

**Submission
No 38**

INQUIRY INTO THE EDUCATION AND PREVENTION FUNCTIONS OF VICTORIA'S INTEGRITY AGENCIES

Organisation: Law Institute of Victoria

Date Received: 22 September 2020



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Date 22 September 2020

Integrity and Oversight Committee

Parliament House, Spring St
East Melbourne VIC 3002

By email: ioc@parliament.vic.gov.au

Dear Integrity and Oversight Committee,

Inquiry into the Education and Prevention Functions of Victoria's Integrity Agencies

The Law Institute of Victoria ('LIV') is Victoria's peak body for lawyers and represents approximately 19,000 people working and studying in the legal sector in Victoria, interstate and overseas. We welcome the opportunity to provide input to the Inquiry into Education and Prevention Functions of Victoria's Integrity Agencies ('the Inquiry'). This submission will focus on the education and preventative functions of the Independent Broad-Based Anti-Corruption Commission ('IBAC') in relation to police oversight and Office of Victorian Information Commissioner ('OVIC').

Education and Prevention Functions of IBAC

The LIV submits that the strong educative functions are important in maintaining a robust and independent police oversight. Under the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic)¹ ('the IBAC Act'), IBAC has statutory functions to provide information and education services to the community about the detrimental effects of corruption on public administration and the ways in which to assist preventing corrupt conduct.² Furthermore, IBAC is obliged to assist the public sector to increase capacity to prevent corrupt conduct and police personnel misconduct by providing advice, training and education services.³ Education and prevention functions are vital in ensuring that police misconduct is effectively dealt with and victims are protected. Section 6(f) of the IBAC Act, obliges IBAC to publish information to prevent corrupt conduct and police personnel misconduct.⁴ The LIV considers

¹ *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

² *Ibid* s 6(c).

³ *Ibid* s 15.

⁴ *Ibid* s6(f).

that the statutory functions could be defined more appropriately to give more clarity to IBAC's functions. LIV members report that education and prevention functions are mutually beneficial, as the more the public is educated about IBAC's role in police accountability, the more likely it is to ensure its prevention. The LIV makes the following recommendations to strengthen the education and prevention functions of IBAC to ensure it has an effective and meaningful role in police accountability.

Reform to the Structure of IBAC

The LIV has continually advocated for enhanced powers and organisational independence of IBAC. The LIV notes that the IBAC Committee released its report into the *Inquiry into external oversight of police corruption and misconduct in Victoria* in 2018 which made several recommendations in improving the processes and enhancing police oversight.⁵ LIV members are disappointed that the Government has not addressed the recommendations made in this report. The LIV recommends that in order to enhance the prevention and education functions of IBAC, the Inquiry must address the recommendations made in this report as they rely on the underlying structural and funding issues of IBAC.

The LIV maintains its position that IBAC should be provided with the additional resources to allow it to prioritise its functions as an independent body investigating police misconduct. LIV members have raised concerns regarding the practical, cultural and organisational independence of IBAC.⁶ The LIV recommends that police misconduct should be investigated and determined by a new body which is practically, culturally and organisationally independent from Victoria Police. LIV members report that the legislative emphasis on anti-corruption in the IBAC Act may obscure the community's understanding of IBAC's powers in regard to police accountability. It is important that Victoria has an independent body which meets the international human rights standard for domestic complaints systems to enable

⁵ Independent-Based Anti-Corruption Commission Committee, Parliament of Victoria, *Inquiry into the external oversight of police corruption and misconduct in Victoria* (Final report, September 2018) <https://www.ibac.vic.gov.au/media-releases/article/ibac-notes-parliamentary-committee-report-into-police-oversight>

⁶ Law Institute of Victoria, Submission 41 to the Independent-Based Anti-Corruption Commission Committee, Parliament of Victoria, *Inquiry into the external oversight of police corruption and misconduct in Victoria* (31 August 2017) 3-4.

community confidence. Additional resources and public confidence will allow for IBAC to ensure their functions not only prevent police misconduct but also educate the community.

In addition, the LIV recognises that IBAC only investigates a small proportion of complaints and this is due to a lack of resources and insufficient powers. Furthermore, IBAC must refer a complaint to Victoria Police if IBAC considers that the subject matter of the complaint is relevant to the performance of the duties and functions or exercises of power of the Victoria Police. In practice, approximately 90 per cent of matters are referred from IBAC to Victoria Police.⁷ LIV members suggest that the small amount of complaints that IBAC investigates do not allow for furthering the educative and preventative functions of IBAC. The LIV submits that it is difficult for IBAC to educate the community and ensure prevention when they only investigate a small amount of complaints.

The LIV recommends that IBAC is appropriately funded and empowered to investigate police complaints as this will aid in educating the public and allow for enhanced prevention against corruption.

Progress Updates to Complainants

Community perception of the effectiveness and efficiency of IBAC investigations is likely to be improved by more effective engagement with complainants. The LIV submits that IBAC should be required by legislation to provide complainants with an update on the progress of their complaint. Progress updates and complaint outcomes should be clearly communicated to complainants through explaining the decision reached by IBAC.

