Australia may only investigate allegations where they amount to criminal conduct. The Act provides an expansive list of criminal offences identified in the definition of corrupt conduct which fall within the Commissioner's jurisdiction.<sup>284</sup> In instances where the allegations amount to 'misconduct', including disciplinary breaches not involving criminal conduct, the Commissioner is more limited in the powers and actions available for dealing with the complaint.<sup>285</sup>

The above examples demonstrate the differing approaches across Australia to the question of how expansive the definition of corrupt conduct for an anti-corruption commission should be. The various definitions of corrupt conduct are not consistent as to whether disciplinary breaches which are not tied to criminal conduct should be included.

The Committee considers the most pressing issue regarding IBAC's jurisdiction relates to whether the offence of misconduct in public office will explicitly cover a number of other common law indictable offences with sufficient clarity.

The Committee believes further clarification would assist IBAC in carrying out its work effectively and may assist in avoiding unnecessary challenges to its jurisdiction. The Committee notes Dr Lynch's evidence that IBAC as part of the ongoing review is discussing whether additional offences should be added to the list of triggering offences for IBAC's jurisdiction.

**RECOMMENDATION 4.2:** The Committee recommends that the Victorian Government as part of its ongoing review should further consider the definition of 'relevant offence' within section 3 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic). The review should examine whether any additional criminal offences should be included in the definition of 'relevant offence' to ensure clarity of the types of conduct able to be considered and investigated by the Independent Broad-based Anti-corruption Commission.

The Committee also considers that further investigation and consideration should be given to the definition of corrupt conduct in the longer term, including whether it should encompass non-criminal conduct.

### 4.3 Protected disclosures

The current protected disclosure regime in Victoria is governed by the *Protected Disclosure Act 2012* (Vic) ('PD Act'). Protected disclosures were previously known as 'whistle-blower' complaints and involve internal employees making complaints about suspected corrupt conduct within their organisation. The classification of a complaint as a protected disclosure provides protection for

<sup>284</sup> *Independent Commissioner Against Corruption Act 2012* (SA) s 5(1).

<sup>285</sup> *Independent Commissioner Against Corruption Act 2012* (SA) ss 24(1)-(2).

complainants, including protection against retribution and anonymity.<sup>286</sup> Criminal offences also attach to individuals who take retributive action against a person who has made a protected disclosure.<sup>287</sup>

The importance of protected disclosure (or 'whistle-blowing') regimes within integrity systems has been emphasised within academic research and by anti-corruption agencies. The research highlights that individuals who are involved within an organisation are best placed to hold and identify concerns about corrupt conduct and bring others to account who may not otherwise be identified.<sup>288</sup> As a result, these sources of complaints are often the most important in detecting and combatting corruption.<sup>289</sup>

The current framework for protected disclosures provides that should a public body receive a complaint that could amount to a protected disclosure, it must refer the complaint to IBAC for assessment.<sup>290</sup> Pursuant to the PD Act, IBAC is the agency provided with responsibility for assessing whether all complaints made are protected disclosures.<sup>291</sup>

Following the introduction of the PD Act, concerns have been raised in respect of the coverage of the scheme, its consistency and some unintended consequences that have resulted since the commencement of its operation.

Some stakeholders have identified general concerns about the operation of the legislation. For example, the ART has suggested that a wholesale review of the operation of the PD Act should be conducted:

The present Victorian whistle-blower protection legislation does not provide adequate protection. We appreciate that this legislation is relatively new. But enough time has passed to warrant a review of its operation... it should be given priority and dealt with as soon as possible because it is critical to the effectiveness of IBAC in addressing the risk of corruption...what is currently in place falls well short of what is required and below what is found in a number of other Australian jurisdictions.<sup>292</sup>

In its *Special Report*, IBAC also reported some concerns regarding the operation of the protected disclosures regime, following its first year of operation. IBAC pointed out that:

<sup>286</sup> *Protected Disclosure Act 2012* (Vic) pt 6.

<sup>287</sup> *Protected Disclosure Act 2012* (Vic) ss 72–74.

<sup>288</sup> Brian Head, A.J. Brown & Carmel Connors (eds) (2008), *Promoting Integrity: Evaluating and Improving Public Institutions*, Ashgate, London, p. 294.

<sup>289</sup> The Hon. Murray Kellam QC, former Tasmanian Integrity Commissioner, Closed Hearing, Melbourne, 12 November 2015.

<sup>290</sup> *Protected Disclosure Act 2012* (Vic) ss 21–23.

<sup>291</sup> *Protected Disclosure Act 2012* (Vic) s 26. As explored further below, potential protected disclosures relating to Members of Parliament are not required to be disclosed and assessed by IBAC.

<sup>292</sup> Accountability Round Table (2015b), 'The amendments recommended by the Accountability Round Table necessary for the IBAC legislation' available at <<http://www.accountabilityrt.org/wp-content/uploads/2015/09/Submission-IBAC-legislation-31.08.15.pdf>>, pp. 4–5.

There are situations where persons who have disclosed information appear not to qualify for protection. IBAC interprets the PD Act such that persons cannot be considered for protected disclosure status if they first make a disclosure to another public sector entity, and where IBAC is not notified under the PD Act by an entity that is prescribed for the purpose of receiving such a disclosure.

As a result, whistleblowers who desire the protections offered by the PD Act may in some cases be deterred from coming forward with valuable information about corrupt conduct, a matter that also calls for further consideration.<sup>293</sup>

Other organisations also identified particular areas of the protected disclosure regime which could be improved, or where further investigation of its operation should be considered.

### 4.3.1 Protected disclosures – police conduct or misconduct?

In its *Special Report* to Parliament in 2014, IBAC stated that the current legislation governing the referral and investigation process of complaints relating to police misconduct led to uncertainties in its operation. IBAC suggested that the relevant legislation lacked clarity in respect of the circumstances in which police must notify IBAC of complaints received about Victoria Police officers. IBAC also identified a lack of clarity relating to whether it was necessary for Victoria Police to await a referral of the complaint back to Victoria Police prior to police commencing an investigation.<sup>294</sup> In response to the ambiguity, IBAC and Victoria Police developed new procedures to ensure consistency in dealing with complaints of police misconduct.<sup>295</sup>

The Committee sought IBAC's views about whether these concerns were still current and received the following comments from the Commissioner:

I think the current legislative position is that it is still not entirely clear that police must wait. However, the issue was solved some time ago by administrative agreement between the two agencies such that Victoria Police has agreed to defer to us after it has notified us of police misconduct.

We are happy to leave things at that administrative arrangement level.<sup>296</sup>

The Committee also received evidence from Victoria Police in respect of their experiences with the current framework. The Victoria Police Deputy Commissioner said they were 'generally satisfied' with the current police misconduct and anti-corruption legislation.<sup>297</sup>

<sup>293</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 26.

<sup>294</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 27.

<sup>295</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 27.

<sup>296</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>297</sup> Deputy Commissioner Wendy Steendam, Victoria Police, Closed Hearing, Melbourne, 14 December 2015.

However, Victoria Police did highlight some of the difficulties of operating within a complex framework involving three separate pieces of legislation in determining the process of receiving and investigating complaints.<sup>298</sup> Assistant Commissioner Brett Guerin identified one area of difficulty as being the classification of all complaints regarding police misconduct as protected disclosures. He explained:

Anything that is reported to IBAC, any reported misconduct, they automatically consider as a protected disclosure. Under that of course it limits us legally as to what we can do in the short term.<sup>299</sup>

The complexities described by Assistant Commissioner Brett Guerin arise from the distinction between whether complaints amount to 'misconduct' or 'conduct':

I think our concern is the lack of clarity about section 167, about what type of complaint constitutes a deemed protected disclosure under section 167(3). I think the intent when the legislation was created was certainly that it is for misconduct, not for conduct matters, but under the literal interpretation that is applied all matters are deemed to be a protected disclosure, which then creates some limitations for us, until it is referred back to us, in being able to, I suppose, start an investigation and protect any evidence that we need to and some of the mechanics that we need to actually work through. Even if we had the statement of intent about what was intended by that section to give clarity that would be helpful to us.<sup>300</sup>

The distinction between 'conduct' and 'misconduct' arises from section 166 of the *Victoria Police Act 2013* (Vic). The section states:

"conduct", in relation to a police officer or protective services officer, means—

- (a) an act or decision or the failure or refusal by the officer to act or make a decision in the exercise, performance or discharge, or purported exercise, performance or discharge, whether within or outside Victoria, of a power, function or duty which the officer has as, or by virtue of being, a police officer or protective services officer; or
- (b) conduct which constitutes an offence punishable by imprisonment; or
- (c) conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or
- (d) disgraceful or improper conduct (whether in the officer's official capacity or otherwise);

"misconduct", in relation to a police officer or protective services officer, means—

- (e) conduct which constitutes an offence punishable by imprisonment; or
- (f) conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or
- (g) disgraceful or improper conduct (whether in the officer's official capacity or otherwise).

<sup>298</sup> *Protected Disclosure Act 2012* (Vic); *Victoria Police Act 2013* (Vic); *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

<sup>299</sup> Assistant Commissioner Brett Guerin, Victoria Police, Closed Hearing, Melbourne, 14 December 2015.

<sup>300</sup> Deputy Commissioner Wendy Steendam, Victoria Police, Closed Hearing, Melbourne, 14 December 2015.

