# Special report following IBAC's first year of being fully operational

Pursuant to section 162 of the
*Independent Broad-based Anti-corruption Commission Act 2011*

April 2014

ibac independent broad-based anti-corruption commission
Victoria

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Published by the Independent Broad-based Anti-corruption Commission, Melbourne, Victoria. April 2014.

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Printed on Australian-made, 70–100 per cent post-consumer recycled, FSC (Forestry Stewardship Council) certified, carbon-neutral paper by Kwik Kopy, William Street, Melbourne, Victoria 3008.

***Ordered to be printed by the Victorian Government Printer. April 2014 PP No 317, Session 2010–14***

ISBN 978-0-9923961-4-5 (print)
ISBN 978-0-9923961-5-2 (online)

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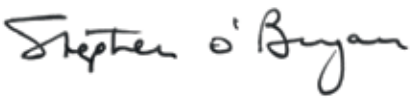
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# Letter of transmittal

To: The Honourable President of the Legislative Council
The Honourable Speaker of the Legislative Assembly

This report, foreshadowed in the *Special report concerning certain operations in 2013* (November 2013), is presented to Parliament pursuant to section 162(1) of the *Independent Broad-based Anti-corruption Commission Act 2011* (IBAC Act).

Relevant formal requirements prescribed for IBAC's special reporting in section 162 of the IBAC Act are addressed in Appendix A.



**Stephen O'Bryan SC**
Commissioner

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# 1. Introduction

In 2012 the IBAC Act was amended to grant IBAC investigative powers as well as to define its main areas of jurisdiction. Those amendments were proclaimed with effect from 10 February 2013.

This special report[1] concerns IBAC's performance of its functions in its first year of full operations, including:

- investigations in the police and general public sector jurisdictions (some of which were referenced in the IBAC special report to Parliament in November 2013[2])
- reviews of internal police investigations and recommendations for reform
- IBAC's important prevention and education programs and initiatives
- IBAC's interpretation and application of the IBAC Act.

Matters investigated by IBAC during 2013 included allegations relating to:

- an assault of an African-Australian man by a police officer stationed in Stawell, resulting in serious injuries
- corrupt conduct by employees of Mitchell Shire Council at the Broadford Works Depot
- passing confidential information to outlaw motorcycle gangs by employees of statutory bodies in Shepparton
- bribery and attempted bribery of public officials employed by the Greater Metropolitan Cemeteries Trust at a particular metropolitan cemetery
- mismanagement of sensitive witnesses and information in the release of highly confidential police documents to organised crime figures
- mishandling of internal bullying complaints by senior Victoria Police officers
- interference by a Councillor into the sale by tender of a church at Crossley, in Moyne Shire in western Victoria.

IBAC reviews of previous investigations included police matters such as:

- allegations concerning the conduct of a former Deputy Commissioner of Police, Sir Ken Jones QPM (reported on separately in February 2014[3])
- an investigation by police into allegations of racist conduct by police at Bairnsdale Police Station
- the possible improper involvement of police in applications to the Victims of Crime Assistance Tribunal (VOCAT)
- alleged unlawful assault, disgraceful conduct, and racial discrimination in the arrest of juvenile offenders.

IBAC corruption prevention and education initiatives developed and delivered during 2013 included:

- research of community perceptions of corruption in Victoria
- a survey of senior public sector employees' perceptions of corruption in public sector agencies in Victoria
- training programs in support of the protected disclosure legislation and regime for public sector agencies
- reviews of public sector integrity frameworks, being the systems, policies and procedures that foster integrity and prevent corruption
- publication of guides, information sheets and other training and education materials regarding IBAC's role and functions, public sector corruption and police misconduct.

IBAC's experience in implementing the IBAC Act and *Protected Disclosure Act 2012* (PD Act) – as with any other new statutory regime – is informing the interpretation, application and possible future amendment of the legislation.

Issues for consideration for the Parliament of Victoria include:

- the extent to which IBAC must be reasonably satisfied before investigating complaints or allegations of corrupt conduct
- the absence of the common law offence of misconduct in public office as something IBAC can investigate
- the desirability of mandatory reporting of possible corrupt conduct to IBAC by public sector body heads and chief executive officers (CEOs) of local councils
- the ability of IBAC to conduct preliminary enquiries or investigations, as occurs in other jurisdictions

[1] IBAC's previous reports to Parliament are noted in Appendix B and are available on IBAC's website at www.ibac.vic.gov.au

[2] See Appendix B.

