



PARLIAMENT OF VICTORIA
Accountability and Oversight Committee

**Report into Victorian
oversight agencies
2014-15**

Parliament of Victoria
Accountability and Oversight Committee

Ordered to be published

VICTORIAN GOVERNMENT PRINTER
December 2015

PP No 120, **Session** 2014-15
ISBN 978 1 925458 06 0 (print version)
978 1 925458 07 7 (PDF version)

Committee functions

The Accountability and Oversight Committee is a joint investigatory committee of the Victorian Parliament. The Committee was first established in the 57th Parliament and re-established in the 58th Parliament, under the *Parliamentary Committees Act 2003* (Vic). Its members are drawn from both the Legislative Assembly and the Legislative Council.

The Committee's functions are contained in the following legislation:

Parliamentary Committees Act 2003, Section 6A **Accountability and Oversight Committee**

1. The functions of the Accountability and Oversight Committee are—
 - a. to monitor and review the performance of the functions and exercise of the powers of the Freedom of Information Commissioner; and
 - b. to consider and investigate complaints concerning the Freedom of Information Commissioner and the operation of the office of the Freedom of Information Commissioner; and
 - c. to report to both Houses of Parliament on any matter relating to—
 - i. the performance of the functions and the exercise of the powers of the Freedom of Information Commissioner; and
 - ii. any complaint concerning the Freedom of Information Commissioner and the operation of the office of the Freedom of Information Commissioner—
that requires the attention of Parliament;
 - d. to examine the annual report of the Freedom of Information Commissioner and any other reports by the Commissioner and report to Parliament on any matters it thinks fit concerning those reports; and
 - e. to inquire into matters concerning freedom of information referred to it by the Parliament and to report to Parliament on those matters;
 - f. to monitor and review the performance of the duties and functions of the Victorian Inspectorate in respect of Ombudsman officers; and
 - 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 in respect of Ombudsman officers that require the attention of the Parliament; and
 - h. to examine any reports made by the Victorian Inspectorate in respect of Ombudsman officers; and
 - i. the functions conferred on the Committee by the *Ombudsman Act 1973*.
2. Despite anything to the contrary in subsection (1), the Accountability and Oversight Committee cannot—
 - a. reconsider a decision of the Freedom of Information Commissioner in relation to a review of a particular matter; or
 - b. reconsider any recommendations or decisions of the Freedom of Information Commissioner in relation to a complaint under the *Freedom of Information Act 1982*; or
 - c. investigate a matter relating to particular conduct the subject of any report made by the Victorian Inspectorate in respect of an Ombudsman officer; or

- d. review any decision to investigate, not to investigate or to discontinue an investigation of, a particular complaint made to the Victorian Inspectorate in accordance with the *Victorian Inspectorate Act 2011* in respect of an Ombudsman officer; or
- e. 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* in respect of an Ombudsman officer; or
- f. disclose any information relating to the performance of a duty or function or exercise of a power by the Victorian Inspectorate which may—
 - i. prejudice any criminal proceedings or criminal investigations; or
 - ii. prejudice an investigation being conducted by the Ombudsman, the IBAC or the Victorian Inspectorate; or
 - iii. contravene any secrecy or confidentiality provision in any relevant Act.

Ombudsman Act 1973, Section 26H
Oversight by Accountability and Oversight Committee

1. The functions of the Accountability and Oversight Committee under this Act are—
 - a. to monitor and review the performance of the duties and functions of the Ombudsman;
 - b. to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the Ombudsman that requires the attention of the Parliament;
 - c. to examine any reports by the Ombudsman that are laid before a House of the Parliament.
2. Despite anything to the contrary in subsection (1), the Accountability and Oversight Committee cannot—
 - a. investigate a matter relating to particular conduct the subject of any particular complaint, protected disclosure complaint, referred complaint or referred matter;
 - b. review any decision to investigate, not to investigate or to discontinue an investigation of, a particular complaint, protected disclosure complaint, referred complaint or referred matter;
 - c. review any findings, recommendations, determinations or other decisions of the Ombudsman in relation to a particular complaint, protected disclosure complaint, referred complaint or referred matter or an investigation conducted by the Ombudsman;
 - d. disclose any information relating to the performance of a function or duty or the exercise of a power by the Ombudsman which may—
 - i. prejudice any criminal proceedings or criminal investigations, or investigations by the Ombudsman, the IBAC or the Victorian Inspectorate; or
 - ii. contravene any secrecy or confidentiality provision in any relevant Act.

Ombudsman Act 1973, Section 26I
Powers and procedures of Accountability and Oversight Committee

The powers and procedures of a Joint Investigatory Committee under the *Parliamentary Committees Act 2003* apply to the Accountability and Oversight Committee in the performance of its functions under this Act.

Committee membership



Mr Neil Angus MP
Chair
Forest Hill



Ms Jaclyn Symes MLC
Deputy Chair
Northern Victoria



Ms Melina Bath MLC
Eastern Victoria



Mr Michael Gidley MP
Mount Waverley



Mr James Purcell MLC
Western Victoria



Mr Nick Staikos MP
Bentleigh



Hon Marsha Thomson MP
Footscray

Committee secretariat

Staff

Mr Sean Coley, Executive Officer

Ms Vicky Finn, Research Officer

Mr Matt Newington, Research and Administrative Officer

Committee contact details

Address Accountability and Oversight Committee
Parliament House, Spring Street
EAST MELBOURNE VIC 3002

Phone 61 3 8682 2832

Email aoc@parliament.vic.gov.au

Web www.parliament.vic.gov.au/aoc

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

Contents

Committee functions	ii
Committee membership	iv
Committee secretariat	v
Chair’s foreword	viii
List of acronyms	xii
1 Introduction	1
1.1 Background	1
1.2 The Accountability and Oversight Committee	1
1.3 Victoria’s integrity system	2
1.4 The Committee’s roles and responsibilities	2
1.4.1 Oversight of agency performance, functions and duties	3
1.5 Structure of the report	3
2 The Victorian Freedom of Information Commissioner	5
2.1 Introduction	6
2.2 The FOI Commissioner’s functions	6
2.3 Changes to FOI framework	7
2.3.1 Introduction of Assistant FOI Commissioners	8
2.3.2 Clarification of process and time limits	8
2.3.3 Restructure of Victorian FOI framework	9
2.3.4 FOI professional standards	10
2.4 Performance of FOI Commissioner	10
2.4.1 Requests for reviews of and complaints about FOI decisions	10
2.4.2 Reviews of government FOI decisions	11
2.4.3 Outcomes of FOI reviews	12
2.4.4 Complaints	15
2.4.5 Education and training	17
2.5 Operation of the FOI Act in Victoria	18
3 The Victorian Ombudsman	19
3.1 Introduction	20
3.2 The Victorian Ombudsman’s functions	20
3.3 Changes to Ombudsman’s functions	22
3.4 Performance of the Ombudsman	23
3.4.1 Complaints	23
3.4.2 Own motion enquiries and investigations	28
3.4.3 Investigation of protected disclosure complaints	29
3.4.4 Assessment of the Victorian Inspectorate	30
3.4.5 Community engagement and collaboration	30

4	The Victorian Inspectorate	33
4.1	Introduction	33
4.2	The Victorian Inspectorate's functions	34
4.3	Performance of the Victorian Inspectorate relating to the Victorian Ombudsman	35
4.3.1	Notifications received from the Ombudsman	35
4.3.2	Complaints received about the Ombudsman	36
4.3.3	Monitoring of the Ombudsman and own motion investigations	38
Appendix 1	Committee briefings	39
Appendix 2	Flow charts for disputes and complaints relating to the Ombudsman and Freedom of Information Commissioner	41
	Bibliography	43

Chair's foreword

I am pleased to present the third report of the Victorian Parliament's Accountability and Oversight Committee into oversight agencies.

This report examines the 2014–15 annual reports of the Freedom of Information (FOI) Commissioner, the Victorian Ombudsman and the Victorian Inspectorate.

From a bipartisan committee that has taken a collaborative approach, this report aims to ensure the Victorian oversight agencies are performing effectively, fairly and efficiently, and in the interests of all Victorians. Overall the Committee was satisfied with the information presented in the annual reports and with the performance of the oversight agencies.

In light of the expected changes to the oversight framework, the Committee considered it timely to recommend performance enhancements for the Government to consider as part of proposed changes. This report builds on the Committee's two previous reports. The Committee is mindful that the last report was only tabled in October 2015, so the eight recommendations from that report still remain current.

In terms of performance, during the 2014–15 year the FOI Commissioner demonstrated effective use of alternative dispute resolution techniques to resolve reviews and complaints. The office also responded to 7828 enquiries by phone and email, had a reduction in complaints and review requests and reduced numbers of FOI appeals to VCAT, as well as delivering well-received training programs.

Similarly, the Victorian Ombudsman demonstrated gains in referral efficiency and in the development of a trial data analytics tool to enhance data sharing and analysis. The Ombudsman had 38 980 approaches to her office, and while the majority were outside jurisdiction, there was an increase of 6 per cent in approaches within her jurisdiction to 13 864. In addition, 3256 enquires and investigations and 34 formal investigations were completed.

The Committee has jurisdiction over the Victorian Inspectorate's oversight of the Ombudsman. The Victorian Inspectorate received 25 complaints and 19 enquiries relating to the Ombudsman and the Committee found the performance of the Victorian Inspectorate in this area to be satisfactory.

In this report, the Committee makes 13 recommendations to the Victorian Government to achieve greater transparency through improved data and information reporting by the three oversight agencies. The recommendations cover the following areas:

- Strengthening powers of the FOI Commissioner to obtain documents and enhance public and agency engagement, including prompt action on FOI by agencies.
- Improving FOI reporting on outcomes achieved.

- Providing clearer guidance on FOI appeals to individuals and agencies.
- Supporting the release of certain types of information before an FOI request is needed.
- Implementing reforms on how protected disclosures are handled by the Ombudsman.
- Improving confidentiality provisions to enhance collaboration by the Ombudsman with agencies and improve responses to complainants.
- Providing more information about the Victorian Inspectorate's methodology and processes involved in assessing complaints about the Ombudsman.

I would like to express my appreciation and thanks to all those people involved with the Committee and in the production of this report: my Committee colleagues Ms Jaclyn Symes MLC (Deputy Chair), Ms Melina Bath MLC, Mr Michael Gidley MP, Mr James Purcell MLC, Mr Nick Staikos MP and Hon Marsha Thomson MP.

Finally, I wish to acknowledge the work of the Committee secretariat, executive officer Sean Coley, research officer Vicky Finn, and research and administrative officer Matt Newington.

I commend this report to the Parliament.

A handwritten signature in black ink that reads "Neil Angus". The signature is written in a cursive, flowing style.