Victoria Police provided particular examples of the impact of the designation of all complaints as 'misconduct' and therefore protected disclosures:

[W]here you have matters of workplace conflict sometimes you need to strike quickly, or not strike quickly but you need to intervene quickly. Also it is very difficult to resolve a workplace conflict issue where you cannot tell anyone much about it, including the identities, so mediation is rendered redundant. There are some issues there that cause some difficulty for us, so what we would suggest is, for example, if legislated reform were to be introduced under the Victoria Police Act, to state that for a complaint to constitute a deemed protected disclosure the information received must show or tend to show a member is engaged in misconduct. That would clarify it somewhat for us.<sup>301</sup>

Assistant Commissioner Brett Guerin also pointed out that as matters and complaints referred to IBAC needed to be assessed and referred back to Victoria Police prior to being able to commence an investigation, the length of time necessary for this process to take place also impacted the resolution of issues:

The other issue with that is that sometimes it can take up to two or three weeks to get a referral with these matters. Really, if you do have some issues fermenting in a workplace, a two or three-week delay can militate against a speedy resolution.<sup>302</sup>

### 4.3.2 Welfare support for complainants

Victoria Police also informed the Committee that a practical difficulty arising from the confidentiality and anonymity provisions of the protected disclosure regime was that Victoria Police was unable to connect individuals with support services after they had made a protected disclosure. The operation of the legislation also prevented individuals who had made a disclosure from seeking out assistance themselves due to restrictions in discussing material that was the subject of a protected disclosure:

...[Complainants] are prohibited from telling anybody if it is a protected disclosure. If it is considered a protected disclosure, they are prohibited from telling someone like a doctor or a psychologist what the circumstances are. So we would like some amendment to loosen that up to enable people to at least tell a certain class of person what the background is, because at the moment they cannot.<sup>303</sup>

The concerns raised by Victoria Police in respect of the accessibility of welfare and support services to officers and employees of Victoria Police have also been identified by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) in its recent review of complaints of sexual harassment and sexual discrimination in Victoria Police.

<sup>301</sup> Assistant Commissioner Brett Guerin, Victoria Police, Closed Hearing, Melbourne, 14 December 2015.

<sup>302</sup> Assistant Commissioner Brett Guerin, Victoria Police, Closed Hearing, Melbourne, 14 December 2015.

<sup>303</sup> Assistant Commissioner Brett Guerin, Victoria Police, Closed Hearing, Melbourne, 14 December 2015.

The review revealed that the prohibition on disclosing information about a protected disclosure, or the name of an individual that is the subject of a protected disclosure, can have the effect of preventing individuals from accessing or being referred to support services:

The Review heard about unintended consequences of the disclosure offences under the Victoria Police Act which may have negative impacts for victims. In particular, the Victoria Police Act does not contain any exceptions to allow a complainant to disclose the subject matter of their complaint for the purposes of receiving welfare support or for making a claim for compensation to WorkSafe Victoria. This can create additional stress for people who are already vulnerable from being targeted by harmful workplace behaviours by their colleagues.<sup>304</sup>

The review recommended that further consideration be given to legislative barriers preventing individuals from accessing support services, and how these may be rectified.

The review also reported that some individuals who participated in the review raised concerns that IBAC may refer complaints made to it back to Victoria Police without notification or seeking the consent of the complainant. The review highlighted the importance of consultation with complainants prior to a referral of their complaint to their employer.<sup>305</sup> To help resolve this concern, the review recommended consideration of whether section 59 of the IBAC Act operated to prevent IBAC from notifying complainants prior to the referral of their complaint to Victoria Police.<sup>306</sup>

### 4.3.3 Members of Parliament

The current protected disclosure regime requires the mandatory referral of almost all complaints which could amount to a protected disclosure to IBAC for assessment.

However, if a potential protected disclosure relates to a Member of Parliament, the allegation must be referred to the Presiding Officers of Parliament (the Speaker of the Legislative Assembly, or the President of the Legislative Council).<sup>307</sup> There is no requirement obliging the Presiding Officers to refer the allegations to IBAC for assessment. The Presiding Officers may at their discretion determine to refer the matter to IBAC, but are not required to do so.<sup>308</sup>

<sup>304</sup> Victorian Equal Opportunity and Human Rights Commission (2015), *Independent Review into sex discrimination and sexual harassment, including predatory behaviour in Victoria Police – Phase 1 Report 2015*, Melbourne, p. 139.

<sup>305</sup> Victorian Equal Opportunity and Human Rights Commission (2015), *Independent Review into sex discrimination and sexual harassment, including predatory behaviour in Victoria Police – Phase 1 Report 2015*, Melbourne, pp. 138–139.

<sup>306</sup> Victorian Equal Opportunity and Human Rights Commission (2015), *Independent Review into sex discrimination and sexual harassment, including predatory behaviour in Victoria Police – Phase 1 Report 2015*, Melbourne, p. 139.

<sup>307</sup> *Protected Disclosure Act 2012* (Vic) s 19(1)–(2).

<sup>308</sup> *Protected Disclosure Act 2012* (Vic) s 21(3).

This particular aspect of the protected disclosure regime has been criticised by the LIV. In its evidence before the Committee, the LIV commented that the current provisions:

[are] different to the mandatory notification requirements for other organisations. In practice this means that protected disclosure complaints about improper conduct by members of Parliament are only handled by Parliament rather than IBAC, and, again, our submission is that amendments should be introduced to address this anomaly.<sup>309</sup>

In previous correspondence and submissions to the Government during the establishment of the new integrity system and protected disclosures regime, the LIV submitted that:

The Government's purported aim to establish an anti-corruption commission applying to a broad range of public officers is significantly undermined by this discretion.<sup>310</sup>

In its submission to the Committee following the introduction of the bill, the LIV expressed concern that this issue had not been addressed by the proposed legislation.<sup>311</sup>

Each state across Australia has established a statutory whistle-blowing or 'protected disclosure regime', although there are some significant differences in how the schemes operate.<sup>312</sup> As a result, it is difficult to compare the Victorian regime with other jurisdictions. However, in New South Wales the *Public Interest Disclosure Act 1994* (NSW) expressly permits the making of a disclosure relating to a Member of Parliament to ICAC.<sup>313</sup>

#### 4.3.4 Greater flexibility to refer protected disclosures

In its *Special Report* in 2014, IBAC outlined that pursuant to the current legislation if a complaint is classified as a protected disclosure, and did not fall within the jurisdiction of IBAC to investigate, it could only refer the matter to a limited number of agencies – the Victorian Ombudsman (VO), VI or Victoria Police. IBAC pointed out that this limitation meant it was unable to refer matters to a more specialised body, such as the Racing Integrity Commissioner, or the head of the relevant public body as appropriate in the circumstances.<sup>314</sup>

<sup>309</sup> Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015.

<sup>310</sup> Law Institute of Victoria (2012b), 'Independent Broad-based Anti-Corruption Commission – November 2012 Reforms', Letter to Members of Parliament, 6 December 2012, Melbourne, p. 4.

<sup>311</sup> Law Institute of Victoria, Submission, 13 January 2016.

<sup>312</sup> Paul Latimer and A.J. Brown (2007), 'In Whose Interest? The Need for Consistency in to whom, and about whom, Australian Public Interest Whistleblowers can make Protected Disclosures' 12 (2) *Deakin Law Review*, pp. 20–21.

<sup>313</sup> *Public Interest Disclosure Act 1994* (NSW) ss 4A, 10.

<sup>314</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 27.

IBAC stated that the limited number of agencies it could refer a protected disclosure to stood in contrast to the broader array of agencies available within its general referral power when considering how to resolve a complaint made to it.<sup>315</sup>

In evidence to the Committee, the Commissioner reiterated his concerns in respect of this issue:

One of the problems, as the Ombudsman may have told you already, is that the Ombudsman's office can get overloaded by protected disclosure complaints that are referred by us that are not police matters and some of them are just as well suited, it seems to us, going back to the entity from where the complaint emanated. But of course that entity would need to have appropriate procedures and processes in place to respect the confidentiality of the complaint and otherwise to protect the individual, as the act requires.<sup>316</sup>

The Victorian Ombudsman also remarked that the current legislation had resulted in a significant spike in the number of protected disclosures referred to the VO in the first year of the PD Act's operation.<sup>317</sup> In the following year, the referral of protected disclosures to the VO (and the effect of provisions within the *Ombudsman Act 1973* (Vic) requiring the VO to investigate protected disclosures) had a significant impact on its investigative capacity.<sup>318</sup> The Victorian Ombudsman has highlighted:

My office has a vital but limited investigative capacity, and I have found that the majority of this is being taken up with the requirement to investigate 'protected disclosures' (formerly known as whistleblower complaints) referred by IBAC. Under the previous Whistleblowers Protection Act the Ombudsman had the discretion to refer such cases elsewhere, including back to the relevant agencies, if appropriate. This is no longer the case, and as a result the resources of the Office are being disproportionately spent on these investigations.

These changes are having a real impact on the ability of my office to do its core business, which is to investigate public complaints and administrative actions of public bodies.<sup>319</sup>

The proposed legislation does not provide IBAC with an expanded range of agencies to whom to refer protected disclosures. However, the proposed amendments provide the VO with a greater flexibility to refuse to deal with referred protected disclosures and undertake preliminary inquiries.<sup>320</sup>

<sup>315</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 27.

<sup>316</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>317</sup> Victorian Ombudsman, *Annual Report 2014-2015*, p. 15.

<sup>318</sup> Victorian Ombudsman, *Annual Report 2014-2015*, p. 7.

<sup>319</sup> Victorian Ombudsman, *Annual Report 2013-2014*, p. 5.

<sup>320</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cls 56, 61; Ms Deborah Glass, Victorian Ombudsman, Submission, 4 January 2016.