[3] See Appendix B.

# 1. Introduction

- the extent to which persons can be bound to maintain the confidentiality of information provided to IBAC
- limitations on protecting whistleblowers who disclose possible improper conduct to bodies that are not prescribed under the PD Act
- the inability to refer protected disclosure complaints to all but the Victorian Ombudsman (VO), Chief Commissioner of Victoria Police (CCP) or the Victorian Inspectorate (VI), when it may be often more appropriate to refer complaints to other bodies for investigation.

IBAC has a number of ongoing investigations, including of significant possible serious corrupt conduct in the public sector, which it expects to report on further during 2014.

# 2. Investigations

IBAC has commenced, and in a number of cases completed, investigations into possible public sector serious corrupt conduct and police personnel misconduct. Eleven former Office of Police Integrity (OPI) cases, which were unable to be completed by that agency before it was dismantled, have been completed by IBAC.

From 10 February 2013 to 10 February 2014, 24 new cases were taken up for investigation by IBAC, 10 of which were completed. Some investigations are significant and ongoing, and IBAC expects to report further on them during 2014.

Some IBAC investigations completed in its first year of full operations are summarised below.

## Operation Derwent: serious injuries sustained in a police arrest

In July 2013, IBAC was notified of a complaint by the Fitzroy Legal Service (FLS), acting on behalf of a complainant who suffered injuries whilst being arrested by a then police officer[4].

The arrest occurred after a car in which the complainant was travelling with others was intercepted by police for speeding on the Western Highway near Stawell on 14 November 2010.

The complainant was detained and subsequently charged with a number of offences, including assaulting police, resisting police and threats to cause harm. He was held in custody at Stawell Police Station.

The complainant alleged that he had been punched by a police officer. Although the complainant declined medical attention at the time, he was subsequently treated for a fractured jaw. A senior officer at Stawell Police Station recorded the injury but not the complaint.

The complainant, through the FLS, subsequently complained to the then Police Ethical Standards Department (ESD) and the former OPI, and sought charges of assault against the police officer he alleged had punched him. ESD found no misconduct by the police officer in November 2011.

The charges against the complainant were heard before the Horsham Magistrates' Court on 21 November 2012. The Magistrate, who was strongly critical of the police, found that the complainant had been assaulted and unlawfully detained, and dismissed all but one minor charge.

The FLS then lodged a complaint with IBAC in July 2013, which included allegations that:

- the police officer had used excessive force in arresting the complainant
- the senior duty officer at Stawell had been deficient in investigating the complaint, and the decision to charge the complainant had been excessive
- the ESD investigation of the complaint had been inadequate.

IBAC investigated the complaint, including the use of force, the arrest and charging of the complainant, the initial investigation at Stawell and the decision to prosecute the complainant. In particular, IBAC assessed police oversight and review of the investigation. IBAC's investigation included a review of ESD's files and holding coercive examinations[5].

As a result of the investigation, IBAC found that:

- there was no justification for the use of force in removing the complainant from the vehicle. It was not possible, however, to determine whether the complainant was punched in an unlawful assault by the police officer
- the incident was not managed appropriately, and the police officer had failed to exercise powers of arrest in an appropriate manner. Additionally, an accompanying police officer had failed to exercise a responsibility to intervene

[4] The officer has since resigned.

[5] Pursuant to Part 6 of the IBAC Act, which examinations are required by section 117 to normally be held in private.

# 2. Investigations

- the senior officer's investigation of the incident was inadequate. Witness statements or contact details had not been obtained. Exculpatory evidence had not been considered. Only evidence that would support a prosecution of the complainant had been considered. The senior officer also failed to report the complainant's allegations to ESD
- Victoria Police's oversight and review of the investigation was inadequate.

IBAC has recommended that the CCP consider the evidence obtained by IBAC to determine whether disciplinary proceedings are warranted against the senior duty officer. Disciplinary proceedings against the police officer alleged to have assaulted the complainant are not possible as the officer has resigned from Victoria Police.

## Operation Continent: alleged corrupt conduct at Mitchell Shire Council

In early 2013, Mitchell Shire Council notified IBAC of allegations of corrupt conduct by council employees at the Broadford Works Depot.