Mr Neil Angus MP
Chair

List of recommendations

2 The Victorian Freedom of Information Commissioner

- RECOMMENDATION 1:** That the Freedom of Information Commissioner (or the new Public Access Counsellor) be required to publish a detailed description of the way in which outcomes are achieved for review applicants through formal and informal resolution of requests for reviews. 14
- RECOMMENDATION 2:** That the Victorian Government considers what powers the new Public Access Counsellor should have to ensure early engagement with, and prompt action by, agencies in relation to Freedom of Information requests. 14
- RECOMMENDATION 3:** That the Victorian Government should consider a range of possible measures to ensure that the new Office of the Public Access Counsellor has sufficient powers to obtain documents where there are grounds to believe that documents provided in response to an FOI request are incomplete. 14
- RECOMMENDATION 4:** That the Freedom of Information Commissioner (or the new Public Access Counsellor) and the Victorian Civil and Administrative Tribunal (VCAT) provide clearer guidance to individuals and agencies relating to appeal of FOI decisions of agencies directly to VCAT. 15
- RECOMMENDATION 5:** That in a subsequent annual report, the Freedom of Information Commissioner (or the new Public Access Counsellor) provides data that identifies how delays have been resolved and workflow enhanced. 15
- RECOMMENDATION 6:** That the Freedom of Information Commissioner (or the new Public Access Counsellor) be required to publish, a detailed description of the way in which outcomes are achieved for complainants through informal complaint resolution. 16
- RECOMMENDATION 7:** That the Freedom of Information Commissioner (or the new Public Access Counsellor) be required to include in subsequent annual reports, the time taken to resolve complaints. 17
- RECOMMENDATION 8:** That the Freedom of Information Commissioner (or the new Public Access Counsellor) develops a protocol for the release of information that is the subject of frequent Freedom of Information requests that are likely to be routinely granted. 18

3 The Victorian Ombudsman

RECOMMENDATION 9: That the Ombudsman includes more transparent reporting in its next annual report regarding how many approaches:

- received in each financial year are finalised in that year
- outstanding from the previous financial year are finalised by the end of the current financial year
- remain outstanding overall at each financial year end. 25

RECOMMENDATION 10: That the Victorian Government considers reviewing the Ombudsman's output targets to ensure greater consistency on how many approaches:

- received in each financial year are finalised in that year
- outstanding from the previous financial year are finalised by the end of the current financial year
- remain outstanding overall at each financial year end. 28

RECOMMENDATION 11: That the Victorian Government implements reforms to address the Committee's recommendations in previous reports relating to the treatment of protected disclosures under the *Ombudsman Act 1973* (Vic). 29

RECOMMENDATION 12: In order to enhance the collaborative efforts across the public sector, the Victorian Government implements reforms to ensure the confidentiality provisions in the *Ombudsman Act 1973* (Vic) facilitate collaborative efforts to resolve complaints. 31

4 The Victorian Inspectorate

RECOMMENDATION 13: The Victorian Inspectorate, in subsequent annual reports, outlines the methodology and process undertaken in assessing all complaints against the Ombudsman and Ombudsman officers. 37

List of acronyms

AOC	Accountability and Oversight Committee
FOI	Freedom of information
IBAC	Independent Broad-based Anti-corruption Commission
OPAC	Office of the Public Access Counsellor
VAGO	Victorian Auditor-General's Office
VCAT	Victorian Civil and Administrative Tribunal
VI Act	<i>Victorian Inspectorate Act 2011 (Vic)</i>
VPSC	Victorian Public Sector Commission

AT A GLANCE

Background

The Accountability and Oversight Committee oversees the Freedom of Information Commissioner, the Victorian Ombudsman and the Victorian Inspectorate. It is empowered to monitor the performance of these bodies and to review any reports tabled by these bodies, including Annual Reports.

This report examines the 2014–15 annual reports of these three agencies.

1.1 Background

This is the third report of the Victorian Parliament’s Accountability and Oversight Committee (AOC), and the second in the 58th Parliament. Using the legislative powers of the Committee, this report examines the 2014–15 annual reports of the three agencies the AOC oversees: the Freedom of Information (FOI) Commissioner, the Victorian Ombudsman and the Victorian Inspectorate.

1.2 The Accountability and Oversight Committee

The AOC was first established in February 2013 under the *Parliamentary Committees Act 2003* (Vic) as part of the implementation of a new integrity regime in Victoria.¹

The AOC, along with the Independent Broad-based Anti-corruption Commission (IBAC) Committee, was re-established in April 2015, following the setting up of the majority of joint investigatory committees in the 58th Parliament. The Committee first met on 4 May 2015 and tabled its first report in the 58th Parliament in– October 2015.

Both the *Parliamentary Committees Act* and the *Ombudsman Act 1973* (Vic) provide the AOC with powers to oversee three of Victoria’s integrity agencies.² In the case of the Victorian Inspectorate, the AOC oversees only those aspects of the Victorian Inspectorate’s work dealing with conduct of Victorian Ombudsman officers.

¹ *Parliamentary Committees Act 2003* (Vic), 110 of 2003.

² *Ombudsman Act 1973* (Vic), 8414 of 1973.

Under both Acts, the AOC is empowered to analyse the outputs of the FOI Commissioner and the Victorian Ombudsman and monitor their overall operational performance. In addition, it has powers to review any reports tabled by the FOI Commissioner and the Ombudsman in the Parliament — including annual reports — and reports of the Victorian Inspectorate in respect of the Victorian Inspectorate’s oversight of the Ombudsman.

1.3 Victoria’s integrity system

Victoria’s integrity system was inaugurated in July 2012 with the establishment of new integrity bodies including IBAC, the Public Interest Monitor, the Freedom of information FOI Commissioner and the Victorian Inspectorate. The functions of the former Office of Police Integrity and the Office of the Special Investigations Monitor were integrated into IBAC and the Victorian Inspectorate, respectively. There were also amendments to the powers of the Victorian Ombudsman and the Victorian Auditor-General’s Office (VAGO) as part of the new system, along with the establishment of the AOC and the IBAC Committee by the Victorian Parliament.

On 16 September 2014 the then Government introduced into Parliament the Integrity Legislation Amendment Bill 2014 (Vic). The Bill aimed to strengthen IBAC and the Victoria’s integrity framework more broadly, but lapsed following its Second Reading as a result of caretaker conventions.

1.4 The Committee’s roles and responsibilities

The Committee’s oversight role differs depending on which body it is overseeing. However, there are some similarities of the roles for each of the three agencies scrutinised by the Committee. These roles fall into the following categories:

- oversight of the performance, functions and duties of each agency (discussed below)
- scrutiny of each agency’s reports
- management of complaints.

The Committee’s legislative functions include:

- monitoring and reviewing the performance — in respect of the functions and exercise of powers — of the Ombudsman and FOI Commissioner
- considering and investigating complaints concerning the FOI Commissioner and the operation of the office of the FOI Commissioner
- examining the performance of the Victorian Inspectorate in relation to the Inspectorate’s duties and functions in respect of Ombudsman officers.

A diagram showing the role of the Committee in relation to the Ombudsman and FOI Commissioner is attached at Appendix 2.

1.4.1 Oversight of agency performance, functions and duties

Scrutiny of agencies' annual reports allows the Committee to fulfil its role in Victoria's integrity system by identifying issues affecting each agency's operational performance and making recommendations to the Government through reports tabled in the Parliament.

The Committee is empowered by legislation to specifically examine the FOI Commissioner's annual report and any reports tabled by the Ombudsman and the FOI Commissioner, or any report made by the Victorian Inspectorate in respect of the Ombudsman's officers.

As the Committee is legislatively bound as to what matters it can examine in relation to the agencies it oversees, the Committee cannot investigate decisions, findings and recommendations made by an agency in the course of its investigation of specific cases. The Committee can only review processes followed by agencies when making decisions rather than overturning an agency's original decision or recommending an agency reconsider its decision.

After the 2014 Victorian State Election, the new Committee was formed in April 2015. Given the short timeframe, the Committee did not undertake formal hearings. However, the Committee attended briefing sessions and site visits with the Ombudsman, the FOI Commissioner and the Victorian Inspectorate during 2015.

1.5 Structure of the report

The report is divided into four chapters. This chapter covers the role and responsibilities of the Committee and Victoria's oversight system generally.

The following three chapters will examine in greater detail each of the three annual reports for the 2014–15 financial year of the agencies the Committee oversees.

Chapter 2 examines the performance of the FOI Commissioner.

Chapter 3 examines the performance of the Victorian Ombudsman.

Chapter 4 examines the performance of the Victorian Inspector in respect of the Victorian Ombudsman.

AT A GLANCE

Background

The Freedom of Information (FOI) Commissioner's role is to review FOI requests and investigate the handling of requests and complaints relating to FOI.

There were a number of changes to Victoria's FOI framework during the 2014–15 financial year, including the ability to appoint assistant FOI commissioners and clarification of time limits and processes.

The Victorian Government has announced it will introduce changes to the FOI framework and establish a new Office of the Public Access Counsellor in early 2016. The Committee's has taken this into account in developing its recommendations.

Recommendations

- 1 That the Freedom of Information Commissioner (or the new Public Access Counsellor) be required to publish a detailed description of the way in which outcomes are achieved for review applicants through formal and informal resolution of requests for reviews.
- 2 That the Victorian Government considers what powers the new Public Access Counsellor should have to ensure early engagement with, and prompt action by, agencies in relation to Freedom of Information requests.
- 3 That the Victorian Government should consider a range of possible measures to ensure that the new Office of the Public Access Counsellor has sufficient powers to obtain documents where there are grounds to believe that documents provided in response to an FOI request are incomplete.
- 4 That the Freedom of Information Commissioner (or the new Public Access Counsellor) and the Victorian Civil and Administrative Tribunal (VCAT) provide clearer guidance to individuals and agencies relating to appeal of FOI decisions of agencies directly to VCAT.
- 5 That in a subsequent annual report, the Freedom of Information Commissioner (or the new Public Access Counsellor) provides data that identifies how delays have been resolved and workflow enhanced.
- 6 That the Freedom of Information Commissioner (or the new Public Access Counsellor) be required to publish, a detailed description of the way in which outcomes are achieved for complainants through informal complaint resolution.

- 7 That the Freedom of Information Commissioner (or the new Public Access Counsellor) be required to include in subsequent annual reports, the time taken to resolve complaints.
- 8 That the Freedom of Information Commissioner (or the new Public Access Counsellor) develops a protocol for the release of information that is the subject of frequent Freedom of Information requests that are likely to be routinely granted.

2.1 Introduction

The Freedom of Information (FOI) Commissioner was established in Victoria on 1 December 2012 as part of a range of reforms to Victoria's integrity system. The FOI Commissioner's role is to review FOI requests and investigate the handling of such requests by government agencies. The FOI Commissioner is an independent officer reporting directly to Parliament. A number of amendments were made to the *Freedom of Information Act 1982* (Vic) in September 2014, including the creation of two assistant FOI commissioner roles.

During the 2014–15 reporting period, Ms Lynne Bertolini served as Victoria's FOI Commissioner until her resignation on 5 September 2015. Mr Michael Ison (previously Assistant FOI Commissioner) was appointed as acting FOI Commissioner on 5 September 2015 and remains in that position at the date of this report.

The Committee's primary functions are to monitor and review the performance of the FOI Commissioner, and to investigate complaints made against the Commissioner.

2.2 The FOI Commissioner's functions

The FOI Commissioner has the following functions and powers under section 6C(1) of the *Freedom of Information Act 1982* (Vic):

- (a) to promote understanding and acceptance by agencies of this Act and the object of this Act;
- (b) to conduct reviews of decisions by agencies on requests in accordance with Division 1 of Part VI;
- (c) to receive and handle complaints in accordance with Part VIA;
- (d) to provide advice, education and guidance to agencies in relation to compliance with any professional standards prescribed by the regulations;
- (e) to monitor compliance by agencies with those professional standards;
- (f) to provide advice, education and guidance to agencies and the public in relation to the Commissioner's functions;
- (g) in accordance with Division 3 of Part VII, to report on the operation of this Act;

- (h) at the request of the Minister, to provide advice to the Minister in relation to the operation and administration of this Act;
- (i) any other functions conferred on the Commissioner by or under this or any other Act.

The FOI Commissioner's objectives are:

- to conduct reviews and handle complaints
- to provide accurate advice and guidance on FOI
- to engage applicants, agencies and the community
- to promote excellence in FOI service delivery.³

Reviews of FOI decisions of agencies and investigation of complaints relating to FOI requests are discussed in detail in Sections 2.4.2 and 2.4.3 of this report. Education and training are discussed in Section 2.4.4.

2.3 Changes to FOI framework

There were a number of changes to Victoria's FOI framework during the 2014–15 financial year.