In a submission to the Committee, the Victorian Ombudsman, Ms Deborah Glass outlined that these changes were 'welcomed' and would ensure the VO could use its investigative resources more efficiently.<sup>321</sup> However, she also remarked that the number of protected disclosure complaints considered by the VO was unlikely to decrease:

I will still be unable to refer protected disclosure complaints elsewhere so I have no reason to believe that the number of protected disclosure complaints handled by my office will decrease. My office will still be required to assess disclosures, refer them to IBAC and conduct enquiries on protected disclosure complaints referred by IBAC.<sup>322</sup>

The former Victorian Ombudsman, George Brouwer also remarked on the absence of a greater number of agencies to whom protected disclosures could be referred in the new legislation, and outlined the potential consequences:

Also, nothing has been done to broaden the category of agencies to whom protected disclosure complaints can be referred for investigation by IBAC, thus continuing to swamp the Victorian Ombudsman with non-police matters.<sup>323</sup>

#### 4.3.5 Committee Comment

The Committee notes that the proposed amendments do not resolve the issues identified by IBAC and other stakeholders regarding protected disclosure complaints. The evidence canvasses a number of important issues in the effective functioning of the protected disclosures regime and as a result, the broader integrity system. To ensure that all aspects of the regime operate effectively and considering its importance to the functioning of the Victorian integrity system, the Committee believes it would be appropriate to review the operation of the regime.

Given the evidence received and academic research which identifies that a robust whistleblowing regime is vital to the effectiveness of an integrity system,<sup>324</sup> the Committee considers that such a review should be conducted as a priority.

In addition, the concern raised by the Commissioner in IBAC's 2014 *Special Report* in regard to the limited number of agencies IBAC can refer has not been resolved by the legislation.

<sup>321</sup> Ms Deborah Glass, Victorian Ombudsman, Submission, 4 January 2016.

<sup>322</sup> Ms Deborah Glass, Victorian Ombudsman, Submission, 4 January 2016.

<sup>323</sup> Mr George Brouwer, former Victorian Ombudsman, Submission, 3 January 2016.

<sup>324</sup> The Hon. Murray Kellam QC, former Tasmanian Integrity Commissioner, Closed Hearing, Melbourne, 12 November 2015; A.J. Brown (2008), 'Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of internal witness management in public sector organisations', ANU E Press, p. 41; Brian Head, A.J. Brown & Carmel Connors (eds)(2008), *Promoting Integrity: Evaluating and Improving Public Institutions*, Ashgate, London, p. 294.

While the Victorian Ombudsman has a greater discretion to refuse to investigate complaints received from IBAC, this may not facilitate the appropriate referral and resolution of the complaint to the most appropriate body.<sup>325</sup>

**RECOMMENDATION 4.3:** The Committee considers there are a number of issues relating to the operation of the *Protected Disclosure Act 2012* (Vic) which require further investigation. The Committee recommends that the Victorian Government as a part of its ongoing review should evaluate the protected disclosure regime. This matter should be prioritised.

The Committee also intends to consider these issues further throughout the course of its work during the next year.

## 4.4 Greater flexibility to deal with complaints and notifications

The current legislative scheme provides that following receipt of complaints or notifications about police misconduct or corrupt conduct, IBAC may dismiss, investigate or refer the allegations.<sup>326</sup>

In its 2014 *Special Report*, IBAC pointed out that it had experienced some practical issues in respect of these options and suggested it be provided with a fourth option – to ‘park’ or delay making a decision in respect of how to deal with a complaint or notification received.

IBAC identified that it had received some complaints where allegations involved criminal conduct which had been previously or concurrently reported to Victoria Police. In these circumstances IBAC noted it did not appear to have an appropriate method of dealing with the allegations, as:

Dismissal seems inappropriate, investigation by IBAC seems inefficient and referral back to the investigating entity somewhat pointless and time consuming.<sup>327</sup>

IBAC argued that it would be appropriate to have greater flexibility in dealing with the complaint, including monitoring the progress of any concurrent investigation and deciding what was appropriate at a later time.<sup>328</sup> The IBAC Commissioner explained that:

<sup>325</sup> Reviewing the requirement that the Victorian Ombudsman investigate all protected disclosure complaints was also the subject of a recommendation of the Victorian Parliament's Accountability and Oversight Committee in 2014 and 2015 – see Accountability and Oversight Committee (2014), *Report into Victorian oversight agencies*, Parliament of Victoria, Melbourne, pp. 35–36; Accountability and Oversight Committee (2015), *Report into Victorian oversight agencies 2013–14*, Parliament of Victoria, Melbourne, pp. 23–24.

<sup>326</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 58.

<sup>327</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 28.

<sup>328</sup> Independent Broad-based Anti-corruption Commission (2014c), *Special Report Following IBAC's First Year of Being Fully Operational*, IBAC, Melbourne, p. 28.

[I]t may be that it is sensible to await the outcome of a related investigation by us or another body that might then have a bearing on the assessment of a given notification or complaint. There are other reasons for such deferrals, but that is one example.<sup>329</sup>

#### 4.4.1 Committee Comment

The Committee is aware that the current legislation does not resolve the concerns raised by IBAC in its *Special Report*. The Committee considers it important that all complaints provided to IBAC are able to be considered appropriately and consistently.

**RECOMMENDATION 4.4:** The Committee recommends that the Victorian Government as a part of its ongoing review should consider providing the Independent Broad-based Anti-corruption Commission with greater flexibility to 'park' or 'suspend' complaints for a reasonable period of time to assist it to deal with complaints consistently and appropriately.

#### 4.5 Operation of IBAC Act on requests for documentation relating to police complaints

The Committee received evidence regarding difficulties arising from the operation of section 194 of the IBAC Act. This provision specifically excludes some documents held by IBAC from the Freedom of Information regime within Victoria.

The rationale for the current provision is to ensure the protection of IBAC investigations. Providing documentation in relation to IBAC investigation could potentially expose investigative strategies and impact informants to the Commission.<sup>330</sup> Exemptions for anti-corruption agencies from freedom of information regimes exist across each jurisdiction and are similarly designed to protect the release of information regarding the conduct of investigations, assessments and intelligence holdings. However, the extent of the exemption varies between states.<sup>331</sup>

<sup>329</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>330</sup> Law Institute of Victoria (2015a), 'Access to Police Misconduct Complaints', Correspondence to the Hon. Martin Pakula MP, Hon. Gavin Jennings MLC & Hon. Wade Noonan MP, 2 November 2015, p. 2

<sup>331</sup> For example, the Western Australia Corruption and Crime Commission is an exempted agency pursuant to the *Freedom of Information Act 1992* (WA) sch 2, as is the Independent Commissioner Against Corruption in South Australia pursuant to the *Freedom of Information Act 1991* (SA) sch 2 (ea). Partial exemptions to documents created for certain purposes exist for the Crime and Corruption Commission in Queensland per *Right to Information Act 2009* (Qld) sch 3. A similar provision exists for the Independent Commission Against Corruption in New South Wales per the *Government Information (Public Access) Act 2009* (NSW) sch 2.

The LIV expressed concern about a particular aspect of the provision; specifically, if an individual lodges a complaint with IBAC regarding police misconduct which is investigated by Victoria Police, that person cannot apply later to IBAC to access documentation resulting from the investigation.<sup>332</sup>

This aspect, the LIV believes, is the result of the broad-ranging terms contained in section 194 that exclude access to documents relating to a police complaint:

The effect of s 194 is that the ability of a complainant to access documents depends on whether their complaint was originally made to IBAC or Victoria Police.<sup>333</sup>

In its evidence to the Committee, the LIV provided the following examples of how the legislation operates in its present form:

Our members have reported the scenario where a complaint made to IBAC and then referred to Victoria Police for investigation will be excluded from the FOI act by operation of section 194. That means that Victoria Police, upon receiving that FOI request, would not even have to process it, not even have to go through to stage of looking at, 'Are there any exemptions that are applicable?', because the act just does not apply at all. Yet if that same complaint had been made directly to Victoria Police, then the FOI act would apply. That means that even though a matter can undergo the same investigative process, the effect of section 194 means that the ability of a complainant to access the Victoria Police documents depends on whether the complaint was originally made to IBAC or to Victoria Police.<sup>334</sup>

In a letter to the Attorney-General, the LIV outlined its experience of the impact this provision has:

LIV members in private practice and in community legal centres are advising complainants to lodge complaints directly with Victoria Police and not with IBAC. A complainant who has sought legal advice may therefore be able to obtain access to documents through FOI which an unrepresented complainant may not be able to obtain. In practice, this means that s 194 is acting as a barrier to complaints regarding Victoria Police being lodged directly with IBAC.<sup>335</sup>

The LIV argued the effect of the provision could potentially result in individual complainants incurring unnecessary costs and delays in seeking an application for discovery to access documentation if they were contemplating litigation against Victoria Police. This is because they would be unable to obtain this documentation through the Freedom of Information regime. The LIV also noted transparency in the investigation of police complaints would be enhanced through the ability to access documentation consistently.<sup>336</sup>

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332 Law Institute of Victoria (2015a), 'Access to Police Misconduct Complaints', Correspondence to the Hon. Martin Pakula MP, Hon. Gavin Jennings MLC & Hon. Wade Noonan MP, 2 November 2015, p. 2

333 Law Institute of Victoria, Submission, 13 January 2016.

334 Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, 23 November 2015.

335 Law Institute of Victoria (2015a), 'Access to Police Misconduct Complaints', Correspondence to the Hon. Martin Pakula MP, Hon. Gavin Jennings MLC & Hon. Wade Noonan MP, 2 November 2015, p. 2.

336 Law Institute of Victoria (2015a), 'Access to Police Misconduct Complaints', Correspondence to the Hon. Martin Pakula MP, Hon. Gavin Jennings MLC & Hon. Wade Noonan MP, 2 November 2015, p. 3.