⁷ In 2014 IBAC's Deputy Commissioner stated that approximately 90 per cent of matters were referred back to Victoria Police, leaving 10 per cent to be investigated by IBAC: 'Policing the Police' (2014) 11 *Law Institute Journal* 14.

The LIV notes that complainants' experiences with IBAC are generally negative because they receive little information in respect of their complaint according to LIV members. The LIV has been informed that IBAC has been unclear when explaining their decision-making processes.

IBAC advises that complainants will receive notice on the outcome of their complaint, usually within 60 days.⁸ In practice, IBAC reports that the majority of complainants were not updated on the progress of investigations or given explanations for delays in the process.⁹ Additionally, IBAC recognised that communication between investigators and complainants was ineffective and ultimately impacted the complainant's trust in the process.¹⁰

The LIV notes that best practice models such as the Office of the Police Ombudsman of Northern Ireland should be considered when reforming the education and prevention functions of IBAC. The Police Ombudsman of Northern Ireland ('PONI') is required under legislation to contact the complainant within three days of a complaint being made and must update complainants on the progress of their complaint every six weeks.¹¹ Additionally, The New York Civilian Complaint Review Board ('CCRB') requires investigators to contact the complainant within 48 hours. Investigators must regularly contact complainants, but complainants are also able to monitor the progress of their complaints online.¹²

As a result of legislated time frames for progress updates and clearly communicated complaint outcomes, the complainant remains informed and involved in the process resulting in a greater understanding of the complaints process.

⁸Independent Broad-Based Anti-Corruption Commission, *What happens to your complaint* (Web Page, 15 September 2020) < <https://www.ibac.vic.gov.au/reporting-corruption/what-happens-to-your-complaint> >

⁹ Independent Broad-based Anti-Corruption Commission, *Audit of Victoria Police Complaints Handling Systems at Regional Level: Summary Report* (September 2016) 51.

¹⁰Ibid.

¹¹ Sinéad O'Brien Butler, 'Policing the Police: Independent Investigations for Victoria' (2018) *UNSW Law Journal* 41(3), 733; Northern Ireland Affairs Committee, 'The Functions of the Office of the Police Ombudsman for Northern Ireland', 2005, 18.

¹² Sinéad O'Brien Butler, 'Policing the Police: Independent Investigations for Victoria' (2018) *UNSW Law Journal* 41(3), 735.

Implementation of Community Liaison Officers

The LIV supports the establishment of a Community Liaison Officer role to engage proactively and effectively with the community. The LIV understands that 62% of Victorian complainants are dissatisfied with the current system which allows complaints to be referred to Victoria Police,¹³ while 67.9% believed the process to resolve a complaint took too long.¹⁴ LIV members submit, implementing Community Liaison Officers will increase communication and ensure that victims' interests are protected.

Community education initiatives have been particularly successful internationally. In New York, the Community Outreach Division offers Outreach programs for vulnerable communities. Immigrants or people who identify as LGBTIQ+ can access these programs to 'engage, inform and empower' them in the process of making a complaint.¹⁵ The Community Outreach Division also conducts workshops and safety presentations for vulnerable communities or schools and also attends resource fairs and other community events¹⁶. While the Community Outreach Division is facilitated directly by the New York Police Department, the strategies for building community trust and connection are directly relevant to the education and prevention functions of IBAC.

The 2018 IBAC Committee's *Inquiry into the external oversight of police corruption and misconduct in Victoria* report recommended the creation of a Complaint Welfare Manager to assist and support complainants in the process of making a complaint.¹⁷ The LIV submits that a Complaint Welfare

¹³ Tim Prenzler et al, 'Complaints against Police: The Complainants' Experience' (2010) 1(1) *Journal of Criminal Justice Research* 1, 8, 10.

¹⁴ Ibid.

¹⁵ New York Police Department, *Immigrant Outreach Unit* (Web Page, 22 August 2020) <<https://www1.nyc.gov/site/nypd/bureaus/administrative/immigrant-outreach.page>>; New York Police Department, *LGBT Outreach Unit* (Web Page, 22 August 2020) <<https://www1.nyc.gov/site/nypd/bureaus/administrative/lgbt-outreach.page>>.

¹⁶ New York Police Department, *LGBT Outreach Unit* (Web Page, 22 August 2020) <<https://www1.nyc.gov/site/nypd/bureaus/administrative/lgbt-outreach.page>>.

¹⁷ Independent-Based Anti-Corruption Commission Committee (n 5) Recommendation 17 xli, 333.

Manager role for supporting complainants could be established alongside a Community Liaison Officer role, with a broader mandate to proactively engage in community education programs.