In September 2014 amendments made to the *Freedom of Information Act 1982* (Vic) came into effect, which provided for the ability of the Governor in Council to introduce assistant FOI commissioners and clarified processes.⁴

With the establishment of the Office of the Special Minister of State, ministerial responsibility for FOI was transferred from the Department of Justice and Regulation to the Department of Premier and Cabinet.⁵

In addition, the Victorian Government announced a restructure of Victoria's FOI framework with the establishment of the Office of the Public Access Counsellor (OPAC), to occur in 2016.⁶

In April 2015, the Victorian Public Sector Commission (VPSC) undertook a review of the Office of the FOI Commissioner which focused on the functions and operation of the office. The VPSC report was not publicly released by the Government.

³ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 13.

⁴ *Freedom of Information and Victorian Inspectorate Acts Amendment Act 2014* (Vic), 59 of 2014.

⁵ Hon. Gavin Jennings MLC, Special Minister of State, *Statement from the Special Minister of State*, media release, Victorian Government, Melbourne, 7 August 2015. See also Victorian Government, *Response to the Accountability and Oversight Committee's Report into Victorian oversight agencies*, Melbourne, 2015.

⁶ Hon. Gavin Jennings MLC, Special Minister of State, *Families to get easier access to government services*, media release, Victorian government, Melbourne, 5 May 2015.

2.3.1 Introduction of Assistant FOI Commissioners

Amendments to the FOI Act in 2014 introduced provisions to allow:

- the Governor in Council to appoint assistant FOI commissioners as required
- the FOI Commissioner to delegate decision-making responsibilities to an assistant commissioner.⁷

These measures were intended to ‘assist in reducing delay and managing the FOI Commissioner’s caseload by deciding on applications for review and complaints referred by the FOI commissioner’.⁸

Mr Michael Ison and Ms Rachel Westaway were appointed Assistant FOI Commissioners in October 2014.⁹ At the time of this report, Mr Ison was operating as acting FOI Commissioner and Ms Westaway was no longer with the office.

2.3.2 Clarification of process and time limits

Amendments to the FOI Act in 2014 introduced a number of measures to enhance efficiency of the FOI process.

The amendments clarified that the FOI Commissioner must perform functions and exercise powers with as little formality and technicality as possible.¹⁰

The amendments also allow the Commissioner, with the consent of the applicant, to provide a copy of a review application to the agency involved.¹¹

In addition, the amendments contain a number of clarifications relating to time limits and notification requirements. Notably, the amendments specify that:

- the FOI Commissioner has the power to accept a review or a complaint made out of time if satisfied that the delay was caused by an act or omission of the agency or Minister involved¹²
- the agency has 28 days to make a fresh decision either where invited by the FOI Commissioner to reconsider the matter (previously 45 days allowed) or on their own initiative (previously not subject to a specified time limit)¹³

⁷ *Freedom of Information Act 1982* (Vic), 9859 of 1982, section 6DA; 6DB.

⁸ Hon. Robert Clark MP, Attorney-General, *Freedom of Information and Victorian Inspectorate Acts Amendment Bill 2014*, Second reading. See Victorian Legislative Assembly 2015, *Debates*, Book 8, p. 2024.

⁹ Hon. Robert Clark MP, Attorney-General, *Assistant freedom of information commissioners appointed*, media release, Victorian Government, Melbourne, 7 October 2014.

¹⁰ *Freedom of Information and Victorian Inspectorate Acts Amendment Act 2014* (Vic), 59 of 2014, section 6C(4); 6DB(4).

¹¹ *Freedom of Information and Victorian Inspectorate Acts Amendment Act 2014* (Vic), 59 of 2014, section 49D(2); 49D(3).

¹² *Freedom of Information and Victorian Inspectorate Acts Amendment Act 2014* (Vic), 59 of 2014, section 49B(3); 61A(5); Freedom of Information Commissioner, ‘Amendments to FOI Act’, viewed 9 September 2015, <www.foicommisioner.vic.gov.au>.

¹³ *Freedom of Information and Victorian Inspectorate Acts Amendment Act 2014* (Vic), 59 of 2014, section 49L; 49M; Freedom of Information Commissioner, ‘Amendments to FOI Act’, viewed 9 September 2015, <www.foicommisioner.vic.gov.au>.

- the applicant has 28 days to advise whether they agree with a fresh decision, or they will be taken to agree to it (previously there was no time limit)¹⁴
- the agency involved is to notify the FOI Commissioner of an application to the Victorian Civil and Administrative Tribunal (VCAT) to review the Commissioner's decision (previously the applicant was required to notify).

2.3.3 Restructure of Victorian FOI framework

In May 2015 the Victorian Government announced \$16 million in funding over four years to establish the Office of the Public Access Counsellor (OPAC), to replace the FOI Commissioner.¹⁵ In its response to this Committee's first report, the Victorian Government indicated that under these proposed changes:

OPAC will maintain all existing powers of the FOI Commissioner and will gain authority to review departmental and ministerial decisions, including Cabinet decisions made in-confidence. OPAC will also gain the power to set professional standards for departmental officers.¹⁶

In addition, the Victorian Government indicated a number of additional efficiency-focused reforms, including:

- reduced time limit for departments to respond to FOI requests (from 45 days to 30 days)
- reduced time limit for departments to seek a review of OPAC's decision (from 60 days to 15 days).¹⁷

The Special Minister of State, Hon. Gavin Jennings MLC, advised the Committee that a Bill to establish OPAC is intended to be introduced into Parliament in the first half of 2016.¹⁸

The Committee welcomes any efforts to streamline access to information and achieve greater accountability.

¹⁴ *Freedom of Information and Victorian Inspectorate Acts Amendment Act 2014* (Vic), 59 of 2014, section 49L(6); 49M(6); Freedom of Information Commissioner, 'Amendments to FOI Act', viewed 9 September 2015, <www.foicommisioner.vic.gov.au>.

¹⁵ Hon. Gavin Jennings MLC, Special Minister of State, *Families to get easier access to government services*, media release, Victorian government, Melbourne, 5 May 2015.

¹⁶ Victorian Government, *Response to the Accountability and Oversight Committee's Report into victorian oversight agencies*, Melbourne, 2015.

¹⁷ Victorian Government, *Response to the Accountability and Oversight Committee's Report into victorian oversight agencies*, Melbourne, 2015.

¹⁸ Hon. Gavin Jennings MLC, Special Minister of State, Victorian Government, *Briefing*, Melbourne, 9 November 2015.

2.3.4 FOI professional standards

On 31 October 2014 the then Attorney-General issued the Victorian FOI Professional Standards, a set of principles for agencies handling FOI matters. The standards were developed through consultation with the FOI Commissioner and Victorian public sector agencies.¹⁹

The Victorian Government's response to the Committee's first report in the 57th Parliament indicates that 'OPAC will gain the power to set professional standards for Departmental officers'.²⁰

2.4 Performance of FOI Commissioner

Some of the highlights reported in the FOI Commissioner's annual report for the 2014–15 year include:

- second FOI Practitioners Forum attended by over 200 people from 110 different agencies
- reduction in complaints and reviews received compared with 2013–14 year
- resolution of 104 review applications and 219 complaints through alternative dispute resolution techniques
- increase in informal resolution of matters
- reduction in number of FOI appeals to VCAT
- response to 7828 enquiries by phone and email
- delivery of training, including in Geelong, to more than 300 individuals.²¹

Overall satisfaction with services performed by the FOI Commissioner was 'satisfactory', rather than 'high' as established by the output target for 2014–15. However it is difficult to ascertain the reasons for this outcome from the information provided in the annual report. The Committee considers there would be value in reporting more transparently on how satisfaction with complaints handling is measured, and therefore will be monitoring transparency arrangements as FOI moves towards a new structure.

2.4.1 Requests for reviews of and complaints about FOI decisions

Those who are not satisfied with FOI decisions or handling of FOI matters by a government agency are able to either apply to the FOI Commissioner for a review of the decision or make a complaint to the Commissioner.

¹⁹ Department of Justice and Regulation, *Freedom of Information Professional Standards*, viewed 9 September 2015, <www.justice.vic.gov.au>.

²⁰ Victorian Government, *Response to the Accountability and Oversight Committee's Report into Victorian Oversight Agencies*.

²¹ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, pp. 8–9.

Applications for reviews of government decisions can result in a formal fresh decision made either by the FOI Commissioner or the government agency concerned. Fresh decisions of the FOI Commissioner can be appealed at VCAT.

Complaints are dealt with informally and commonly relate to situations where documents do not exist or cannot be located, or to delays in processing FOI requests within the legislated time limit of 45 days. Complaints do not lead to formal fresh decisions, and complaint outcomes cannot be appealed to VCAT.²²

As outlined in Table 2.1, the vast majority of applications for review of decisions and complaints were from individual members of the public, with the remainder submitted by the media, organisations and members of Parliament.

Table 2.1 Profile of applicants and complainants in the 2014–15 financial year

	Review of decision	Complaint
Members of the public	359	212
Media	33	13
Organisations	20	12
Members of parliament	5	6
Total	417	243

Source: Freedom of Information Commissioner (2015), *Annual report 2014–15*.

2.4.2 Reviews of government FOI decisions

An applicant seeking information under FOI may apply to the FOI Commissioner for review of a decision of an agency:

- to refuse access to a document
- to defer access to a document
- not to waive or reduce an application fee
- not to amend a document.

In 2014–15, the FOI Commissioner received 417 applications for review of agency decisions. 143 applications for review were carried over from 2013–14, and 134 of these were completed in the 2014–15 year. In total, 404 reviews were completed in the 2014–15 year. This achieved the full year output target for 2014–15 of 400 reviews completed.²³ As at 30 June 2015, 156 review applications remained to be finalised.

²² Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 29.

²³ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 36.

Table 2.2 below provides a summary of the requests for reviews received, carried over and finalised.

Table 2.2 Summary of FOI reviews in the 2014–15 financial year

	2013–14	2014–15	Total
Requests for reviews received	-	417	417
Unfinalised reviews carried over	143	-	143
Reviews finalised	(134)	(270)	(404)
• Fresh decisions made by FOI Commissioner			218
• Fresh decisions made by agencies			16
• Dismissed under s49G			31
• Applications not accepted			55
• Withdrawn by applicants			84
Total reviews outstanding	9	147	156

Source: Freedom of Information Commissioner (2015), *Annual report 2014–15*.

The 417 applications for review received during the 2014–15 year represent 1.25 per cent of all FOI requests made between 1 July 2014 and 30 June 2015. These reviews related to FOI requests of 100 government agencies.

The annual report provides the following explanation of the 9 reviews that continue to be outstanding from the 2013–14 year:

- 3 were held over at the request of the applicants.
- 6 were not completed due to complexities with the documents under review.

2.4.3 Outcomes of FOI reviews

During the 2013–14 year, the FOI Commissioner made a total of 218 fresh decisions. In 124 of these, the agency decision was upheld and in 94 the FOI Commissioner's decision differed from that of the agency.

Of the 31 applications for review that were dismissed by the FOI Commissioner under section 49G of the FOI Act:

- 4 were dismissed with the applicant's agreement
- 6 were dismissed on the ground the FOI Commissioner considered a review was not appropriate in the circumstances
- 17 were dismissed as the FOI Commissioner considered the review would be more appropriately dealt with by VCAT
- 4 were dismissed on the ground that the FOI Commissioner was unable to contact the applicant following reasonable attempts.²⁴

²⁴ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 21.

In 15 cases, agencies made fresh decisions which were accepted by applicants. In one case, the fresh decision made by the agency fell outside the FOI Commissioner's jurisdiction. The annual report does not identify how many fresh decisions by agencies were not accepted by applicants. In such cases it would be up to the Commissioner to resolve the application by making a fresh decision.