The allegations investigated by IBAC included:

- a corrupt business relationship between a council employee and an external contractor
- unauthorised work by council employees, using council materials, in return for cash payments
- invoicing of the council for work not undertaken, and improper use of council staff and property by an external contractor
- theft of council equipment and property, including fuel, tools and vehicle parts, by council employees
- fraudulent purchasing of goods by council employees.

The IBAC investigation, which included physical and electronic surveillance[6] and targeted council audits, confirmed fraudulent purchasing, but could not substantiate the other allegations[7]. However, the investigation did reveal a number of issues in the conduct, management and supervision of the Broadford Works Depot including:

- poor record keeping
- a lack of registers for managing physical assets
- inadequate controls such as regular audits and effective separation of duties
- inappropriate relationships with external contractors.

IBAC notes the close cooperation of council management, in particular the CEO Ms Rebecca McKenzie, during its investigation. IBAC also notes that the council has already taken a number of steps to address the issues raised by the investigation.

IBAC and council management plan to discuss possible corruption prevention and education activities to support Mitchell Shire Council as a result of this investigation.

[6] The latter pursuant to the *Surveillance Devices Act 1999*.

[7] In reaching its findings, IBAC applies a high standard of proof on the balance of probabilities in accordance with the principles established in *Briginshaw v Briginshaw* [1930] 60 CLR 336 at 361-62.

# 2. Investigations

## Operation Toucan: alleged supply of information to outlaw motorcycle gang members

Early in 2013, IBAC received information that several Victorian public sector employees, working at different statutory bodies based in Shepparton, were providing confidential information to members of an outlaw motorcycle gang (OMCG).

IBAC suspended part of its investigation following consultations with Victoria Police's Echo Taskforce, which has been investigating unlawful activity by OMCGs. IBAC was subsequently informed by Victoria Police that relevant alleged criminal activity could not be confirmed in relation to employees at one statutory body.

IBAC was able to establish, however, direct links between at least one of the public sector employees and one or more OMCG members. In particular, IBAC investigated allegations that the employee had supplied names and addresses of vehicle owners, including unmarked police cars, to OMCG members.

It remains possible that a detailed newspaper article about a connected police investigation may have compromised IBAC's investigation, by putting persons of interest to IBAC on alert.

Whilst IBAC did not uncover direct evidence of the employee in question passing information to OMCG members, IBAC has notified the relevant public sector agency head[8] of the employee's:

- proven links to one or more OMCG members
- suspicious conduct regarding other issues in connection with the person's employment
- proven unauthorised or otherwise inappropriate access to some agency-held information
- failure to disclose declarable associations.

These notifications were made in relation to both the employee in question and as a systemic risk to the organisation.

While the investigation has been suspended, IBAC has ongoing contact with Victoria Police in relation to the matter. Accordingly, further details of the entities investigated, as well as the methods used to date in this investigation, have not been revealed in this report.

## Operation Wyong: alleged bribery at a metropolitan cemetery

Allegations of mismanagement and misconduct at cemeteries have been the subject of public concern, and various inquiries by the State Services Authority, the VO and the Victorian Auditor-General's Office (VAGO) over many years. These audits and reviews have highlighted inadequate governance arrangements.

In early 2013, IBAC was informed of alleged attempts to bribe employees of the Greater Metropolitan Cemeteries Trust (GMCT), in order to secure gravesites at a metropolitan cemetery, additional to those allowed under cemetery rules.

IBAC also received information alleging similar corrupt conduct elsewhere, due to high demand and limited supply of new gravesites, particularly at inner suburban cemeteries. At some cemeteries, for example, a maximum of two sites are offered when a deceased person needs to be buried: often the family's preference is for more.

IBAC's investigation, which included witness interviews and use of electronic interceptions[9], assumed identitiy[10] and controlled operations powers[11], was also accompanied by a targeted GMCT audit of relevant gravesite and burial records.

Charges have been laid and are currently before the courts.

IBAC notes the close cooperation of GMCT management during the investigation. IBAC is continuing work with the GMCT to consider potential prevention and education initiatives.

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[8] Pursuant to section 163(3)(a) of the IBAC Act.