The Committee wrote to IBAC and sought its views on the proposal of the LIV and asked what impact such changes would have on its operations. IBAC outlined in response that it 'did not necessarily agree' that section 194 created an anomaly in the accessing of documentation relating to police complaints.<sup>337</sup> The IBAC Commissioner explained the process of referring a complaint to Victoria Police for investigation:

I do not necessarily agree that section 194 of the IBAC Act creates an anomaly. Where IBAC refers a complaint or notification to the Chief Commissioner of Police for investigation, it remains an 'IBAC complaint': IBAC will continue to monitor a police investigation of an IBAC complaint in appropriate circumstances. In addition, when required IBAC can withdraw a referral to the Chief Commissioner and complete the investigation of the complaint or notification itself.<sup>338</sup>

The IBAC Commissioner also outlined that in his view, the LIV's proposal would reduce IBAC's capacity to oversight complaints against police. He explained:

The Law Institute's proposal would reduce IBAC's capacity to oversight a police investigation or to complete it when a referral was withdrawn given the necessity to protect operational methodology and other sensitive information and, in some cases, the safety and welfare of witnesses.<sup>339</sup>

#### 4.5.1 Committee Comment

The LIV has outlined to the Committee that its members have reported experiencing difficulties in accessing documentation relating to police complaints where an individual has complained in the first instance to Victoria Police and not IBAC. As a result, section 194 of the IBAC Act appears to have the unintended consequence of requiring individuals to complain first to Victoria Police should they wish to access documentation relating to their complaint at a later date.

Based on the evidence provided to the Committee, it appears the current operation of this provision places an individual at a disadvantage in accessing their documentation should they complain first to IBAC, rather than directly to Victoria Police.

Section 52 of the IBAC Act expressly permits IBAC to act as an alternative body where complaints regarding Victoria Police may be made. The Committee believes there are often significant and important reasons why an individual may choose to complain to IBAC as an alternative to Victoria Police. The Committee is concerned that the operation of the current legislation does not fulfil the intention of this section for IBAC to operate as an alternative body to make a complaint regarding Victoria Police.

<sup>337</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Correspondence to the Independent Broad-based Anti-corruption Commission Committee, 18 January 2016.

<sup>338</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Correspondence to the Independent Broad-based Anti-corruption Commission Committee, 18 January 2016.

<sup>339</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Correspondence to the Independent Broad-based Anti-corruption Commission Committee, 18 January 2016.

However, the Committee acknowledges and understands the concerns raised by IBAC that it is necessary to ensure the protection of methods used within investigations, and the safety of witnesses is of the utmost importance. Any review of the operation of section 194 of the IBAC Act should consider how IBAC's methodologies and the safety of witnesses could be appropriately preserved.

**RECOMMENDATION 4.5:** The Committee recommends that the Victorian Government as a part of its ongoing review should assess section 194 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) to review any inconsistency in accessing documents between complaints lodged with the Independent Broad-based Anti-corruption Commission and Victoria Police. This matter should be prioritised.

## 4.6 Complaints regarding Victoria Police

One of IBAC's primary functions is to receive complaints and notifications regarding employees of Victoria Police in respect of a broad range of conduct, which includes:

- failing or refusing to perform duties
- behaving disgracefully or improperly (on or off duty), or
- discrediting Victoria Police or its personnel.<sup>340</sup>

Victoria Police are required to notify IBAC of complaints made regarding police misconduct internally within Victoria Police, the details of the investigation and the outcome.<sup>341</sup>

After receipt of complaints or notifications, IBAC may determine to investigate, dismiss, or refer the complaint back to Victoria Police for investigation.<sup>342</sup>

Many stakeholders in Victoria have identified the investigation of police complaints as an area requiring further consideration. The LIV, for example, has suggested all complaints regarding police should be investigated independently, rather than internally within Victoria Police.<sup>343</sup> Similar concerns were raised in 2015 by the Human Rights Law Centre.<sup>344</sup> In late 2015, the Police Accountability Project (a project of the Flemington and Kensington Legal Centres in Victoria) also released a policy briefing paper outlining its support for the establishment of an independent body separate from police to investigate complaints.<sup>345</sup>

<sup>340</sup> Independent Broad-based Anti-corruption Commission, 'What is Police Misconduct', viewed 15 December 2015, <<http://www.ibac.vic.gov.au/reporting-corruption/what-can-you-complain-about/what-is-police-misconduct>> and *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 5.

<sup>341</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 57(2)-(4).

<sup>342</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 58.

<sup>343</sup> Law Institute of Victoria (2015b), *Strengthening Victoria's Integrity Regime – Position Paper*, Melbourne, p. 7; Law Institute of Victoria, Submission, 13 January 2016.

<sup>344</sup> Human Rights Law Centre (2015), 'Court decision highlights need for overhaul of police complaints in Victoria', viewed 11 January 2016 <<http://hrlc.org.au/court-decision-highlights-need-for-overhaul-of-police-complaints-in-victoria/>>.

<sup>345</sup> Police Accountability Project (2015), 'Independent Investigation of Complaints against the Police – Policy Briefing Paper', viewed 11 January 2016 <[http://www.policeaccountability.org.au/wp-content/uploads/2015/11/CLCpaper\\_final.pdf](http://www.policeaccountability.org.au/wp-content/uploads/2015/11/CLCpaper_final.pdf)>.

In evidence to the Committee, the LIV reiterated its concerns:

It is the LIV's position that police misconduct needs to be investigated independently of Victoria Police. While IBAC has the ability to investigate complaints of police misconduct, it currently refers police complaints overwhelmingly to Victoria Police. According to a report by one of the deputy commissioners of Victoria Police in late 2014, around 90 per cent of complaints of police misconduct were being investigated by Victoria Police. As part of this review of IBAC, the LIV recommends that thought be given to increasing IBAC's resources so that it can investigate more complaints of police misconduct independently of Victoria Police.<sup>346</sup>

#### 4.6.1 Committee Comment

The question of whether an independent body separate from police should investigate complaints about police misconduct has arisen in almost every jurisdiction in Australia. The inherent difficulties in striking an appropriate balance to investigate complaints about police are demonstrated in recent developments in other states across Australia.

For example, as recently as November 2015, significant changes have been proposed in New South Wales regarding the structure of police oversight, following a review of its operations.<sup>347</sup> The review recommended the Police Integrity Commission be abolished and the functions of the New South Wales Ombudsman relating to the oversight of complaints of police misconduct be transferred to a newly established police oversight body – the Law Enforcement Integrity and Complaints Commission.<sup>348</sup> The New South Wales Government has accepted the recommendations of the review.<sup>349</sup>

In South Australia, the Independent Commissioner Against Corruption recently published a report in respect of the oversight arrangements regarding complaints made about police. In this report, the Commissioner recommended that the Police Ombudsman be abolished, and the responsibility for the oversight of complaints regarding police be transferred to the Commission.<sup>350</sup>

Despite anti-corruption agencies having been established in Australia for more than 27 years, these examples demonstrate the ongoing nature of legislative processes and developments that seek to create the most effective and appropriate body to investigate complaints about police misconduct.

Given the experience of other jurisdictions and the concerns raised by stakeholders in Victoria, the Committee intends to further investigate this issue.

<sup>346</sup> Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015.

<sup>347</sup> Andrew Tink (2015), *Review of Police Oversight: A report to the New South Wales Government on options for a single civilian oversight model for police*, New South Wales Department of Justice.

<sup>348</sup> Andrew Tink (2015), *Review of Police Oversight: A report to the New South Wales Government on options for a single civilian oversight model for police*, New South Wales Department of Justice, p. 5.

<sup>349</sup> The Hon. Troy Grant MP, Deputy Premier and Minister for Police (2015), *New Law Enforcement Watchdog for NSW*, Media Release, 26 November 2015.

<sup>350</sup> Independent Commissioner Against Corruption (2015), *Review of legislative schemes: The oversight and management of complaints about police and the receipt and assessment of complaints and reports about public administration*, p. 5.

## 4.7 Additional issues raised by IBAC

In evidence to the Committee, IBAC raised a number of issues for further consideration in respect of the operations of the IBAC Act. These suggestions included the following matters.

### 4.7.1 Follow the Dollar Powers

The Commissioner suggested further consideration be given to the introduction of 'follow the dollar powers' which have been recently provided to VAGO.<sup>351</sup> So-called 'follow the dollar' powers expressly permit oversight and anti-corruption agencies to access the documentation of private organisations and individuals providing services or carrying out functions which are funded by Government.<sup>352</sup>

The Commissioner argued that the introduction of such a power would be important in further increasing the effectiveness of IBAC to investigate corrupt conduct:

[B]eing able to follow the dollar wherever it may lead, including beyond the public sector, means that normally you can get the whole of the story and that is important in terms of getting to the bottom of matters of serious corrupt conduct.<sup>353</sup>

The introduction of 'follow the dollar' powers was also supported by the former Tasmanian Integrity Commissioner, Murray Kellam. In evidence to the Committee, Mr Kellam stated:

I think the legislation really ought to give some power and following the dollar — I mean it could be adequately defined. I mean it is the state's dollar. It is the state's dollar that is being spent on a project, even though it might be a private entrepreneur who is putting that into effect, it is still the state's money. It is still the taxpayer's money. I think there is a reasonable argument to say that you should not be constrained only to look at those activities of the public sector employee.<sup>354</sup>

### 4.7.2 Committee Comment

The Committee acknowledges that the Commissioner has raised the possibility of IBAC being provided with 'follow the dollar' powers as an area for further consideration. The Committee is of the view that this issue requires further investigation, including consideration of the powers provided to other anti-corruption bodies across Australia.