In its briefing to the Committee on 3 August 2015, the FOI Commissioner's office indicated that informal resolution is a preferred methodology for requests for review. The annual report states that:

The emphasis on the informal resolution of matters gained traction in 2014–15, with 48% of all closed files (reviews and complaints) resolved in this manner, an increase from less than 40% in previous years.²⁵

Although the annual report does not specify how many requests for FOI reviews were resolved informally, it would appear this accounts for some of the 84 cases withdrawn by applicants.

The Committee considers that the information provided in the report does not provide a sufficient insight into the resolution (neither formal nor informal) of requests for review. In light of the forthcoming introduction of OPAC, the Committee believes the government should consider introducing greater transparency in this area.

In the Committee's interactions with members of the public and in the FOI Commissioner's 2014–15 annual report, there is some indication that the FOI Commissioner has insufficient powers to compel action by agencies in relation to FOI matters. For example, the report quotes a complainant who states that 'it is very unfortunate that you are not given more power to force [agencies] to conform with the spirit of the Act'.²⁶ Similarly, some of the delays to processing FOI requests appear to be caused by lack of responsiveness by government agencies. The Committee considers the Victorian Government should determine what powers are appropriate for the new OPAC to ensure early engagement and prompt action by agencies in relation to FOI requests.

The Committee considers there may be some justification for OPAC being given search powers, where there are grounds to believe that documents provided in response to an FOI request are incomplete and a further search is warranted. In at least one case raised with the Committee directly, such a search is likely to have satisfied the complainant that everything was done to obtain the relevant documents.

²⁵ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 7.

²⁶ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 26.

RECOMMENDATION 1: That the Freedom of Information Commissioner (or the new Public Access Counsellor) be required to publish a detailed description of the way in which outcomes are achieved for review applicants through formal and informal resolution of requests for reviews.

RECOMMENDATION 2: That the Victorian Government considers what powers the new Public Access Counsellor should have to ensure early engagement with, and prompt action by, agencies in relation to Freedom of Information requests.

RECOMMENDATION 3: That the Victorian Government should consider a range of possible measures to ensure that the new Office of the Public Access Counsellor has sufficient powers to obtain documents where there are grounds to believe that documents provided in response to an FOI request are incomplete.

Appeals to VCAT

An agency or applicant may appeal a fresh decision or dismissal by the FOI Commissioner to VCAT. The annual report indicates that as at 30 June 2015 no decision of the FOI Commissioner appealed in the 2014–15 year has been overturned by VCAT:

- Appeals by agencies — 4 agencies appealed 9 decisions to VCAT. Of these, 3 were set aside, 3 were withdrawn, 1 decision was affirmed and 2 remained outstanding.
- Appeals by applicants — 43 appeals to VCAT. Of these:
 - 12 matters were withdrawn
 - 4 matters were struck out
 - 1 matter concluded when the applicant failed to appear
 - 1 matter was referred back to the agency
 - 25 matters remained outstanding.

Applicants may also appeal decisions of agencies directly to VCAT. In some circumstances, appeal to VCAT is the only alternative (e.g. where the decision was made by a principal officer of a department or agency). However, the Committee is aware that in some circumstances people have appealed decisions directly to VCAT, even though application to the FOI Commissioner was available as an avenue for review. In one case raised with the Committee directly, the applicant appeared to make an application to VCAT that could have been directed to the FOI Commissioner. Subsequently the applicant sought to make an application to the FOI Commissioner, however the timing of the VCAT process meant the applicant ran out of time to make such an application.

The Committee does not have sufficient information to determine the number of people who appeal decisions of agencies directly to VCAT — and their reasons for doing so — instead of applying to the FOI Commissioner. The Committee considers there may be a need for clearer guidance from both the FOI Commissioner (or the new OPAC) and VCAT relating to which types of matters need to go directly to VCAT and which can be dealt with by the FOI Commissioner in the first instance.

RECOMMENDATION 4: That the Freedom of Information Commissioner (or the new Public Access Counsellor) and the Victorian Civil and Administrative Tribunal (VCAT) provide clearer guidance to individuals and agencies relating to appeal of FOI decisions of agencies directly to VCAT.

Timeliness

Of the fresh decisions made by the FOI Commissioner, 82 per cent were made within the legislated or agreed timeframe. This was just short of the 85 per cent full year target for 2014–15.²⁷

In 320 of the reviews dealt with by the FOI Commissioner’s office, the applicants agreed to extensions of time, with a total of 542 extensions agreed to in total. The annual report states that reasons for extensions included:

- late lodgement of submissions
- significant number of documents involved
- complexity or sensitivity of documents
- need to attend agencies to inspect documents
- prescriptive approaches by agencies.

As outlined in Section 2.3, recent and proposed reform to the FOI regime in Victoria has sought to reduce delay and ease caseloads. The Committee suggests greater transparency is needed to identify how these reforms have or will address delays in processing requests for reviews of FOI decisions.

RECOMMENDATION 5: That in a subsequent annual report, the Freedom of Information Commissioner (or the new Public Access Counsellor) provides data that identifies how delays have been resolved and workflow enhanced.

2.4.4 Complaints

The FOI Commissioner has the power to receive and investigate complaints about a Victorian government department, agency or council’s handling of an FOI request. In contrast to requests to review FOI decisions, complaints are resolved informally and do not result in a fresh decision by the FOI Commissioner.

The types of complaints the FOI Commissioner can investigate include:

- an action taken or failed to be taken by an agency, including a decision that a document does not exist or cannot be located
- a delay by a Minister in dealing with an FOI request an action taken or failed to be taken by a Minister in making a decision to:
 - defer access to a document, or

²⁷ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 36.

- disclose a document that is claimed to be exempt under sections 33 or 34 of the FOI Act.²⁸

In 2014–15, the FOI Commissioner received 243 complaints. 184 complaints were carried over from 2013–14, and 160 of these were completed in the 2014–15 year. In total, 275 complaints were dealt with in the 2014–15 year. This exceeded the full year output target for 2014–15 of 150 complaints completed.²⁹ As at 30 June 2015, 152 review applications remain to be finalised.

Table 2.3 below provides a summary of the requests for reviews received, carried over and finalised.

Table 2.3 Summary of FOI complaints in the 2014–15 financial year

	2013–14	2014–15	Total
Complaints received	-	243	243
Unfinalised complaints carried over	184	-	184
Complaints finalised	(160)	(115)	(275)
• Resolved informally			219
• Dismissed under s61B			23
• Complaint not accepted			33
Total complaints outstanding	24	128	152

Source: Freedom of Information Commissioner (2015), *Annual report 2014–15*.

The annual report provides the following explanation of the 24 complaints that continue to be outstanding from the 2013–14 year:

- 2 were held over at the request of the applicants
- 22 were not completed due to the complexity of those matters.

Outcomes of Complaints

The annual report indicates that of the 275 complaints finalised in the 2014–15 year, 219 were resolved informally, 23 were dismissed and 33 were not accepted. However, the report does not identify the type of resolution achieved through informal complaint handling (e.g. revised approach by the agency, better communication about an FOI decision). Similarly, the timeliness of complaint resolution is not reported.

RECOMMENDATION 6: That the Freedom of Information Commissioner (or the new Public Access Counsellor) be required to publish, a detailed description of the way in which outcomes are achieved for complainants through informal complaint resolution.

²⁸ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 27.

²⁹ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 36.

Timeliness

The 2014–15 annual report does not address the timeliness of complaint handling. The FOI Act does not require the Commissioner to resolve a complaint within a specified or agreed timeframe. Similarly, it appears that the output targets do not include timeliness for dealing with complaints.

RECOMMENDATION 7: That the Freedom of Information Commissioner (or the new Public Access Counsellor) be required to include in subsequent annual reports, the time taken to resolve complaints.

2.4.5 Education and training

The FOI Commissioner conducted 16 formal education and training activities during the 2014–15 year, which included:

- the second FOI Practitioners Forum, held in Melbourne
- presentations and training to several agencies, including regional sessions in Geelong and an address to attendees of the Leo Cussen Centre for Law Freedom of Information Conference
- an FOI awareness session to new Ministerial staff
- six education and training sessions to the Victorian Public Service Graduate Recruit Program.³⁰

The formal training opportunities provided by the office were well received, with participants rating the training as relevant and 87 per cent noting that they would recommend the training to other staff.³¹

Participants of the second FOI Practitioners Forum identified this as a good networking and information sharing opportunity for FOI practitioners from all agencies and representatives of the office of the FOI Commissioner.

The 16 education and training activities delivered fell short of the 2014–15 target of 20 activities.³² The annual report states that this was due to pressure to manage a very high intake of reviews and complaints and the ongoing complexity of review applications. The report indicates that the Commissioner has embedded education activities in all its processes, while providing fewer formal training activities to larger groups. It further states that:

Our strategic approach is to use every interaction with an applicant or an agency or a member of the public to explain how FOI operates, how the FOI Act is administered, what the FOI Commissioner’s role is and what the agency’s responsibilities are. In this way, activities aimed at promoting understanding and acceptance by

³⁰ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, pp. 9; 35.

³¹ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 35.

³² Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 36.

agencies of the object of the Act are integrated into the processes adopted by the FOI Commissioner to meet statutory obligations in conducting reviews and handling complaints. This approach instils a culture of knowledge sharing in everything we do.³³

The Committee considers that embedding guidance and education in all interactions between FOI Commissioner officers and government agencies is essential. However, on its own, this type of education is reactive as it relies on complaints and requests for review being made rather than developing training methods that help to ensure a positive government culture that provides open access to information where appropriate.

2.5 Operation of the FOI Act in Victoria

The 2014–15 annual report provides an analysis of FOI trends over the past three years. Some of the highlights identified include:

- reporting by agencies that 94.5 per cent of requests were processed in 45 days or less
- an increase in personal requests (from approximately two-thirds in previous years to 73.4 per cent in the 2014–15 year)
- the total number of FOI requests made to agencies has decreased over this period (from 34 126 in the 2013–14 year to 33 209 in the 2014–15 year)
- increases in the proportion of FOI access decisions citing personal affairs (section 33) and material obtained in confidence (section 35) exemptions
- the health sector continues to account for the largest percentage of requests made.³⁴

The Committee notes that although the health sector accounts for the largest percentage of requests made, full access is granted in more than 90 per cent of such cases.³⁵ The Committee considers that the FOI Commissioner (or the new OPAC) could undertake a proactive role in supporting the health sector and other sectors to reduce the need for freedom of information requests by providing commonly requested information upfront, particularly in cases where such information is likely to be routinely granted.

RECOMMENDATION 8: That the Freedom of Information Commissioner (or the new Public Access Counsellor) develops a protocol for the release of information that is the subject of frequent Freedom of Information requests that are likely to be routinely granted.

³³ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 34.

³⁴ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, pp. 43–47.

³⁵ Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015, p. 44.

3 The Victorian Ombudsman

AT A GLANCE

Background

The Victorian Ombudsman has broad functions, including the ability to investigate and resolve complaints as well as undertake own-motion enquiries.

In the 2014–15 year, in addition to resolving complaints, the Ombudsman completed a number of significant enquiries.

The Committee understands that the legislation to incorporate changes to the oversight framework, including changes to the operation of the *Ombudsman Act 1973* (Vic), is to be introduced into Parliament in December 2015.