[9] Pursuant to the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 1999.*

[10] Pursuant to the *Crimes (Assumed Identities) Act 2004.*

[11] Pursuant to the *Crimes (Controlled Operations) Act 2004.*

# 2. Investigations

## Victoria Police Operation Plyers: police handling of defendant agreement

In May 2013, Victoria Police notified IBAC of an internal complaint regarding a Victoria Police investigation codenamed Operation Plyers, an offshoot from the Petra Taskforce which had commenced in 2008.

Petra Taskforce was established to investigate alleged Victoria Police member connections to the 2004 murder of police informers Mr Terrence and Mrs Christine Hodson. The Taskforce was supervised by a steering committee which included members of Victoria Police senior command, as well as a Deputy Director of OPI. The principal allegation was that the Petra Taskforce steering committee had failed to properly authorise a police investigator in Operation Plyers to obtain information concerning the leak of a police surveillance unit profile to an organised crime figure[12].

The investigator had struck an agreement with a person charged with serious offences, who had undertaken to provide the information. The information and level of cooperation was subsequently considered by the investigator to be insufficient, and the agreement was not fulfilled. The defendant subsequently successfully relied on the agreement to avoid trial and asset confiscation.

In its investigation, IBAC examined the weekly updates of the Petra Taskforce steering committee, the defendant's police file, Victorian Government Solicitor Office's files, the Victoria Police Legal Services Division's files and a record of interview dated 28 May 2013 between the Operation Plyers investigator and the Professional Standards Command (PSC)[13]. IBAC also interviewed and corresponded with members of the steering committee and other witnesses.

There is no record of the Petra Taskforce steering committee, or any member of the committee (or any other person or body) approving the agreement. It is also clear that the OPP was not consulted about the agreement. As a result, IBAC concluded there was no sufficient basis for a finding that the investigator was authorised to enter into the agreement.

IBAC also sought to ascertain whether there was any cause to be concerned that the investigator's relationship with the defendant was in any way unprofessional, inappropriate or improper. No reason for such concern was established.

It was not until August 2011 that the internal complaint was made to PSC. Moreover, there was a further lapse of almost two years until the matter was notified to IBAC. These delays, considered to be innocent, complicated IBAC's enquiries.

IBAC referred the matter – insofar as it related to the conduct of the Operation Plyers investigator and any possible disciplinary proceedings – to the CCP in December 2013[14].

IBAC has since been notified by Victoria Police of its further investigation into the conduct of the investigator, resulting in the complaint allegations being 'unable to be determined'. Victoria Police do not intend to take any further action.

[12] Being the subject matter of Operation Plyers.

[13] PSC was formerly ESD.

[14] This occurred pursuant to section 73 of the IBAC Act. The CCP was also privately briefed by the IBAC Commissioner with further detailed background.

# 2. Investigations

## Operation Hydrogen: police handling of internal bullying complaints

In February 2013, the VO notified IBAC of a complaint made by a senior police officer about Victoria Police management.

In November 2013, Victoria Police notified IBAC of a complaint by the same officer alleging detrimental action in response to his earlier complaint by members of the Victoria Police senior command[15].

Taken together, the complaints included allegations of:

- poor treatment during an internal investigation and denial of natural justice
- detrimental action in a return to active duty to an inferior position, despite the basis for the initial investigation having been found to be unsubstantiated
- lack of action by senior command in responding to the matter.

The IBAC investigation, which included examining relevant documents, interviews and coercive examination of witnesses[16], focused on the decision to direct the senior officer to other duties (so-called 'gardening leave') when the original allegations had been made, and the reasons for delays in the numerous investigations that followed.

Additionally, IBAC sought to establish whether there were any breaches of Victoria Police policies, procedures and protocols that could constitute police personnel misconduct or corrupt conduct under the provisions of the IBAC Act.

IBAC's investigation found that:

- Victoria Police took reasonable steps in response to the initial allegations. However, subsequent multiple investigations conducted into the allegations had taken over 18 months
- IBAC could identify no evidence that any person at Victoria Police intended such a delay. Victoria Police took reasonable steps to ensure the senior officer was updated on the progress of investigations, and provided appropriate welfare and support assistance
- the transfer of position offered following the investigations was appropriate and commensurate with the rank, skills and experience of the senior officer.

Victoria Police and the senior officer were informed of the outcomes of the IBAC investigation in February 2014.

## Operation Blackwood: alleged council interference in property sale

In August 2013, IBAC received a complaint principally alleging interference in the sale of St Brigid's Church in Crossley by a Moyne Shire Councillor.