<sup>351</sup> Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) cls 90–93, 97.

<sup>352</sup> The Hon. Jacinta Allan, Minister for Public Transport, Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic), Second Reading Speech, 10 December 2015, Hansard (Legislative Assembly), p. 5532.

<sup>353</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>354</sup> The Hon. Murray Kellam QC, former Tasmanian Integrity Commissioner, Closed Hearing, Melbourne, 12 November 2015.



**RECOMMENDATION 4.6:** The Committee considers that providing a 'follow the dollar' power to the Independent Broad-based Anti-corruption Commission requires further consideration and investigation. The Committee recommends that the Victorian Government as a part of its ongoing review should investigate this issue further.

The Committee also intends to consider this issue further throughout the course of its work during the next year.

### 4.7.3 Derivative Evidence

The IBAC Commissioner also identified another area for further consideration related to how 'derivative evidence' obtained through the course of a coercive examination conducted by IBAC could be used:

[W]here I think our act needs to be shored up in terms of what is called derivative use of coerced evidence. So, for example, if a witness were to tell us in a coercive examination where they had hidden incriminating evidence and we sought a search warrant on that basis and found the material, that is arguably derivative evidence and, on one view of the common law, you need the act to be crystal clear about being able to use derivative evidence in a criminal prosecution. I think that is one area for tidying up.<sup>355</sup>

Derivative evidence is a term used to describe evidence obtained through a number of different means, but includes evidence obtained through the course of an examination conducted using coercive means which is used in another proceeding.<sup>356</sup> Coercive examinations may require an individual to answer questions posed to them, even if it is against their own interests.

Whether evidence that is obtained during the course of coercive examinations may be used in subsequent criminal proceedings and, if so, how it may be used has recently been the subject of consideration by the High Court of Australia.<sup>357</sup> Other anti-corruption agencies across Australia are also considering this issue, including the impact of the decisions of the High Court and how derivative evidence obtained by Commissions should be used in subsequent or other proceedings.<sup>358</sup>

Mr Murray Kellam, the former Tasmanian Integrity Commissioner also stated that the use of derivative evidence obtained through IBAC investigations is an area which requires further consideration and legislative reform following a number of decisions by the High Court of Australia and New South Wales Court of Criminal Appeal. Mr Kellam said these decisions:

<sup>355</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>356</sup> Derivative evidence may also include evidence that is obtained illegally and improperly through, for example, the improper execution of a search warrant. Paul Sofronoff (1994), 'Derivative Use Immunity and the Investigation of Corporate Wrongdoing' 10 *Queensland University of Technology Law Journal*, pp. 122-123.

<sup>357</sup> *X7 v Australian Crime Commission* (2013) 248 CLR 92, *Lee v The Queen* (2014) 308 ALR 252, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

<sup>358</sup> See evidence given to the Queensland Parliamentary Crime and Corruption Committee, Commissioner Ian Stewart, Queensland Police Service, Public Hearing, 30 November 2015.

raised potential serious implications for criminal proceedings resulting from IBAC investigations. The use of derivative evidence has recently been clarified by legislation of the Commonwealth Parliament and by the Victorian Parliament for the Office of the Chief Examiner. Consideration should be given to similar clarification being the subject of legislative action in relation to IBAC investigations.<sup>359</sup>

#### 4.7.4 Committee Comment

The use of derivative evidence is a complex area of law with a number of competing consideration and divergent views. The Committee is aware that similar issues in respect of how derivative evidence may be used and whether any amendments are necessary to legislative frameworks for anti-corruption issues are areas currently being considered in Queensland.<sup>360</sup>

**RECOMMENDATION 4.7:** The Committee considers that the use of derivative evidence requires further consideration and investigation. The Committee recommends that the Victorian Government as a part of its ongoing review should investigate this issue further.

#### 4.7.5 Questioning individuals the subject of criminal charges

Another area the IBAC Commissioner nominated for further consideration was that of providing greater clarity for the IBAC to be able to conduct examinations with an individual who is currently the subject of criminal charges, with appropriate protections and limitations.

At present, section 70 of the IBAC Act enables IBAC to commence and conduct an investigation where there are concurrent civil or criminal proceedings. In doing so, the legislation requires IBAC to take all reasonable steps to avoid prejudice to those proceedings. However, the situation in respect of whether IBAC may specifically question an individual who is concurrently the subject of criminal charges is unclear following a decision of the High Court of Australia.<sup>361</sup>

The Commissioner stated that such powers can be necessary in conducting corruption investigations:

Another area for tidying up is the ability, in appropriate circumstances and without prejudicing any criminal trials, to question a witness on matters the subject of charges, just as now, as I understand it, the chief examiner has that power as a result of amendments, and of course that would normally only be done in private and the evidence could not be used against the person. But sometimes that is necessary in the context of a broader corrupt conduct investigation.<sup>362</sup>

<sup>359</sup> The Hon. Murray Kellam QC, former Tasmanian Integrity Commissioner, Submission, 5 January 2016.

<sup>360</sup> See evidence give to the Queensland Parliamentary Crime and Corruption Committee, Commissioner Ian Stewart, Queensland Police Service, Public Hearing, 30 November 2015.

<sup>361</sup> *X7 v Australian Crime Commission* (2013) 248 CLR 92.

<sup>362</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

## 4.7.6 Committee Comment

The legal issues surrounding powers of anti-corruption and law enforcement agencies to question individuals who are concurrently the subject of criminal charges is a complex area of law, involving many competing considerations.<sup>363</sup> The use of questioning of this nature has also recently been the subject of decisions by the High Court of Australia and may be considered further this year.<sup>364</sup>

A recent report of the Senate Legal and Constitutional Affairs Legislation Committee considered issues relating to whether the Australian Commission for Law Enforcement Integrity should be provided with powers to coercively question individuals the subject of criminal charges and disclose this information to prosecuting authorities. The report outlined that the submissions it received contained a number of competing views and acknowledged the difficulties in striking a balance between the need to protect individuals rights and ensuring the relevant corruption bodies are not 'adversely hindered in the performance of their respective roles'.<sup>365</sup>

An important factor to take account of when determining if such powers should be provided to anti-corruption bodies is how an individual's civil liberties will be impacted. Further, consideration should be given to whether such powers are used by equivalent bodies and what the experiences of those jurisdictions have been.

**RECOMMENDATION 4.8:** The Committee considers that the ability of the Independent Broad-based Anti-corruption Commission to examine an individual the subject of criminal charges requires further investigation. The Committee recommends that the Victorian Government as a part of its ongoing review should investigate this issue further.

## 4.7.7 Appropriation of IBAC funding

In its evidence to the Committee, IBAC also referred to the need to examine and establish an appropriate model for the funding of IBAC. At present, IBAC is funded by 'accrual based parliamentary appropriations'. These appropriations are in the form of grants facilitated through the Department of Premier and Cabinet.<sup>366</sup>

<sup>363</sup> Stephen Donaghue (2000), 'Coercive Questioning After Charge' 28 (1) *Federal Law Review*, pp. 3–4.

<sup>364</sup> *R & Anor v Independent Broad-based Anti-corruption Commissioner* [2015] HCATrans 293 (13 November 2015); *X7 v Australian Crime Commission* (2013) 248 CLR 92.

<sup>365</sup> Senate Legal and Constitutional Affairs Legislation Committee (2015), *Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth)*, June 2015, Canberra, pp. 15–19.

<sup>366</sup> Independent Broad-based Anti-corruption Commission, *Annual Report 2014–2015*, p. 58; Mr Alistair Maclean, Chief Executive Officer, Independent Broad-based Anti-corruption Commission, Closed Hearing, 14 December 2015.

IBAC proposed that because IBAC operated independently from the Executive Government this principle should also be reflected in the model used for appropriating its funds. It was suggested that it may be appropriate in recognition of IBAC's independence from the Executive for the funding mechanism to be appropriated directly through the Parliament, via the IBAC Parliamentary Committee. The Commissioner explained such a model would ensure independence of the funding process:

Finally, it does seem to us that the way we are funded ought to be looked at and perhaps a funding model that respects the independence of IBAC from the executive, a funding model that is direct from the Parliament, perhaps in consultation with this committee, concurrently with looking at our annual plans. That would ensure that there is no perception that at ministerial whim the funding base could be increased or decreased.<sup>367</sup>

The Chief Executive Officer of IBAC, Mr Alistair Maclean, also concurred:

...that as an independent body reporting directly to Parliament, then the question of a funding base, whether it should be from appropriation through the Department of Premier and Cabinet or through a direct appropriation through the parliamentary committee, I think is something worth considering in the longer term.<sup>368</sup>

#### 4.7.8 Committee Comment

The Committee notes IBAC is funded in a similar manner to the Victorian Ombudsman, Victorian Auditor-General's Office and other integrity agencies.

### 4.8 Victorian Inspectorate – additional oversight

The Committee also received evidence in regard to the scope of the VI's oversight of IBAC, and whether aspects of its monitoring powers should be extended.

#### 4.8.1 Witness Summons

During the course of an investigation, IBAC may issue a summons requiring the attendance of an individual to IBAC to give evidence or produce documents.<sup>369</sup> The summons usually contains information in relation to the nature of the matters the person will be questioned about. However, IBAC may refuse to provide this information if it believes on reasonable grounds that providing this information would be likely to prejudice the conduct of the investigation or would be contrary to the public interest.<sup>370</sup>

<sup>367</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>368</sup> Mr Alistair Maclean, Chief Executive Officer, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>369</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 121(1).

<sup>370</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 121(2).