Recommendations

- 9 That the Ombudsman includes more transparent reporting in its next annual report regarding how many approaches:
 - received in each financial year are finalised in that year
 - outstanding from the previous financial year are finalised by the end of the current financial year
 - remain outstanding overall at each financial year end.
- 10 That the Victorian Government considers reviewing the Ombudsman's output targets to ensure greater consistency on how many approaches:
 - received in each financial year are finalised in that year
 - outstanding from the previous financial year are finalised by the end of the current financial year
 - remain outstanding overall at each financial year end.
- 11 That the Victorian Government implements reforms to address the Committee's recommendations in previous reports relating to the treatment of protected disclosures under the *Ombudsman Act 1973* (Vic).
- 12 In order to enhance the collaborative efforts across the public sector, the Victorian Government implements reforms to ensure the confidentiality provisions in the *Ombudsman Act 1973* (Vic) facilitate collaborative efforts to resolve complaints.

3.1 Introduction

The Victorian Ombudsman is an independent officer of the Victorian Parliament, established under the *Ombudsman Act 1973* (Vic). The independence of the Ombudsman is guaranteed under Sections 18(1B) and 94E of the *Constitution Act 1975* (Vic).

Ms Deborah Glass OBE was appointed as Victoria's fifth Ombudsman in March 2014 for a term of 10 years. At 30 June 2015 the Ombudsman's office comprised 86 staff members.

3.2 The Victorian Ombudsman's functions

The Victorian Ombudsman's functions are broad and provided under several pieces of legislation.³⁶

The Victorian Ombudsman's website states that its mission is to 'promote fairness, integrity, respect for human rights and administrative excellence in the Victorian public sector' through:

- independently investigating, reviewing and resolving complaints concerning administrative actions of Victorian government departments, local councils and statutory authorities
- reporting the results to complainants and the agencies involved
- reporting to Parliament
- improving accountability
- promoting fair and reasonable public administration.³⁷

Unlike other review tribunals or commissions, the Ombudsman can review the lawfulness of an agency's actions or decisions, as well as the reasonableness and fairness of the actions in the circumstances.³⁸ For instance, the Ombudsman is able to recommend agencies reconsider the strict application of laws or policies if these produce an unfair outcome in light of the specific context.³⁹

The Ombudsman has jurisdiction under the Ombudsman Act to investigate a range of activities undertaken by, and deal with complaints about, over 1000 public sector agencies, with the following public sector bodies and agencies subject to investigation by the Ombudsman:

- Victorian government departments
- statutory authorities

³⁶ For a more detailed outline, see Victorian Ombudsman, *Governing legislation*, viewed 18 November 2015, <www.ombudsman.vic.gov.au>.

³⁷ Victorian Ombudsman, *Fact sheet 1 – About the Victorian Ombudsman*, viewed 9 September 2015, <www.ombudsman.vic.gov.au>.

³⁸ Victorian Ombudsman, *About the Victorian Ombudsman*, <www.ombudsman.vic.gov.au>.

³⁹ For example, see Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, pp. 34–36.

- local councils
- private agencies that carry out statutory responsibilities of government.⁴⁰

Agencies, bodies or situations excluded from oversight by the Ombudsman include:

- Victoria Police
- private organisations such as banks, finance companies or shops
- disputes between individuals
- departments and authorities of the Commonwealth, States and Territories other than Victoria
- decisions by Ministers of the Crown
- decisions made by courts and tribunals
- decisions made by a municipal council.⁴¹

Unless there are extenuating circumstances that warrant the Ombudsman's attention, the Ombudsman does not investigate complaints that are:

- more than 12 months old
- more appropriately decided by a court or tribunal.⁴²

For each complaint, the Ombudsman Act allows the Victorian Ombudsman to conduct enquiries to determine whether a formal investigation is necessary or the matter may be resolved informally.⁴³ The majority of complaints are resolved through an informal resolution process.⁴⁴

In addition, the Ombudsman may conduct enquiries or investigations into particular matters using 'own motion' powers under the Ombudsman Act.⁴⁵

The Victorian Ombudsman is also required to investigate certain types of protected disclosures under the *Protected Disclosure Act 2012* (Vic). Although the Independent Broad-based Anti-corruption Commission (IBAC) Commissioner has overall responsibility for administration of the Act, the Ombudsman's roles include:

- receiving disclosures relating to a Victorian councillor, the Freedom of Information (FOI) Commissioner, the Commissioner for Privacy and Data Protections or the Health Services Commissioner

⁴⁰ Victorian Ombudsman, *Complaining to the Victorian Ombudsman*, viewed 23 October 2015, <www.ombudsman.vic.gov.au>.

⁴¹ Victorian Ombudsman, *What we can and cannot investigate*, viewed 23 October 2015, <www.ombudsman.vic.gov.au>.

⁴² Victorian Ombudsman, *What we can and cannot investigate*, viewed 23 October 2015, <www.ombudsman.vic.gov.au>.

⁴³ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 13A(1).

⁴⁴ Victorian Ombudsman, *Fact sheet 5 – Investigations and section 15B of the Ombudsman Act 1973*, viewed 15 September 2015, <www.ombudsman.vic.gov.au>.

⁴⁵ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 13A; 16A.

- referring to IBAC protected disclosures that are received by the Ombudsman
- investigating certain protected disclosure complaints referred by IBAC.⁴⁶

The Protected Disclosure Act came into operation in February 2013 and established IBAC as the ‘clearing house’ for protected disclosure cases.

For protected disclosure complaints received from IBAC, the Ombudsman will conduct an investigation under the provisions of the Ombudsman Act.

In 2014–15, IBAC established the Protected Disclosure Liaison Group, which involves the Victorian Ombudsman, Victoria Police, the Victorian Inspectorate and the Presiding Officers of Parliament. The group hold quarterly meetings and provide a forum to discuss issues regarding protected disclosures.⁴⁷

3.3 Changes to Ombudsman’s functions

In September 2014 the Victorian Government introduced the Integrity Legislation Amendment Bill 2014 (Vic) into the Legislative Assembly. The Bill sought to make amendments to the functions of the Victorian Ombudsman, however it lapsed at the conclusion of the 57th Parliament.

The aim of the Bill was to ‘support and enhance Victoria’s integrity regime, by making amendments arising out of [IBAC’s] experience of interpreting and applying the legislation following one year of operation’.⁴⁸ Among other provisions, the Bill sought to amend the Ombudsman Act to enable concurrent or cooperative investigations by IBAC and the Ombudsman into alleged non-serious corrupt conduct (not including conduct of police).⁴⁹

The Committee has been advised by the Special Minister of State, Hon. Gavin Jennings MLC, that legislation to incorporate changes to the oversight framework, including changes to the operation of the Ombudsman Act, is to be introduced into Parliament in December 2015.⁵⁰

⁴⁶ *Protected Disclosure Act 2012* (Vic), 85 of 2012, section 13; 16; 21(2); *Ombudsman Act 1973* (Vic), 8414 of 1973, section 15D; 15E.

⁴⁷ Independent Broad-based Anti-corruption Commission, *Annual report 2014–15*, viewed 15 September 2015, <www.parliament.vic.gov.au>, p. 20.

⁴⁸ *Integrity Legislation Amendment Bill 2014* (Vic), Explanatory Memorandum.

⁴⁹ Proposed new section 15(1B), *Ombudsman Act 1973* (Vic), 8414 of 1973.

⁵⁰ Hon. Gavin Jennings MLC, Special Minister of State, Victorian Government, *Briefing*, Melbourne, 9 November 2015.

3.4 Performance of the Ombudsman

Some of the highlights reported in the Ombudsman's annual report for the 2014–15 year include:

- increased approaches⁵¹ to the office (38 980), with an increase of 6 per cent in approaches within the Ombudsman's jurisdiction
- completion of 3256 enquiries and investigations
- completion of 34 formal investigations (of 37 commenced during the year)
- undertaking 4 own motion investigations
- conducting 4 regional visits
- tabling of 8 parliamentary reports
- development of data analytics tool.⁵²

In February 2015, the Ombudsman's office commissioned an independent market survey to assess the public awareness and perceptions of the office. The survey indicated that, of the 7 per cent of respondents who had contact with the office, 87 per cent found the experience 'satisfactory/positive'.⁵³

3.4.1 Complaints

One of the Ombudsman's main functions is the investigation of approaches relating to complaints about public sector agencies. The Ombudsman's office provides citizens with a mechanism for investigating the conduct of public sector agencies that are unable to be resolved directly with the agency concerned.

The Ombudsman identified that the greatest number of approaches within jurisdiction in the 2014–15 year related to the Corrections, Justice and Regulation portfolio (4269 or 30 per cent), local government (3410 or 24 per cent) and the Health and Human Services portfolio (2177 or 15 per cent).⁵⁴

As shown in Table 3.1, in 2014–15 the Ombudsman received 38 980 approaches. 17 251 approaches were redirected and 21 587 approaches were closed in the 2014–15 year. 3256 were closed through enquiries and investigations with departments and agencies and the remainder were closed by providing advice and referral services.

51 'Approaches' includes complaints, non-jurisdictional complaints and requests for information received by the office.

52 Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, pp. 2–3; Deborah Glass, Victorian Ombudsman, Ombudsman Victoria, *Briefing*, Melbourne, 17 August 2015.

53 Deborah Glass, Victorian Ombudsman, Ombudsman Victoria, *Briefing*, Melbourne, 17 August 2015.

54 Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, pp. 19–31.

Table 3.1 Summary of Ombudsman approaches in the 2014–15 financial year

	2013–14	2014–15
Approaches received	34 374	38 980
Approaches redirected from website and telephone	(8 916)	(17 251)
Approaches closed (not including auto re-directed approaches)	(25 400)	(21 587)
• Approaches within jurisdiction	13 152	13 864
• Requests for information	11 763	7 389
• Approaches outside jurisdiction	485	334
• Approaches closed through enquiries and investigations	2 742	3 256
• Approaches closed through advice and referral	22 658	18 331

Source: Victorian Ombudsman (2015), *Annual report 2014–15*.

The number of approaches closed that were within jurisdiction increased from 13 152 in 2013–14 to 13 864 in 2014–15. The Ombudsman attributed this 6 per cent increase to increased public awareness of the office.

The Ombudsman’s annual report infers that the increased workload presents challenges.⁵⁵ However the Committee observes that although the number of jurisdictional approaches has increased, it is still just short of the 2014–15 output target of 14 000, which has not increased since last year.⁵⁶ A review of resource allocation and output targets for jurisdictional approaches may be warranted.

The Committee notes that a review of Ombudsman’s office funding was undertaken in April 2013. The review recommended an increase to the Ombudsman’s base budget from \$10.9 to \$11.2 million and noted some efficiency measures which it projected would result in a stable ongoing workload.⁵⁷ The Ombudsman’s office informed the Committee that a second stage of the review was intended to commence six months after the introduction of the integrity regime amendments in 2012, however this did not occur.

Improving referral efficiency

The Committee acknowledges that a significant portion of the Ombudsman’s work is represented by referrals of outofjurisdiction approaches to other bodies, and commends the Ombudsman’s introduction of efficiency promoting measures such as telephone re-direction services.⁵⁸ However, as an effective method to further enhance efficiency and effectiveness, the Committee reiterates the need for the Victorian Government to develop a one-stop shop complaints portal, as recommended in the Committee’s last report.⁵⁹

⁵⁵ Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 5.

⁵⁶ Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 57.

⁵⁷ Third Horizon Consulting Partners, *Office of the Victorian Ombudsman Funding Review Project – Final Report*, 2013.

⁵⁸ Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 10.

⁵⁹ Accountability and Oversight Committee, *Report into Victorian oversight agencies 2013–14*, Victorian Parliament, Melbourne, 2015.

Quality measures

The quality measures relating to outcomes of complaints are very positive. Reviews of Ombudsman office complaint resolutions very rarely resulted in the decision being set aside.⁶⁰ Similarly the Ombudsman reported that 96 per cent of its recommendations were accepted by government agencies.⁶¹

Approaches outstanding

The Committee notes an increase in the discrepancy between approaches received and redirected/closed by financial year end from 58 in the 2013–14 year to 142 in the 2014–15 year, as can be seen from Table 3.1. The Committee made several attempts to clarify this discrepancy with the Ombudsman's office. The Ombudsman's office advised that the difference of 142 was due to approaches received and approaches closed not being comparable. The Ombudsman's office was able to produce some 'ad hoc' data about approaches received and not finalised in each financial year, but advised that these were unable to be relied upon due to limitations in the reporting capabilities of their case management system.