The allegations were that the Councillor interfered with the private tender process of the sale of St Brigid's Church with the intent to assist a community group to purchase the property at a reduced price.

A particular concern for IBAC was an allegation that the Councillor had falsely told the unsuccessful higher tenderer that the Council would not issue works permits or allow development of the property. This allegedly facilitated a financial advantage for the community group, being a $150,000 reduction in the sale price of St Brigid's Church.

The IBAC investigation included examination of open source information, Council minutes and extended interviews with a number of interested parties.

IBAC's investigation led it to conclude that the complaint was unfounded and the complainant was informed accordingly.

[15] Under Section 65(1) of the IBAC Act, IBAC must investigate a complaint or notification regarding the conduct of the Chief Commissioner, Deputy Commissioners or Assistant Commissioners of Victoria Police.

[16] Pursuant to Part 6 of the IBAC Act, which examinations are required by section 117 to normally be held in private.

# 2. Investigations

## Operation Herbert: alleged unlawful disclosure of information concerning a protected witness identity

In July 2013, Victoria Police notified IBAC of a complaint that a member of its Witness Protection Unit, contrary to the *Witness Protection Act 1991*[17], had disclosed information about a person who had been in the Victoria Police witness protection program.

IBAC's investigation, which included examining relevant documents and conducting interviews, established that the member had released information about the person. However, this was done as part of an application[18] to the Supreme Court of Victoria. The purpose of the application was to release such information to the Victorian Civil & Administrative Tribunal (VCAT), as part of any review of an earlier decision to refuse the person's application for an individual private security licence. In early September 2013, the Court granted the application and authorised the release of the information to VCAT[19].

As such, IBAC found the allegation against the police member to be unsubstantiated. The conduct was part of a lawful process which required the Court to consider certain documents relating to the witness, in the public interest. All interested parties were informed by IBAC of this outcome, including the CCP, earlier this year.

## Operation Warrego: alleged improper use of AUSTRAC information

In early 2013, IBAC received information about possible unauthorised access to the Australian Transaction Reports and Analysis Centre (AUSTRAC) financial transactions database, by a Victoria Police officer.

The alleged unauthorised access, by a Detective Senior Constable in a metropolitan Criminal Investigation Unit, was for information about a known criminal, with a request that the information be sent to a private email address.

IBAC's investigation, which included examining relevant documents and seeking a formal response from the Detective Senior Constable in the matter[20], established that the request for information was for legitimate police purposes, with the private email address used (albeit contrary to police protocols) due to the police officer being on leave at the time.

In notifying Victoria Police, a number of issues were drawn to the attention of the CCP, including the receipt and use of AUSTRAC information by members of police, and work conducted by police officers whilst on recreational leave.

## Operation Tamar: alleged creation of false penalty notices

IBAC investigated an allegation that police officers at a metropolitan police station were falsely issuing penalty notices (predominantly for smoking in the local mall) against known offenders, without the notices ever being served on the offender. The allegation was that the practice had been adopted to secure impressive work performance statistics.

Through the careful analysis of certain raw data and other police station records, IBAC established that the allegations were without foundation, and no pattern of misconduct could be established. IBAC so notified the CCP in January 2014.

[17] Refer section 10(5)(a) of the *Witness Protection Act 1991.*

[18] Pursuant to section 10 of the *Witness Protection Act 1991.*

[19] *Chief Commissioner of Police v YYY* [2013] VSC 473 per Beach J.

[20] Pursuant to a direction under section 84 of the IBAC Act.

# 3. Reviews and recommendations

IBAC reviews select police and public sector investigations, and may make recommendations, relating to important public interest matters. Some of these matters may have been referred by IBAC to other bodies for investigation.

Death or serious injury, or the risk of death or serious injury, as a result of contact with Victoria Police is a serious matter that warrants ongoing scrutiny and review. It is an important, if not critical, element of IBAC's police oversight role.

As such, IBAC maintains a standing 'own motion' interest into deaths, serious injury or risk of death or serious injury associated with police contact, which themselves are notified to IBAC by Victoria Police.

The key objective is to ascertain whether any death or serious injury associated with police contact was a result of action or inaction by police that constituted a failure to discharge the duties and responsibilities of the state, and whether or not anything could have been done to prevent the death or serious injury.