Within three days of a summons being issued, IBAC must provide a written report to the VI containing the name of the person summoned and the reasons why the witness summons was issued.<sup>371</sup> However, if IBAC determines to provide the witness summons without information pertaining to the nature of the matters an individual is to be questioned about, it is not necessary for IBAC to provide reasons for this decision to the VI.

The LIV has raised concerns in respect of whether the power to withhold information regarding the nature of the questions an individual will be the subject of during an examination should be the subject of oversight by the VI. In respect of the power to issue witness summons which do not contain information regarding the matters a person will be questioned about, the LIV stated that:

[T]he LIV understands that witness summonses cannot in all circumstances include information about matters on which the witness will be questioned (s 121(2)). However, LIV is of the view that IBAC withholding such information has an adverse impact on a witness and may affect their ability to answer questions.

It is the LIV's view that the Inspectorate should have an oversight role in relation to decisions not to disclose information in summonses. This view underpins LIV's 2012 recommendation to amend the relevant section so that when such information is withheld from a witness, IBAC must provide an explanation to the Victorian Inspectorate of the reasons for the decision to withhold it. The LIV reiterates this recommendation and is of the view that it will allow for appropriate oversight of the circumstances surrounding information being withheld from witnesses, provide accountability for these decisions and ensure that this power is being exercised fairly and appropriately by IBAC.<sup>372</sup>

#### 4.8.2 Confidentiality Notices

Confidentiality notices prohibit individuals from discussing that they are to be, or have been, the subject of an examination before IBAC.<sup>373</sup> An individual is permitted to discuss the information contained in a confidentiality notice if it is for the purposes of:

- making a complaint about the conduct of the IBAC or an IBAC Officer to the Victorian Inspectorate
- obtaining legal advice
- obtaining assistance if they are unable to understand the notice.<sup>374</sup>

The current legislation requires that as soon as reasonably practicable, IBAC must provide to the VI a copy of each confidentiality notice issued,<sup>375</sup> however it does not require the reasons why a confidentiality notice has been issued to be disclosed.

<sup>371</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 122.

<sup>372</sup> Law Institute of Victoria, Response to Question on Notice, 8 December 2015.

<sup>373</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 42(2)(e).

<sup>374</sup> This may include due to the individual's age, language abilities, or mental and physical disability as outlined in the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 44(2)(b)(i)–(iii).

<sup>375</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 43.

The LIV also expressed the view that the VI should oversight the reasons why a confidentiality notice has been issued:

LIV recommends that IBAC be required to provide to the Victorian Inspectorate the reasons why it has issued a confidentiality notice. This would allow for oversight and monitoring of these decisions by the Inspectorate, and provide safeguards against notices being issued without proper basis.<sup>376</sup>

The Committee sought the views of IBAC about the LIV's above proposals relating to witness summons and confidentiality notices and what impact the proposed changes would have on IBAC carrying out its function:

Normally witnesses are told the subject matter of the examination in advance, sometimes in more detail, sometimes in less detail. The degree of detail is very much a discretionary matter and takes into account operational considerations. There already is a lot of paper shuffling that goes on between our organisations for, as far as I can see, little or no return, and that involves a drain on the resources of both organisations. If anything, I think we should be examining lessening that drain on resources in order to promote efficiencies in public expenditure.

I would make the same general comment in relation to the next point, which is notifying the reasons every time a confidentiality notice is issued. That is a slightly different situation, in that confidentiality notices are issued routinely for the same reason every time — namely, to avoid prejudice to an investigation in terms of potential witness collusion, cover-up attempts, document destruction and the like. It is also important I think to have confidentiality imposed during investigations, to protect reputations of persons under investigation, not only from gossip but, worse, from media coverage. The only other comment I would wish to make is that the inspectorate can always ask for such information in particular cases, and of course we will provide it.<sup>377</sup>

The Committee sought the views of the Victorian Inspectorate on the above issues raised by the LIV.

### *Witness Summons*

The Inspector outlined he was of the view that section 122 of the IBAC Act required IBAC to provide reasons as to why matters that a witness was to be questioned about were not included. He noted this was an implicit requirement based on his view of the legislation.

The Inspector indicated if a report did not 'properly set out the reasons' for not identifying the matters the witness was to be questioned about may not fulfil the requirement of notification to the VI.<sup>378</sup> The Inspector explained that while he believed the relevant provision implied that IBAC was also required to justify why matters that a witness was to be questioned about were not included in a witness summons, there would be 'no harm' in making such a requirement explicit:

<sup>376</sup> Law Institute of Victoria, Response to Question on Notice, 8 December 2015.

<sup>377</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 14 December 2015.

<sup>378</sup> Mr Robin Brett QC, Inspector, Victorian Inspectorate, Correspondence to the Independent Broad-based Anti-corruption Commission Committee, 14 January 2016.

I do not think it would do any harm for an amendment to be made to the IBAC Act to include an explicit requirement for the section 122 report to include the reasons why IBAC thought it necessary not to identify the matters about which it proposes to question the witness; but my view is that such a requirement is implicit in the section as it is.<sup>379</sup>

The Inspector further identified to the Committee that another aspect of the notifications relating to the issuing of witness summons could be considered further. In accordance with section 124 of the IBAC Act, witness summons must be served upon the individual at least seven days prior to the examination taking place. However, IBAC may in some circumstances require a person's immediate attendance before IBAC if it considers on reasonable grounds that it could result in:

- (a) evidence being lost or destroyed
- (b) the commission of an offence
- (c) the escape of a person who is summoned, or
- (d) serious prejudice to the conduct of the investigation to which the witness summons relates.<sup>380</sup>

The Inspector explained he took a similar approach to notifications of this nature. He identified that it was an implicit requirement of his oversight that reasons be provided as to why a summons had an abridged service period. The VI explained it would also do no harm to make such a requirement explicit within the IBAC Act:

My view is that the position in relation to such summonses is similar. That is to say, I think section 122 in its current form already requires a report under that section about such a summons to give the reasons why IBAC thought it necessary to abridge the notice period; but it would do no harm to make that requirement explicit.<sup>381</sup>

### *Confidentiality Notices*

In respect of the provision of reasons as to why a confidentiality notice has been issued to the VI, the Inspector noted he did not see a particular need to oversight this aspect of the IBAC's work. He explained that confidentiality is essential to IBAC's investigations, and they may only be issued during the course of an investigation relating to serious corrupt conduct or police personnel misconduct:

I do not see a need for IBAC to inform the Inspectorate of the reasons why a confidentiality notice has been issued. Most confidentiality notices are issued in conjunction with summonses, and in such cases the reasons for the notice are usually very evident. A confidentiality notice may only be issued in the course of an investigation, and IBAC's investigations all relate to serious corrupt conduct or the

<sup>379</sup> Mr Robin Brett QC, Inspector, Victorian Inspectorate, Correspondence to the Independent Broad-based Anti-corruption Commission Committee, 14 January 2016.

<sup>380</sup> *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)* ss 124(2)(a)-(d).

<sup>381</sup> Mr Robin Brett QC, Inspector, Victorian Inspectorate, Correspondence to the Independent Broad-based Anti-corruption Commission Committee, 14 January 2016.

most serious cases of police personnel misconduct, and confidentiality is almost always essential in order to protect the integrity of the investigation and the evidence gathered by IBAC.<sup>382</sup>

### 4.8.3 Committee Comment

The Committee acknowledges the LIV's concerns in regard to the level of oversight of IBAC's exercise of some coercive powers. The Committee agrees that the exercise of a power not to provide an individual with information pertaining to the questions they will be asked at an examination involves potentially significant ramifications for individuals.

The Committee has identified that IBAC is required to provide reasons for its decision in respect of issuing witness summons, decisions to hold a public examination and for a direction being provided to an individual that they may not be permitted to retain the services of a particular legal practitioner.<sup>383</sup>

The Committee notes the comments of the IBAC Commissioner that providing information regarding a copy of a witness summons and a confidentiality notice to the VI, who may request additional information, enables a degree of oversight.

However, the Committee considers it appropriate that the significant powers exercised by IBAC should be appropriately and consistently monitored by an oversight body. The LIV's suggestion would place the exercise of the issuing of witness summons in the same manner as other powers the subject of VI oversight. The Committee also acknowledges that providing an explicit requirement would expressly permit a process that is implicit in the legislation and already in practice.

**RECOMMENDATION 4.9:** The Committee recommends that the Victorian Government as a part of its ongoing review should clarify the responsibility of the Victorian Inspectorate in relation to the oversight of witness summons issued by the Independent Broad-based Anti-corruption Commission.

The Committee acknowledges the concerns raised by the LIV in respect of the issuing of the reasons for issuing confidentiality notices. However, having regard to the information provided by IBAC and the VI regarding the practical operation of the current system, the Committee does not consider that any further action is necessary.

<sup>382</sup> Mr Robin Brett QC, Inspector, Victorian Inspectorate, Correspondence to the Independent Broad-based Anti-corruption Commission Committee, 14 January 2016.

<sup>383</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ss 117(5)(b), 122(1)(b), 128(1)(b).



## 4.9 Victorian Inspectorate – oversight of public examinations

When completing investigations, IBAC may determine to conduct examinations of individuals in public. To hold a public examination, IBAC must consider on reasonable grounds that there are exceptional circumstances, and the public interest in doing so outweighs the risk to the reputation of the individuals involved.<sup>384</sup>

If IBAC determines a public examination is necessary, seven days prior to the public examination being held the VI must be notified and a written report outlining the reasons for the decision must be provided.<sup>385</sup>

In its evidence, the VI told the Committee that during the operation of the integrity regime over the past three years, issues had arisen with regard to the above matters. These included the length of time provided in advance to the VI of a public examination taking place and the operation of the provision in providing oversight of IBAC's decision to conduct public examinations:

[I]t is just not sufficient time to enable us to make any meaningful response to their notice and perhaps suggest that they reconsider their decision or ask questions about it, or whatever. We do have powers to ask those things and do those things, but by having the notice given to us so late, effectively that power is not effective.