Although the Committee did not receive a clear explanation of the number of outstanding approaches, the increase in the discrepancy suggests that the number of outstanding approaches at year end is increasing.

The Committee considers that there needs to be more transparent reporting of complaint resolution that clearly identifies:

- how many approaches received in each financial year are finalised in that year
- how many of those outstanding at the end of the financial year are finalised in the following year
- how many remain outstanding overall at year end.

These measures are important to ensure that the Ombudsman is adequately resourced to finalise outstanding approaches in a timely way.

RECOMMENDATION 9: That the Ombudsman includes more transparent reporting in its next annual report regarding how many approaches:

- received in each financial year are finalised in that year
- outstanding from the previous financial year are finalised by the end of the current financial year
- remain outstanding overall at each financial year end.

⁶⁰ Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 57.

⁶¹ Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 57.

Investigations undertaken

The Ombudsman undertook a number of significant investigations, which resulted in reports tabled in Parliament. The reports tabled by the Ombudsman in Parliament are shown in Table 3.2.

Table 3.2 Reports tabled in Parliament in the 2014–15 financial year

Report title	Date
<i>Investigation into allegations of improper conduct in the Office of Living Victoria</i>	5 August 2014
<i>Annual report 2013–14</i>	4 September 2014
<i>Investigation following concerns raised by community visitors about a mental health facility</i>	15 October 2014
<i>Investigation into an incident of alleged excessive force used by authorised officers</i>	12 February 2015
<i>Councils and complaints – A report on current practice and issues</i>	25 February 2015
<i>Investigation into Department of Health Oversight of Mentone Gardens, a supported residential service</i>	15 April 2015
<i>Investigation of allegations of improper conduct by officers of VicRoads</i>	10 June 2015
<i>Investigation into disability abuse reporting: Phase 1 – The effectiveness of statutory oversight</i>	25 June 2015

Source: Victorian Ombudsman (2015), Annual report 2014–15.

Method of approach

Table 3.3 shows that the vast majority of approaches to the Ombudsman are by telephone, with the remainder submitted by email and online. Only 5 per cent of approaches were by letter or fax.

Due to the requirement to lodge complaints in writing, some approaches made by telephone did not result in a complaint. The Ombudsman indicated that in at least 667 cases where an initial contact was made, no complaint was received. The Committee re-iterates the importance of allowing complaints to be made by means other than in writing as recommended in the Committee's last report.⁶² The Committee has raised this issue directly with the Special Minister of State.

Table 3.3 Approaches in the 2014–15 financial year

Method of approach	Percentage of approaches
Telephone	74
Email	12
Online	8
Letter/fax	5

Source: Victorian Ombudsman (2015), Annual report 2014–15.

⁶² Accountability and Oversight Committee, *Report into Victorian oversight agencies 2013–14*, Victorian Parliament, Melbourne, 2015.

Timeliness

As shown in Table 3.4, of the 21 587 approaches closed in the 2014–15 year, 61.1 per cent were closed on the day they were received and 92 per cent were closed within 30 days, slightly lower than in the 2013–14 year (69.1 per cent and 95.7 per cent, respectively).

Table 3.4 All approaches in the 2014–15 financial year

	2013–14 (No.)	2013–14 (%)	2014–15 (No.)	2014–15 (%)
On day received	17 559	69.1%	13 196	61.1%
1–7 days	3 993	15.7%	3 846	17.8%
8–30 days	2 761	10.9%	2 819	13.1%
1–3 months	857	3.4%	1 352	6.3%
3–6 months	177	0.7%	310	1.4%
After 6 months	53	0.2%	64	0.3%
Total	25 400	100%	21 587	100%

Source: Victorian Ombudsman (2015), *Annual report 2014–15*.

The 2014–15 annual report identifies that 0.3 per cent or 64 cases were outstanding for more than 6 months (see Table 3.4). However, it does not specify how many approaches were carried over from 2013–14, nor how many remain outstanding at the end of the 2014–15 year. The Committee notes that it is not clear how many of the 64 cases were outstanding for longer than 12 months.

A different measure is used in reporting on the timeliness output targets for the 2014–15 year.⁶³ According to this measure, 88 per cent of complaints were resolved within 30 days, which is less than the 2013–14 year (92 per cent) and below the 95 per cent target. The Ombudsman attributes this ‘under-target outcome’ to increased workload due to:

- an increase in jurisdictional cases handled by the office
- an increase in the number of complaints the Ombudsman enquired into or investigated
- the impact of completing the Ombudsman’s investigation into *Reporting and Investigation of allegations of abuse in the disability sector: Phase 1 — the effectiveness of statutory oversight* within tight timeframes to inform the Victorian Parliamentary Inquiry into Abuse in Disability Services and the quality and safeguarding framework of the National Disability Insurance Scheme.⁶⁴

⁶³ Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 57.

⁶⁴ Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 57.

Although the Ombudsman suggests this investigation has in part impacted timeliness, the absence of transparent reporting makes it impossible to clearly identify whether such investigations have a cumulative impact on the timeliness of complaint handling over time.

RECOMMENDATION 10: That the Victorian Government considers reviewing the Ombudsman’s output targets to ensure greater consistency on how many approaches:

- received in each financial year are finalised in that year
- outstanding from the previous financial year are finalised by the end of the current financial year
- remain outstanding overall at each financial year end.

3.4.2 Own motion enquiries and investigations

Part 4 of the Ombudsman Act provides the Ombudsman with powers to undertake investigations of public sector agencies, either as an ‘own motion’ investigation by the Ombudsman (section 16A), by the Victorian Parliament (section 16) or as a ‘referred’ investigation by another body in Victoria’s integrity system (section 16B).⁶⁵

An own motion enquiry or investigation is commenced by the Ombudsman’s office when an issue is considered to be in the public interest or is systemic.⁶⁶ In her briefing to the Committee, the Ombudsman indicated that own motion investigations are likely to arise from the three most common areas of complaint to the Ombudsman’s office, namely the portfolio areas of Corrections, Justice and Regulation; Local Government; and Health and Human Services.⁶⁷

In addition, own motion powers may be used to address an approach that requires an urgent response. The annual report indicates that in the 2014–15 year, the Ombudsman’s office concluded 14 own motion enquiries and 4 own motion investigations. Own motion investigations resulted in the following significant reports tabled in Parliament:

- reporting and investigation of abuse in the disability sector (25 June 2015)
- rehabilitation and reintegration of prisoners (tabled 17 September 2015).

The Ombudsman reported that these two investigations took up more than half of the resources in the Strategic Investigations area (previously Major Investigations area).⁶⁸

⁶⁵ *Ombudsman Act 1973* (Vic), 8414 of 1973.

⁶⁶ For example, see Victorian Ombudsman, *Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – The effectiveness of statutory oversight*, Ombudsman Victoria, Melbourne, 2015; Victorian Ombudsman, *Conflict of interest by an executive officer in the Department of Education and Training*, Ombudsman Victoria, Melbourne, 2015.

⁶⁷ Deborah Glass, Victorian Ombudsman, Ombudsman Victoria, *Briefing*, Melbourne, 17 August 2015.

⁶⁸ Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 15.

3.4.3 Investigation of protected disclosure complaints

One of the roles of the Ombudsman is to assess and investigate protected disclosure complaints. Both the Ombudsman and IBAC can receive such complaints, however the Ombudsman can only investigate protected disclosure complaints if she receives a referral from IBAC.⁶⁹ The Ombudsman is required to notify IBAC if she receives an assessable disclosure, and the Ombudsman must investigate any protected disclosures referred from IBAC.

Of the 37 investigations commenced by the Ombudsman in the 2014–15 year, 21 related to protected disclosures. This is fewer than the number of protected disclosure investigations in the previous year, which made up 33 of the 51 formal investigations conducted by the Ombudsman. The Ombudsman dismissed five disclosures.

The Ombudsman's report argues that the requirement to investigate all protected disclosures referred by IBAC continues to consume significant resources and reduces the investigative capacity of the office. She states:

Our formal investigations are, however, relatively few, and remain dominated by protected disclosures referred by IBAC, which the law at present requires me to investigate. While some of these raise serious issues that should be independently investigated, many involve relatively minor matters that could have been dealt with more efficiently without formal investigation.⁷⁰

The amount of time and resources spent on protected disclosure investigations is not clearly identified in the annual report. However, the Ombudsman acknowledges that there were fewer protected disclosures assessed as requiring investigation in the 2014–15 year, as 'the protected disclosure regime is better understood' compared with the first year of IBAC's operation. The Committee would like to see a more transparent reporting of the resources and time taken to investigate protected disclosures in comparison with other investigations.

Both the Ombudsman and the Committee have recommended reforms in this area to allow greater flexibility to deal with protected disclosures. Notably the Integrity Legislation Amendment Bill 2014 (Vic) did not address this issue. The Committee re-iterates its recommendation from its previous report.

RECOMMENDATION 11: That the Victorian Government implements reforms to address the Committee's recommendations in previous reports relating to the treatment of protected disclosures under the *Ombudsman Act 1973* (Vic).

⁶⁹ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 13; 13AA.

⁷⁰ Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 10.

3.4.4 Assessment of the Victorian Inspectorate

The Victorian Inspectorate monitors procedural fairness and the use of covert and intrusive investigative powers by IBAC, the Victorian Auditor-General's Office (VAGO) and the Ombudsman. During the reporting year, the Victorian Inspectorate considered that the reports made to it by the Ombudsman were comprehensive and adequate.⁷¹

The Victorian Inspectorate noted that an issue that arose in the previous reporting year, concerning the adequacy of information available to persons examined under oath by an Ombudsman officer, had been adequately addressed by the Ombudsman.⁷²

The performance of the Victorian Inspectorate is discussed in Chapter 4 of this report.

3.4.5 Community engagement and collaboration

In 2014–15 the Ombudsman's office undertook a broad range of community engagement initiatives. Some highlights identified in the annual report include:

- 24 presentations to regional audiences
- 10 visits to correctional facilities
- 11 events for local government audiences
- 8 events for community groups
- 9 presentations to educational institutions
- 18 presentations to public sector bodies.⁷³

In her briefing to the Committee, the Ombudsman stressed the importance of collaboration with the public sector. She emphasised that the independence of the office is not compromised by this form of collaboration.⁷⁴

Examples of collaboration provided in the 2014–15 annual report include:

- data sharing pilot with Corrections Victoria⁷⁵
- development of a good practice guide for council complaint handling⁷⁶
- development of best practice guidelines tailored for universities.⁷⁷

71 Victorian Inspector, *Annual report 2014–15*, Victorian Inspectorate, Melbourne, 2015, p. 25.

72 Victorian Inspector, *Annual report 2014–15*, Victorian Inspectorate, Melbourne, 2015, p. 25.

73 Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 49.

74 Deborah Glass, Victorian Ombudsman, Ombudsman Victoria, *Briefing*, Melbourne, 17 August 2015.

75 Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 41.

76 Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 41.

77 Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 49.

The Ombudsman also collaborated with IBAC and VAGO to produce a guide to Victoria's Integrity System, published in November 2014.⁷⁸

During the briefing to the Committee, the Ombudsman emphasised her commitment to data sharing and analysis. The Ombudsman demonstrated a trial data analytics tool that is capable of interrogating trends in complaints data.