IBAC also monitors the investigation by PSC of more serious referred complaints about police personnel conduct[21], and may formally review PSC investigations[22] and PSC reviews of previous PSC investigations that are the subject of a complaint.

IBAC refers many complaints about possible corrupt or improper conduct in the public sector, either to other integrity agencies such as the VO, or to the heads of public sector agencies or local councils in which possible corrupt conduct is alleged to have occurred.

In doing so, IBAC may flag its intention to review the investigation, and specifically request that the agency concerned notify IBAC of the outcomes. Otherwise, IBAC retains the discretion to monitor and review the handling of all referrals, and has the power to recall matters for investigation itself.

From 10 February 2013 to mid-March 2014, IBAC had reviewed a total of 85 matters, and was actively reviewing 22 matters. As at 14 March 2014, a further 89 reviews were pending, including matters that had been received by IBAC and were awaiting review, and matters that had been requested for review but had not yet been completed by the investigating agency[23].

Some examples of IBAC reviews of police investigations are set out below.

## Allegations about the conduct of Sir Ken Jones QPM

A significant review, which was the subject of a special report to Parliament in February this year[24], concerned previous OPI and VO reports[25] into allegations about the conduct of a former Deputy Commissioner of Police, Sir Ken Jones QPM. The review concluded that the evidence set out in the OPI report did not support an allegation that Sir Ken had engaged in serious misconduct by leaking or facilitating leaking to the media of confidential police information.

[21] See Sections 86L and 86M of the *Police Regulation Act 1958* (as amended).

[22] Under section 65(1) of the IBAC Act, IBAC must itself investigate a complaint or a notification of a complaint about the conduct of the Chief Commissioner, a Deputy Commissioner or an Assistant Commissioner of Police.

[23] These figures include reviews of serious incidents, such as deaths associated with police contact, and non-fatal police shootings. They also include non-police investigations.

[24] See Appendix B.

[25] The OPI report was an investigation report to the VO pursuant to section 62 of the former *Whistleblowers Protection Act 2001*, whilst the VO report was to IBAC pursuant to clause 6 of Schedule 1 of the PD Act.

# 3. Reviews and recommendations

## Operation Preston: Bairnsdale Police Station social club racist stubby holders

IBAC reviewed a PSC investigation into allegations that the Bairnsdale Police Station social club was improperly involved in the design, production and sale of racist 'stubby holders'.

The Victoria Police investigation of the allegations against members of the social club resulted in findings of 'unsubstantiated', except for one police officer, a former Senior Constable, against whom the allegation was 'not proceeded with'.

The IBAC review identified a former Senior Constable as responsible for the design of the stubby holder, and a serving Sergeant as producing them for sale. IBAC further identified that the investigation appeared to have considered each alleged racist element of the stubby holders in isolation, and did not take into account the collective narrative of the design, which if read in sequence depicted the following:

- police member arrives at a call out in Bairnsdale
- member is called 'Yadawg' by an Indigenous person
- member deploys capsicum spray ('Bairnsdale handshake')
- the capsicum spray is implicated in the person catching alight ('Not that flammable')
- the member reports back to the station GOANODAAC ('Gone on arrival, no offence detected, all apparently correct').

IBAC regarded the PSC conclusion that the terms used were not racist as contentious, and noted the PSC acknowledgment of the language and terms used on the stubby holder as not compatible with Victoria Police values.

On 16 January 2014, IBAC recommended to the CCP that the outcome of the investigation be amended to 'substantiated' for the former Senior Constable and serving Sergeant, and that disciplinary proceedings be considered. Victoria Police has accepted the recommendation.

# 3. Reviews and recommendations

## Operation Cobalt: police and victims of crime assistance

In 2013, IBAC reviewed an OPI investigation, Operation Cobalt, into the alleged improper involvement of police officers in applications to VOCAT.

As a result of the review, IBAC confirmed a practice within sections of Victoria Police first identified by OPI of:

- applying for victims of crime assistance for injuries incurred in the course of their duties[26], which may be inappropriate and which may conflict with other processes such as WorkSafe compensation
- receiving applications to VOCAT on behalf of victims of crime, and referring those applications to select solicitors who are former Victoria Police officers.

IBAC brought the matter to the attention of the CCP in July 2013 and recommended Victoria Police consider relevant policy to ensure:

- clear advice on whether or not members may assist victims of crime to submit applications to VOCAT
- a consistent process to any referral of applications to solicitors, with controls to prevent restrictive and inappropriate referral practices
- applications by police for victims of crime assistance to be subject to independent review
- the entitlements of police injured in the course of duty – including victims of crime assistance – to be clearly outlined.