The LIV recognises the value of employing Community Liaison Officers from a range of backgrounds and disciplines. Reports suggest that the process of making a complaint and the conduct which is the subject of a complaint is likely to be traumatic.¹⁸ As such, Community Liaison Officers must be capable of working with and supporting diverse language, religious and social groups. In particular, a Community Liaison Officer with ties to local Aboriginal and Torres Strait Islander groups would be best placed to support these communities and acknowledge the complex socio-economic challenges that arise in response to and as a result of increased community interaction with police.¹⁹

Remove the ‘exceptional circumstances’ requirements for Public Examinations

The LIV submits that public examinations are a useful tool to educate the community on the impact of corruption and police misconduct which would adhere to the obligations under s 6(f) of the IBAC Act. We recognise that this is also the view of IBAC.²⁰ The LIV supports the removal of the requirement for ‘exceptional circumstances’ to exist in order for IBAC to conduct public examinations more frequently where it is appropriate.

Several limitations exist under legislation to restrict the use of public examinations. As a result, a public examination may only be held where exceptional circumstances exist, such as the public interest outweighs the risk of damage to a person’s reputation, safety or wellbeing and the conduct is an

¹⁸ Hopkins, Tamar ‘Complaints against Police Behaviour in Flemington, Victoria 2006’ (2007) 32(1) <<http://classic.austlii.edu.au/au/journals/AltLawJl/2007/9.html>>.

¹⁹ National Aboriginal and Torres Strait Islander Legal Service, *Strategic Plan 2019-2023*, 9; Oxfam Australia, *In Good Hands: The People and Communities behind Aboriginal-led Solutions* (October 2019), 44.

²⁰ IBAC Special Report: IBAC’s First Five Years (December 2017), 13.

appropriate matter for investigation by IBAC.²¹ Over four years, only five public examinations were conducted out of a total of 55 investigations by IBAC.²²

In New South Wales, the Law Enforcement Conduct Commission ('LECC') is empowered to hold examinations in public or private, based on a determination by the LECC Commissioner.²³ The Commissioner must consider the benefit of exposing the examination or information to the public, the seriousness of the allegation or matter being investigated, the risk of undue prejudice to a party's reputation, the benefit of using a public examination to encourage people with relevant information to assist with the investigation and balance the public interest in exposing the matter with personal privacy obligations.²⁴

Removing the 'exceptional circumstances' presumption lowers the threshold requirement for conducting public examinations in Victoria and would positively impact the community education function of IBAC.

Educative Functions of Office of Victorian Information Commissioner

The LIV wishes to take this opportunity to provide some feedback regarding the educative functions of OVIC. OVIC is established under the *Freedom of Information Act 1982 (Vic)* ('FOI Act')²⁵ and the functions of the Information Commissioner are provided in s 6I of the FOI Act. The functions include:

- to promote understanding and acceptance by agencies and the public of the FOI Act and its objects;

²¹ *Independent Broad-Based Anti-Corruption Commission Act 2011 (Vic)*, s 117(1); IBAC Special Report: IBAC's First Five Years (Dec 2017), p 13.

²² IBAC Special Report: IBAC's First Five Years (Dec 2017), 13.

²³ *Law Enforcement Conduct Commission Act 2016 (NSW)*, s 63(2).

²⁴ *Ibid* s 64(5).

²⁵ *Freedom of Information Act 1982 (Vic)*.

- to conduct reviews of decisions made by agencies and Ministers under the FOI Act;
- to receive and handle complaints made under the FOI Act;
- to provide advice, education and guidance to agencies and the public in relation to the Information Commissioner's functions; and
- to develop and monitor compliance with professional standards, and to provide advice, education and guidance to agencies and the public in relation to compliance with the professional standards.²⁶

LIV members report that the wording of the functions does not appear to extend to allow for creating Practice Notes which purport to instruct agencies on how they should be interpreting and applying exemptions under the FOI Act. The LIV submits that the function is to promote the *understanding* of the FOI Act. However, the statute does not empower the Information Commissioner to issue guidelines unlike other statutes.²⁷

LIV members report that there appear to be some legal flaws in parts of the Practice Notes and to the extent that the Practice Notes are legally flawed, they give rise to issues about inflexible application of policy or acting under dictation in administrative law terms when it comes to either:

- (a) OVIC making a decision on review following their own practice notes; or
- (b) agencies blindly following the Practice Notes because they have been put forward as the way agencies **should** be applying the provisions of the FOI Act.

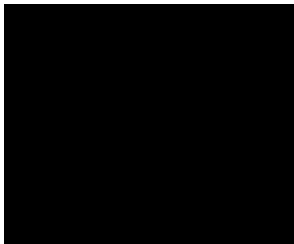
²⁶ *Freedom of Information Act 1982* (Vic) s 6I; Office of Victorian Information Commissioner, *Organisation and Functions* <https://ovic.vic.gov.au/about-us/part-ii-statements/organisation-and-functions/>

²⁷ Such as the *Privacy and Data Protection Act 2014* (Vic) which empowers the Information Commissioner to issue guidelines in relation to privacy.

The LIV recommends that the Integrity and Oversight Committee provides clarity on the educative functions of OVIC in creating Practice Notes on exemptions.

Should you wish to discuss any of these matters further, please contact [REDACTED] to the LIV's Administrative Law and Human Rights Section on [REDACTED] [REDACTED] to the LIV's Administrative Law and Human Rights Section on [REDACTED] [REDACTED]

Yours sincerely,



Sam Pandya

LIV President