In order to fully realise the benefits of collaboration and data sharing, the Ombudsman has called for a change to the confidentiality provisions in the Ombudsman Act. She stated in the 2014–15 annual report:

The need for a review of the confidentiality provisions in the Ombudsman Act grows increasingly apparent. I will be unable to fulfil my aspirations to provide valuable feedback to the public sector or to engage fully with the Victorian public without legislative change permitting greater communication in the public interest. I have received an assurance from the government that some of the changes I have requested will be before the Parliament this year, and I wait to see.⁷⁹

RECOMMENDATION 12: In order to enhance the collaborative efforts across the public sector, the Victorian Government implements reforms to ensure the confidentiality provisions in the *Ombudsman Act 1973* (Vic) facilitate collaborative efforts to resolve complaints.

⁷⁸ Independent Broad-based Anti-corruption Commission, *Safeguarding integrity – A guide to the integrity system in Victoria*, State of Victoria, Melbourne, 2014.

⁷⁹ Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015, p. 7.

4 The Victorian Inspectorate

AT A GLANCE

Background

The Victorian Inspectorate is a key oversight body in Victoria's Integrity system. The Accountability and Oversight Committee has responsibility for oversight of the Victorian Inspectorate's activity relating to the Victorian Ombudsman.

Recommendation

- 13 The Victorian Inspectorate, in subsequent annual reports, outlines the methodology and process undertaken in assessing all complaints against the Ombudsman and Ombudsman officers.

4.1 Introduction

The Victorian Inspectorate is a key oversight body in Victoria's integrity system. It commenced operations in February 2013 and operates under the *Victorian Inspectorate Act 2011* (Vic) (VI Act). The VI Act constitutes the position of Inspector to undertake the duties and functions of the Victorian Inspectorate.

Under the VI Act, the Victorian Inspector is an independent officer who reports directly to Parliament. The Inspector is appointed by Governor-in-Council on recommendation by the Special Minister for State, and is subject to veto by the Independent Broad-based Anti-corruption Commission (IBAC) Committee. Mr Robin Brett QC is Victoria's inaugural inspector, appointed in January 2013 for a period of 5 years. The Victorian Inspectorate comprises 6 staff.

Under the *Parliamentary Committees Act 2003* (Vic), the Accountability and Oversight Committee can only scrutinise actions taken by the Victorian Inspectorate that relate to the Victorian Ombudsman and her officers.

Scrutiny of other actions is performed by the Public Accounts and Estimates Committee (in respect to actions relating to Victorian Auditor-General's Office [VAGO] officers) and the IBAC Committee (for all other actions).

4.2 The Victorian Inspectorate's functions

The Victorian Inspectorate has monitoring and oversight functions of IBAC, VAGO, and the Victorian Ombudsman.⁷⁹

The Inspectorate is required to review and assess the use of coercive powers by those bodies, to ensure that those powers are exercised appropriately, proportionately and in accordance with the law. Coercive powers include the power to examine witnesses compulsorily under oath and the power to compel the provision of documents.⁸⁰ In addition, the Victorian Inspectorate assesses and investigates complaints against the conduct of these agencies.⁸¹ The Inspectorate is also responsible for monitoring the compliance of the Public Interest Monitor.⁸²

Under Sections 40, 41 and 42 of the VI Act, the Victorian Inspectorate may require IBAC, the Auditor-General or the Victorian Ombudsman to provide it with a report specifying circumstances where an examination of a person has been conducted.⁸³

The Victorian Inspectorate is also able to issue confidentiality notices where considered reasonable under Sections 38 and 39 of the VI Act, if the matter may prejudice:

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

As noted above, the Committee can only scrutinise actions taken by the Victorian Inspectorate in relation to the Victorian Ombudsman and her officers. Functions and powers of the Victorian Inspectorate relating to the Ombudsman are to:

- monitor the exercise of coercive powers by Ombudsman officers
- monitor compliance by the Ombudsman with procedural fairness, including during enquiries, investigations, reports and recommendations
- receive and investigate complaints about Ombudsman officers and their conduct, and report and develop recommendations on these matters.⁸⁴

The Victorian Inspectorate may also undertake an own motion investigation into the conduct of an Ombudsman officer.⁸⁵

⁷⁹ *Victorian Inspectorate Act 2011* (Vic), 70 of 2011.

⁸⁰ *Victorian Inspectorate Act 2011* (Vic), 70 of 2011.

⁸¹ *Victorian Inspectorate Act 2011* (Vic), 70 of 2011.

⁸² *Victorian Inspectorate Act 2011* (Vic), 70 of 2011.

⁸³ *Victorian Inspectorate Act 2011* (Vic), 70 of 2011.

⁸⁴ *Victorian Inspectorate Act 2011* (Vic), 70 of 2011, section 11(4).

⁸⁵ *Victorian Inspectorate Act 2011* (Vic), 70 of 2011, section 46.

The Victorian Inspectorate may make recommendations to the Ombudsman. While the Ombudsman is not required to comply with such recommendations, the Inspectorate may require a report to be produced stating the reasons for rejecting the recommended action.⁸⁶

Furthermore, the Victorian Inspectorate has powers to refer the complaint of Ombudsman officers to appropriate bodies.⁸⁷

The Ombudsman has a number of responsibilities in relation to the Victorian Inspectorate. The *Ombudsman Act 1973* (Vic) requires the Ombudsman to:

- notify the Victorian Inspectorate of any complaint involving conduct of IBAC, Ombudsman, VAGO and Chief Examiner personnel⁸⁸
- notify the Victorian Inspectorate 3 days after the issue of a witness summons detailing the reasons for the summons⁸⁹
- provide copies of audio or video recordings for compulsory appearances before the Ombudsman⁹⁰
- provide the Inspectorate with copies of any confidentiality notices or related documents.⁹¹

4.3 Performance of the Victorian Inspectorate relating to the Victorian Ombudsman

4.3.1 Notifications received from the Ombudsman

Table 4.1 outlines the notifications received by the Victorian Inspectorate from the Ombudsman.

The Victorian Inspectorate considered that the reports made to it by the Ombudsman were comprehensive and adequate.⁹² In his briefing to the Committee, the Victorian Inspector explained the basis on which this assessment is made:

- **comprehensiveness:** the scope and detail of information provided
- **adequacy:** whether sufficient information was provided to allow the Victorian Inspectorate to make an assessment as to whether legislative requirements are met.

The Victorian Inspectorate told the Committee that the Ombudsman provides sufficient detail to allow the Victorian Inspectorate to make an assessment of the documents issued.

⁸⁶ *Victorian Inspectorate Act 2011* (Vic), 70 of 2011, section 82.

⁸⁷ *Victorian Inspectorate Act 2011* (Vic), 70 of 2011, section 83(3).

⁸⁸ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 16F.

⁸⁹ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 18A; 18F.

⁹⁰ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 18A; 18F.

⁹¹ *Ombudsman Act 1973* (Vic), 8414 of 1973, section 26E; 18F.

⁹² Victorian Inspector, *Annual report 2014–15*, Victorian Inspectorate, Melbourne, 2015, p. 25.

Table 4.1 Summary of Victorian notifications received from the Ombudsman in the 2014–15 financial year

	2013–14	2014–15
Notifications of complaints received	36	9
• Concerning IBAC officers	-	4
• Concerning Ombudsman officers	-	3
• Concerning VAGO officers	-	2
Notification of summonses	18	13
• To give evidence	-	4
• To produce documents	-	7
• To produce documents and give evidence	-	2
Notification of issue and cancellation of confidentiality notices	16	27
Audio recordings of persons compulsorily examined	167 persons	39 persons

Source: Victorian Inspectorate (2015), Annual report 2014–15.

4.3.2 Complaints received about the Ombudsman

The Victorian Inspectorate received 25 complaints and 19 enquiries relating to the Ombudsman in the 2014–15 year (compared with 17 complaints and 25 enquiries in the 2013–14 year).

After requesting information from the Ombudsman, the Inspectorate assessed all complaints as either being outside its jurisdiction or not meriting investigation.⁹³

The Inspectorate did conduct one investigation relating to a complaint received in the previous year. After inspecting files and interviewing the complainant and a senior Ombudsman officer, this complaint was dismissed.⁹⁴

The Victorian Inspectorate's annual report does not provide additional information in respect of the types of complaints received by the Victorian Inspectorate in respect of the Ombudsman, nor the reasons for the dismissal of the complaints within its jurisdiction. The Committee sought additional information relating to the complaints and their dismissal by the Victorian Inspectorate and was provided with a comprehensive response.

The Victorian Inspectorate informed the committee that the most common reason for complaints was dissatisfaction with the outcome provided by the Ombudsman. Other reasons included dissatisfaction with response times or processes.

The Victorian Inspectorate clarified that its statutory powers only allow the office to investigate complaints where there are concerns relating to the exercise of coercive powers or procedural fairness. The Victorian Inspectorate informed the Committee that no complaints were received relating to the Victorian

⁹³ Victorian Inspector, *Annual report 2014–15*, Victorian Inspectorate, Melbourne, 2015, p. 25.

⁹⁴ Victorian Inspector, *Annual report 2014–15*, Victorian Inspectorate, Melbourne, 2015, p. 25.

Ombudsman's exercise of coercive powers. Of the 25 complaints received, 20 were deemed not to merit investigation following information being sought from the Ombudsman and the complainant, and 5 were deemed to be outside the Victorian Inspectorate's jurisdiction.

The Victorian Inspectorate identified that the 5 complaints outside jurisdiction were due to:

- the complaint not relating to procedural fairness or a particular conduct
- the complaint concerning an agency or organisation over which the Inspectorate had no statutory power (e.g. Victoria Police, local councils, courts, other public bodies)
- the complaint being within jurisdiction of another organisation and therefore being referred to that body (e.g. the Freedom of Information Commissioner).

The Victorian Inspectorate identified that the cause of 20 of the complaints being considered to not merit investigation included:

- the complainant failing to respond to Victorian Inspectorate enquiries
- the allegations lacking substance or credibility
- the complainant failing to exhaust avenues within the Victorian Ombudsman or the initial complaint body
- after consideration of all the material, a finding that there was no substantial evidence of any failure by the Victorian Ombudsman to act appropriately or afford procedural fairness.

The Committee is satisfied with the detailed information provided by the Victorian Inspectorate in response to its queries and considers that more detail should be provided in subsequent annual reports relating to the methodology and process undertaken in assessing all complaints against the Ombudsman and Ombudsman officers.

The Committee notes that, although the Victorian Inspectorate is able to make recommendations to the Victorian Ombudsman, it is unable to compel the Ombudsman to comply with these recommendations.⁹⁵ When queried about this, the Victorian Inspectorate pointed out that his office has the ability to report to the Victorian Parliament if insufficient justification is provided by the Victorian Ombudsman for failure to comply with the Inspectorate's recommendation. In addition, both the Victorian Inspectorate and the Ombudsman are able to be questioned by a Parliamentary Committee.

RECOMMENDATION 13: The Victorian Inspectorate, in subsequent annual reports, outlines the methodology and process undertaken in assessing all complaints against the Ombudsman and Ombudsman officers.

⁹⁵ *Victorian Inspectorate Act 2011* (Vic), 70 of 2011, section 82.

4.3.3 Monitoring of the Ombudsman and own motion investigations

In the prior reporting year, the Victorian Inspectorate identified an issue concerning the adequacy of information available to persons examined under oath by an Ombudsman officer. The 2014–15 annual report indicates that this issue was adequately addressed by the Ombudsman.⁹⁶

No information is provided in the Victorian Inspectorate’s annual report about any own motion investigations conducted relating to the Ombudsman.

The Inspectorate noted in its briefing to the Committee that it is currently looking into the Ombudsman’s approach to procedural fairness.⁹⁷

Committee room, 23 November 2015.

⁹⁶ Victorian Inspector, *Annual report 2014–15*, Victorian Inspectorate, Melbourne, 2015, p. 25.