What we would ultimately like to see is, we have proposed 21 days' notice and we have also proposed — and I think this is an important part of it — that we should get that notice prior to any public announcement being made by IBAC that they intend to hold a public hearing, because once it is in the public domain the capacity to affect anything is very limited.<sup>386</sup>

After the VI gave evidence to the Committee, the Committee wrote to IBAC to seek its views on the proposal. It also asked what impact an extension of the advance notice period would have and whether a requirement that such decisions should not be declared public until the notice period had expired would impact its work.

The IBAC Commissioner responded that it was his view that an alteration of the notification arrangement would run contrary to the fundamental nature of the VI's intended role. He explained:

[T]his provision is intended to form part of the VI's broader function of monitoring IBAC's compliance with the IBAC Act: the VI could form a view as to the legality of a decision to conduct a public examination and in due course report to Parliament on its view.

<sup>384</sup> *Independent Broad Based Anti-corruption Commission Act 2011* (Vic) s 117(1).

<sup>385</sup> *Independent Broad Based Anti-corruption Commission Act 2011* (Vic) s 117(5).

<sup>386</sup> Mr Robin Brett QC, Inspector, Victorian Inspectorate, Closed Hearing, Melbourne, 14 December 2015.

It is difficult to see how the suggestion for the proposed altered notification arrangements could enhance the VI's functions in this regard. The VI's role in relation to a decision to conduct a public examination is not time-critical, and the provision is clearly not intended to have the VI otherwise 'second-guess' a decision by IBAC to conduct a public examination, especially before it is announced.

Given this, not only do I have difficulty supporting the suggestion, I consider it runs contrary to the fundamental nature of the VI's intended role, which apart from dealing with complainants, seems to me to be to (sic) provide assurances about IBAC's capacity, capability and compliance, and is not one of reviewing IBAC's decisions in advance of their implementation.<sup>387</sup>

### 4.9.1 Committee Comment

The Committee understands the Inspector's concern that the current operation and obligations arising from s 117(5) of the IBAC Act do not appear to provide sufficient time for the VI to carry out the function of overseeing this power of IBAC effectively.

The Committee also acknowledges the concerns and views put forward by IBAC in response to this proposal, however, the Committee is concerned that the time-frames involved within the current provision prevent the VI from 'meaningfully responding' at all to notifications of public examinations received by IBAC.

The functions of IBAC in conducting public examinations involve an exercise of power which may result in a significant encroachment on an individual's personal liberties. Accordingly, the Committee is of the view that it is vital the VI is able to carry out its oversight function effectively.

**RECOMMENDATION 4.10:** The Committee recommends that the Victorian Government as a part of its ongoing review should examine section 117(5) of the Independent Broad-based Anti-corruption Commission Act 2011 (Vic), to ensure the Victorian Inspectorate has sufficient time to oversight decisions of the Independent Broad-based Anti-corruption Commission to conduct public examinations. This matter should be prioritised.

## 4.10 Victorian Inspectorate – clarity of terminology relating to functions

The Inspector advised the Committee he was concerned about the consistency of terminology contained within the *Victorian Inspectorate Act 2011* (Vic) relating to the VI's function. The Inspector highlighted that terms such as 'assess', 'monitor'

<sup>387</sup> Mr Stephen O'Bryan QC, Commissioner, Independent Broad-based Anti-corruption Commission, Correspondence to the Independent Broad-based Anti-corruption Commission Committee, 18 January 2016.

and 'oversee' were used interchangeably in different sections of the Act. The Inspector acknowledged that consistency of terminology relating to his functions would be desirable for greater clarity. He explained:

I also raised some concerns about the actual form of the provisions giving us these functions, some doubts about terminology — the word 'assess' is used at one point, the word 'monitor' is used at another point, the word 'oversee' is used at another point. I think it would be desirable at some stage for precisely what the differences are between those words to be addressed. That has not been addressed in the current bill, but I am aware that, as was said in the second-reading speech, there is an ongoing review into the legislation, and I am confident that those sorts of matters will be addressed in the course of that review.<sup>388</sup>

#### 4.10.1 Committee Comment

The Committee suggests the concerns raised by the Inspector could be considered further in the course of the government's discussion paper and ongoing review of the Victorian integrity system.

**RECOMMENDATION 4.11:** The Committee recommends that the Victorian Government as a part of its ongoing review should assess the consistency of terminology in the *Victorian Inspectorate Act 2011* (Vic) that relates to the Victorian Inspectorate's functions.

### 4.11 Other issues

#### 4.11.1 The VI's oversight of section 20(1) of the *Audit Act 1994* (Vic)

The Committee received correspondence from the Inspector in October 2015 in respect of oversight and monitoring functions pursuant to a number of sections within the *Victorian Inspectorate Act 2011* (Vic) and the *Audit Act 1994* (Vic).

A particular concern raised by the Inspector related to practical difficulties in the VI's role in monitoring VAGO's compliance with section 20(1)(a) of the *Audit Act 1994* (Vic). This provision precludes VAGO from including in a report any information that would prejudice an investigation by the VI or IBAC.

The Inspector reported that practical difficulties arose in the monitoring of this provision, as VAGO may not be aware of investigations being undertaken by the VI.<sup>389</sup> Further, monitoring VAGO's compliance with this section would require the VI to be aware of IBAC's investigations, to ensure that they also were not impacted.<sup>390</sup>

<sup>388</sup> Mr Robin Brett QC, Inspector, Victorian Inspectorate, Closed Hearing, Melbourne, 14 December 2015.

<sup>389</sup> Mr Robin Brett QC, Inspector, Victorian Inspectorate, Correspondence to the Independent Broad-based Anti-corruption Commission Committee, 29 September and 15 October 2015.

<sup>390</sup> Mr Robin Brett QC, Inspector, Victorian Inspectorate, Correspondence to the Independent Broad-based Anti-corruption Commission Committee, 29 September and 15 October 2015.

The Committee also received a submission from VAGO in relation to the VI's monitoring of compliance with section 11D of the *Audit Act 1994* (Vic). This particular provision relates to VAGO providing advance notice to organisations which are to be the subject of a performance audit. VAGO noted the Inspector had expressed concern that this provision should not be the subject of oversight by the VI as it does not relate to the use of coercive powers by VAGO.<sup>391</sup> VAGO indicated it supported repealing this provision from the oversight of the VI.<sup>392</sup>

#### 4.11.2 Committee Comment

The Committee notes the concerns raised by the Inspector and VAGO. The issues raised by both agencies demonstrate a complexity that exists within the current Victorian integrity system. That is, the issues outlined above relate to the VI's monitoring of the VAGO, which may be more appropriately directed to the Public Accounts and Estimates Committee, as the IBAC Committee informed the VI.

However, section 20(1)(a) of the *Audit Act 1994* (Vic) also relates to investigations undertaken by the IBAC and the VI (which may be in relation to its oversight of IBAC), in which case it is relevant to the functioning of this Committee.

The Committee suggests the concerns raised by the Inspector and VAGO could be considered further in the course of the government's ongoing review of the Victorian integrity system.

#### 4.11.3 Information sharing between integrity agencies

The Committee received a submission from VAGO following the introduction of the proposed legislation in which it raised doubts about its ability to share information obtained through the course of audits conducted with other integrity agencies, including IBAC.<sup>393</sup>

VAGO explained that the bill contains some amendments to improve the ability for it to share information, however, it was of the view that the broad definition of particularly Cabinet-in-Confidence documents could operate to limit VAGO's ability to share information received during the process of an audit.<sup>394</sup> VAGO identified that as a result of this limitation, it 'restrict[ed] the capacity for VAGO to effectively participate in the Victorian integrity system'.<sup>395</sup>

<sup>391</sup> Dr Peter Frost, Acting Auditor-General, Victorian Auditor-General's Office, Submission, 18 January 2016.

<sup>392</sup> Dr Peter Frost, Acting Auditor-General, Victorian Auditor-General's Office, Submission, 18 January 2016.

<sup>393</sup> Dr Peter Frost, Acting Auditor-General, Victorian Auditor-General's Office, Submission, 18 January 2016.

<sup>394</sup> Dr Peter Frost, Acting Auditor-General, Victorian Auditor-General's Office, Submission, 18 January 2016.

<sup>395</sup> Dr Peter Frost, Acting Auditor-General, Victorian Auditor-General's Office, Submission, 18 January 2016.

#### 4.11.4 Committee Comment

Due to time constraints, the Committee has not been able to canvass or request information from other integrity agencies (including the IBAC and VI) regarding the impact of the current and proposed information sharing arrangements provided in the Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic).

Accordingly, the Committee suggests the concerns raised by VAGO in respect of increasing the information sharing capacity between integrity agencies could be considered further in the course of the government's ongoing review of the Victorian integrity system.

#### 4.12 Conclusion

While the Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) has proposed amendments which will significantly strengthen the operation of the Victoria integrity regime, there are some outstanding issues which require further consideration.

A number of concerns raised result from the inherent tensions involved in creating integrity frameworks and powers of anti-corruption commissions, as outlined in Chapter 2. Questions relating to how far the jurisdiction of these commissions should extend, their powers to conduct examinations and how this evidence may be used involve complicated considerations, which no commission across Australia has yet resolved.

As has been outlined elsewhere in this Report, research and the experience of anti-corruption commissions across Australia demonstrates there is no 'model integrity body' – with each state taking a divergent approach to a number of different areas. Therefore, further consideration should be given to these issues.