⁹⁷ Robin Brett QC, Victorian Inspector, Victorian Inspectorate, *Briefing*, Melbourne, 19 October 2015.

Appendix 1

Committee briefings

Site visit Melbourne, 3 August 2015

Hosted by Ms Lynne Bertolini, Freedom of Information Commissioner and Mr Michael Ison, Assistant Freedom of Information Commissioner.

Site visit Melbourne, 17 August 2015

Hosted by Ms Deborah Glass OBE, Victorian Ombudsman.

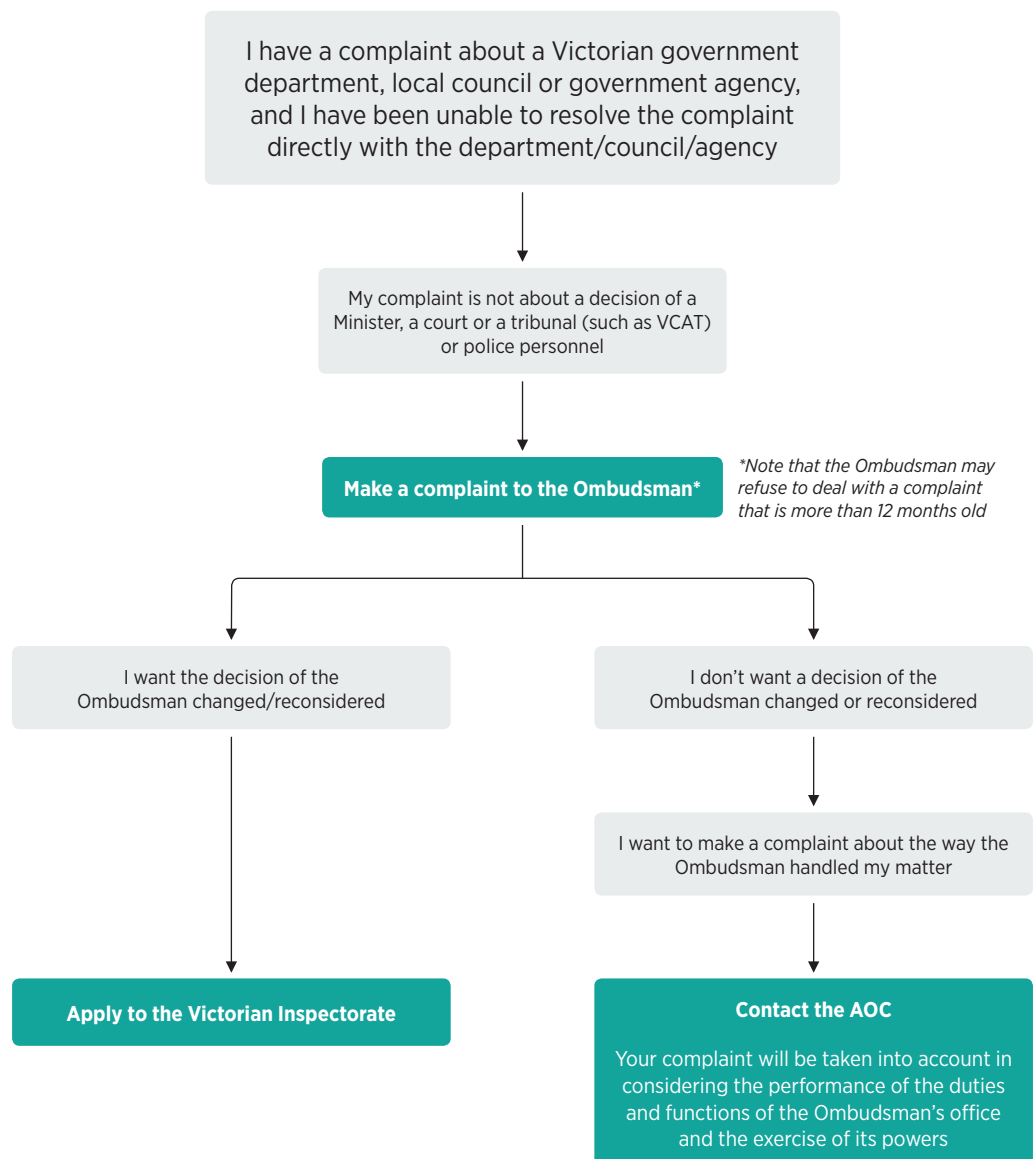
Site visit Melbourne, 19 October 2015

Hosted by Mr Robin Brett QC, Victorian Inspector.

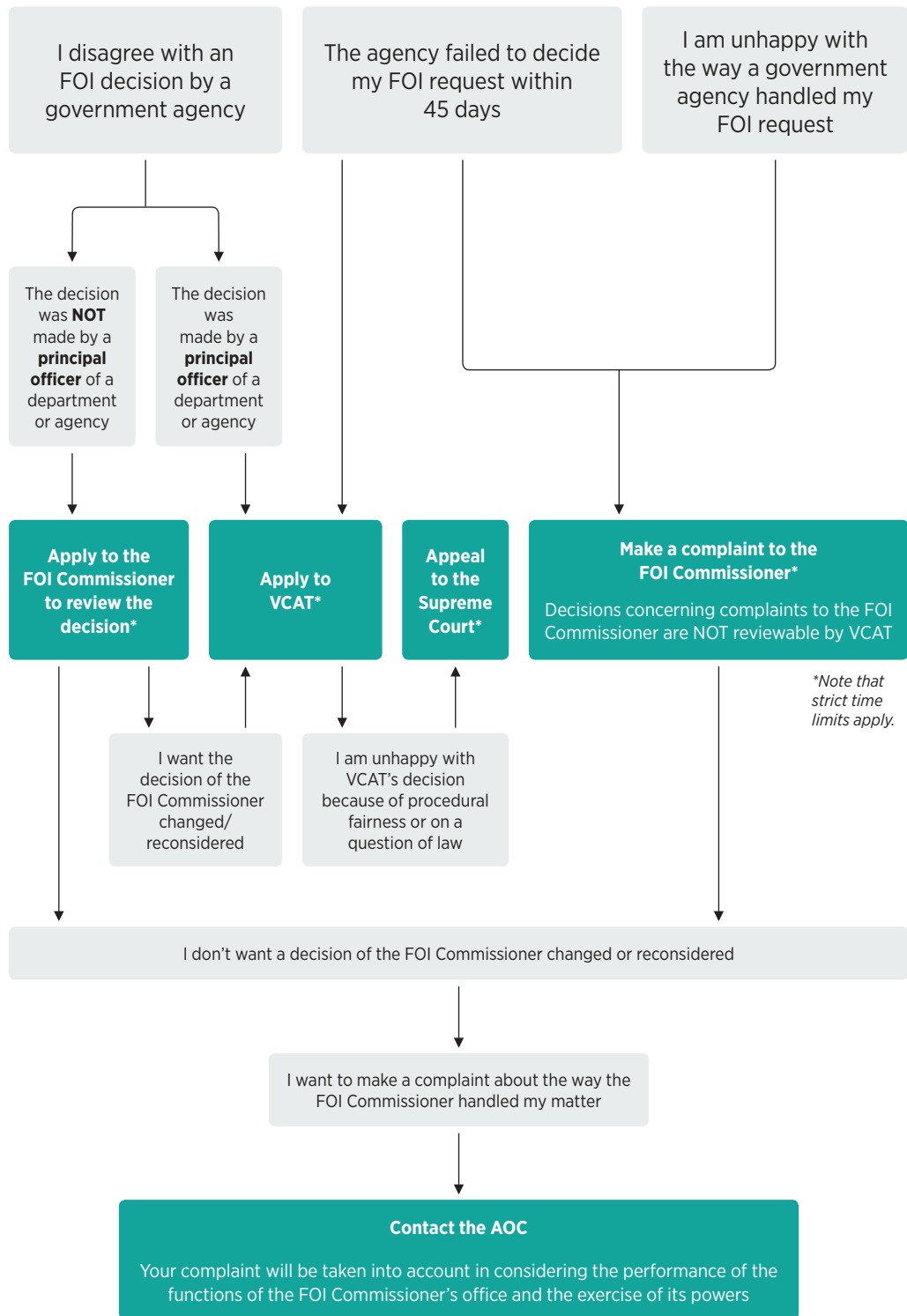
Appendix 2

Flow charts for disputes and complaints relating to the Ombudsman and Freedom of Information Commissioner

Where to go with your Ombudsman dispute or complaint



Where to go with your FOI dispute or complaint



Bibliography

Accountability and Oversight Committee, *Report into Victorian oversight agencies 2013–14*, Victorian Parliament, Melbourne, 2015.

Department of Justice and Regulation, 'Freedom of Information Professional Standards', viewed 9 September 2015, <www.justice.vic.gov.au/home/your+rights/freedom+of+information/freedom+of+information+professional+standards>.

Freedom of Information Commissioner, 'Amendments to FOI Act', viewed 9 September 2015, <www.foicommissioner.vic.gov.au/home/tools+and+resources/amendments+to+foi+act>.

Freedom of Information Commissioner, *Annual report 2014–15*, Office of the Freedom of Information Commissioner, Melbourne, 2015.

Independent Broad-based Anti-corruption Commission, *Safeguarding integrity — A guide to the integrity system in Victoria*, State of Victoria, Melbourne, 2014.

Independent Broad-based Anti-corruption Commission, 'Annual report 2014–15', viewed 15 September 2015, <www.parliament.vic.gov.au/file_uploads/IBAC_Annual_report_2014-15_H2jPfMNp.pdf>.

Third Horizon Consulting Partners, *Office of the Victorian Ombudsman Funding Review Project — Final Report*, 2013

Victorian Government, *Response to the Accountability and Oversight Committee's Report into Victorian oversight agencies*, Melbourne, 2015.

Victorian Inspector, *Annual report 2014–15*, Victorian Inspectorate, Melbourne, 2015.

Victorian Inspectorate, 'The Inspector's functions', viewed 16 September 2015, <www.vicinspectorate.vic.gov.au/home/about+us/the+inspectors+functions/>.

Victorian Ombudsman, 'About the Victorian Ombudsman', viewed 23 October 2015, <www.ombudsman.vic.gov.au/About/The-Victorian-Ombudsman>.

Victorian Ombudsman, 'Complaining to the Victorian Ombudsman', viewed 23 October 2015, <www.ombudsman.vic.gov.au/Complaints>.

Victorian Ombudsman, 'Fact sheet 1 — About the Victorian Ombudsman', viewed 9 September 2015, <www.ombudsman.vic.gov.au/Fact-Sheets/For-Complainants/About-the-Victorian-Ombudsman>.

Victorian Ombudsman, 'Fact sheet 5 — Investigations and section 15B of the Ombudsman Act 1973', viewed 15 September 2015, <www.ombudsman.vic.gov.au/Fact-Sheets/For-Respondants/Fact-Sheet-5-Investigations-and-Section-15B-of-the>.

Victorian Ombudsman, 'Governing legislation', viewed 18 November 2015, <www.ombudsman.vic.gov.au/About/Our-Responsibilities/Governing-Legislation>.

Victorian Ombudsman, 'What we can and cannot investigate', viewed 23 October 2015, <www.ombudsman.vic.gov.au/Complaints/What-We-Can-and-Cannot-Investigate>.

Victorian Ombudsman, *Annual report 2014–15*, Ombudsman Victoria, Melbourne, 2015.

Victorian Ombudsman, *Conflict of interest by an executive officer in the Department of Education and Training*, Ombudsman Victoria, Melbourne, 2015.

Victorian Ombudsman, *Reporting and investigation of allegations of abuse in the disability sector: Phase 1 — The effectiveness of statutory oversight*, Ombudsman Victoria, Melbourne, 2015.