# 5 Conclusion

## 5.1 Concluding Comments

The Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic) represents a positive step forward in strengthening Victoria's integrity framework.

The evidence received by the Committee confirms that a number of concerns raised relating to the legislative framework of Independent Broad-based Anti-corruption Commission (IBAC) and the Victorian Inspectorate (VI) will be resolved by the proposed amendments. As the Government has stated, the proposed legislation represents the first step in a number of intended reforms.<sup>396</sup> This report has also highlighted aspects of the integrity framework relating to IBAC and the VI which could be further improved or should be considered further by the Victorian Government.

Establishing and maintaining the agencies empowered to effectively combat corruption requires balancing interests that at times are in conflict with one another. As there are many issues requiring further consideration, documented in this report, it will be important during the proposed review announced by the Government to obtain evidence from stakeholders and develop best-practice processes in order to ensure the continued strengthening of the Victorian integrity system.

## 5.2 Future work by the Independent Broad-based Anti-corruption Commission Committee (IBACC)

This is the first report of the IBACC. The research conducted by the Committee in drafting this report has raised a number of issues for further consideration. Some of these are issues which other anti-corruption bodies across Australia have grappled with in recent years, and which warrant further investigation by this Committee.

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<sup>396</sup> The Hon. Jacinta Allan, Minister for Public Transport, Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic), Second Reading Speech, 10 December 2015, Hansard (Legislative Assembly), p. 5533.

### 5.2.1 Complaints regarding Police misconduct

Throughout the work undertaken by the Committee for this report, an issue that reoccurred was the extent to which complaints about police should be investigated independently.<sup>397</sup> As a result, the Committee has sought and received evidence about the structure of different models for investigating police complaints operating across Australia.

As noted in Chapter 4, a number of stakeholders in Victoria have identified the investigation of complaints about police as an area requiring further investigation. The experience of other jurisdictions across Australia also demonstrates some of the complexities within this area.

Given the experience of other jurisdictions and the concerns raised by stakeholders in Victoria, the Committee intends to investigate this issue further.

### 5.2.2 Protected Disclosures

‘Whistle-blower’ or ‘protected disclosure’ complaint regimes are vitally important to the effectiveness of an integrity framework, as discussed in Chapter 4. In addition to learning how the protected disclosure framework operates within Victoria, the Committee has been made aware of concerns about the operation of the legislation and potential areas for improvement.

In examining these areas the Committee has identified that the structures and operation of protected disclosure regimes within each state are disparate and it intends to investigate how these schemes operate and what lessons Victoria could learn from the experiences and models established elsewhere.

### 5.2.3 Providing Follow the Dollar Powers to IBAC

The Committee received evidence from IBAC suggesting that further consideration should be given to providing IBAC with ‘follow the dollar powers’ which would enable it to obtain documents and evidence beyond the public sector.

The Committee considers that this issue requires further investigation and consideration, including of the experiences of similar anti-corruption agencies across Australia. The Committee intends to consider this issue further in the course of its work throughout this year.

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<sup>397</sup> Professor Tim Prenzler, University of the Sunshine Coast, Closed Hearing, Brisbane, 17 November 2015; the Hon. Bruce Lander QC (2015) ‘Independent Oversight of Police: Experiences in South Australia’ Paper presented at the Australian Public Sector Anti-corruption Conference, Brisbane, 19 November 2015; Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015.



## 5.2.4 Performance of the IBAC and VI

A function of the IBAC Committee involves monitoring and reviewing the performance of IBAC and the VI.<sup>398</sup> This includes commenting on the performance of each body and reviewing the reports prepared by both agencies, including Annual Reports. In carrying out this function, the Committee intends to further consider the reports prepared by IBAC and the VI throughout the course of the year.

### **Adopted by the Independent Broad-based Anti-corruption Commission Committee**

**55 St Andrews Place**

**East Melbourne 3002**

**1 February 2016.**

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<sup>398</sup> *Parliamentary Committees Act 2003* (Vic) ss 12A (1)(a), 12A(1)(f).



# Appendices

## Appendix 1 List of site visits and informal briefings in Melbourne

Date and city	Name	Position	Organisation
25 May 2015 Melbourne	The Hon. Gavin Jennings MLC	Special Minister of State	Victorian Government
	Mr Stephan O'Bryan QC	Commissioner	
19 June 2015 Melbourne	Mr Alistair Maclean	Chief Executive Officer	Independent Broad-based Anti-corruption Commission
	Ms Christine Howlett	Director, Crime Prevention and Communication	
22 June Melbourne	IBAC Public Examination, Operation Ord		
17 August 2015 Melbourne	Mr Robin Brett QC	Victorian Inspector	Victorian Inspectorate
	Mr Neal Jedwab	Chief Operations Officer	
31 August 2015 Melbourne	Dr Peter Frost	Acting Auditor-General	Victorian Auditor General's Office
	Dr Marco Bini	Director, Policy and Coordination	
5 October 2015 Melbourne	Ms Deborah Glass OBE	Ombudsman	Victorian Ombudsman
	Ms Megan Philpot	Deputy Ombudsman	
	Ms Jenny Hardy	Director of Investigations	
9 November 2015 Melbourne	The Hon. Gavin Jennings MLC	Special Minister of State	Victorian Government

## Appendix 2 List of Closed Hearings in Melbourne

Date and city	Name	Position	Organisation
12 November 2015 Melbourne	The Hon. Murray Kellam QC	Former Tasmanian Integrity Commissioner	Private capacity
	Ms Katie Miller	President	
23 November 2015 Melbourne	Ms Fiona Spencer	Barrister, Victorian Bar, Greens List	Law Institute of Victoria
	Ms Kate Browne	Lawyer, Administrative Law and Human Rights Section	
	Mr George Brouwer	Former Victorian Ombudsman	Private capacity
	Dr Simon Longstaff (via video conference)	Executive Director	The Ethics Centre
7 December 2015 Melbourne	The Hon. Tim Smith QC		Private capacity
	Mr Stephan O'Bryan QC	Commissioner	
	Mr Alistair Maclean	Chief Executive Officer	Independent Broad-based Anti-corruption Commission
	Dr John Lynch	General Counsel	
14 December 2015 Melbourne	Mr Robin Brett QC	Inspector	Victorian Inspectorate
	Deputy Commissioner Wendy Steendam	Deputy Commissioner, Capability	
	Assistant Commissioner Brett Guerin	Assistant Commissioner, Professional Standards Command	Victoria Police

### Appendix 3 List of site visits, informal briefings, and Closed Hearings in Brisbane

Date and city	Name	Position	Organisation
<b>SITE VISITS AND INFORMAL BRIEFINGS</b>			
17 November 2015 Brisbane	Mr Alan MacSporran QC	Chairman, Crime and Corruption Commission	Brisbane Crime and Corruption Commission Queensland
	Ms Kathleen Florian	Chief Executive Officer, Crime and Corruption Commission	
	Mr Peter Russo MP	Acting Chair	Parliamentary Crime and Corruption Commission Committee
	Ms Joan Pease MP	Member	
	Ms Jo Mathers	Acting Research Director	
	Mr Peter Rogers	Principal Research Officer	
<b>CLOSED HEARINGS</b>			
17 November 2015 Brisbane	Professor Nicholas Aroney	Australian Research Council Future Fellow- Centre for Public, International and Comparative Law	The University of Queensland
	Mr Paul Favell	Parliamentary Crime and Misconduct Commissioner	Parliament of Queensland
	Mr Mitchell Kunde	Principal Legal Officer	Office of the Parliamentary Crime and Corruption Commissioner
	Mr Richard Bingham	Integrity Commissioner	Queensland Integrity Commissioner
	Professor Tim Prenzler	Co-ordinator Bachelor of Criminology and Justice	University of the Sunshine Coast

## Appendix 4 List of submissions

Submission no.	Name of individual/organisation	Date received
1	Mr George Brouwer	3 January 2016
2	Ms Deborah Glass, Victorian Ombudsman	4 January 2016
3	The Hon. Murray Kellam QC	5 January 2016
4	Accountability Round Table	13 January 2016
5	Ms Belinda Wilson, Vice President, Law Institute of Victoria	13 January 2016
6	Dr Peter Frost, Acting Auditor-General, Victorian Auditor-General's Office	18 January 2016

## Appendix 5 Issues identified by IBAC arising from the *Special Report*

Issue	Relevant legislative provision in the <i>Independent Broad-based Anti-corruption Commission Act 2011 (Vic)</i>
Difficulties arising from the legislative threshold for IBAC to commence an investigation into corrupt conduct.	Section 60 (2) and s 4 (1).
Inclusion of common law offence of misconduct in public office within IBAC's jurisdiction.	Section 4 and extended definition of 'relevant offence' in section 3.
Introduction of preliminary inquiries or investigations power prior to the commencement of a formal investigation.	No current provision
Providing a power for IBAC's to review its own prior decisions.	No current provision.
Providing an ability to dismiss complaints on discretionary grounds other than those currently provided for in Section 68 of the IBAC Act.	Section 68.
Providing wider powers of delegation to the IBAC Commissioner.	Section 115.
Widening the ability to refer protected disclosure complaints to a broader range of agencies.	Section 73 (3)(a).
Clarifying the confidentiality provisions to apply to voluntary provision of documents to evidence.	Section 59 (5).
Defining the term 'present' at an IBAC examination to include people present remotely.	Section 119 (1).
Mandatory reporting of corrupt conduct to IBAC by public sector body heads and local government councils.	No current provision.
Providing IBAC with the option of suspending or 'parking' complaints.	No current provision.
Allowing IBAC to apply for a search warrant to a Magistrates' Court as an alternative to the Supreme Court.	Section 91 (3).





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