IBAC also identified risks to VOCAT, particularly fraudulent, corrupt or improper practices[27]. These risks were brought to the attention of the Secretary of the Department of Justice (DOJ)[28] in July 2013. Both DOJ and VOCAT were offered an opportunity to engage with IBAC in responding to the issues[29].

## Operation Harp: allegations of unlawful assault, disgraceful conduct, racial discrimination and failure to comply with police manual

In February 2014, in line with the terms of a County Court settlement, IBAC commenced oversight of a PSC review of an incident in April 2009, in which eight Victoria Police officers were involved in apprehending, arresting and detaining suspected juvenile offenders in Williamstown.

The incident was brought to the attention of the former OPI by the Flemington & Kensington Community Legal Service in a complaint lodged in June 2009, which alleged *inter alia* physical assault, unlawful entry, racial discrimination, racial targeting and breaches of the *Charter of Human Rights and Responsibilities 2006.*

The matter was investigated and then referred by OPI to the then ESD in December 2009, and returned to OPI for review in December 2011. IBAC's oversight of the PSC review included a review of the original OPI and ESD reports.

IBAC's oversight of the reviews and reports found that the police officers had failed to comply with procedures, but could not substantiate (or was unable to determine) allegations of assault, disgraceful conduct or discharging capsicum spray without justification. An allegation of failure to comply with an instruction was found not to be substantiated, and the police officers involved were exonerated of an allegation of failure to render appropriate care after exposure to capsicum spray.

IBAC concurred with PSC criticism of aspects of the police handling of the incident, in particular failure to comply with police manual principles and responsibilities, lack of judgment and lack of proportionality.

[26] Section 7(2)(a) of the *Victims of Crime Assistance Act 1996* designates a person as a 'primary victim' and therefore eligible for financial assistance if that person is injured in the course of trying to arrest someone who he or she believes has committed an act of violence.

[27] Importantly, the success of applications made to VOCAT is not dependent on a conviction or even the identity of the alleged offender being known.

[28] Being the public service body head relevant to VOCAT.

[29] Because some of the information provided by IBAC was the subject of statutory restrictions imposed by section 23 of the now repealed *Police Integrity Act 2008,* earlier this year necessary directions were made by IBAC under section 183 of the IBAC Act for such material to be disclosed and considered within and between DOJ, VOCAT and Victoria Police.

# 3. Reviews and recommendations

In advising the CCP of the outcome of this matter, IBAC has noted racist remarks in subsequent emails between some police officers involved, which suggested deeper cultural issues within the peer group.

IBAC has further noted the progress made by Victoria Police since 2009 in reviewing policies and procedures associated with police interaction with minority community groups.

## Recommendations

IBAC can make recommendations in relation to any matter arising out of an investigation of alleged public sector serious corrupt conduct or police personnel misconduct. These recommendations can be made to the head of the relevant public sector agency, the CCP, the responsible minister, or the Premier of Victoria, who must then report to IBAC advising whether or not the recommendation has been accepted and implemented.

In the case of Victoria Police, recommendations must be adopted unless the CCP specifically reports the reasons for not adopting a recommendation to IBAC[30].

IBAC monitors the recommendations it makes and where reports are not received, seeks advice from relevant public bodies on their responses. IBAC intends to report publicly on recommendations and Victoria Police and public sector agency responses each year.

Outstanding recommendations made as a result of reviews by the former OPI to Victoria Police were transferred to IBAC following proclamation of the *Independent Broad-based Anti-corruption Commission Amendment (Investigative Functions) Act 2012*. IBAC also determined that outstanding recommendations made by OPI to Victoria Police would be deemed to be requests made under section 160 of the IBAC Act.

In July 2013, IBAC requested advice from Victoria Police on 40 outstanding recommendations made by OPI. Victoria Police advised IBAC that 20 of these recommendations had been implemented. Two recommendations had not been implemented, due to a requirement for legislative amendments or additional funding. A further 18 recommendations remained to be implemented[31].

The outstanding active matters include recommendations to review or develop policies, procedures and training to address specific integrity and corruption risks. The recommendations cover property and exhibit handling, the reporting of wrongdoing in the workplace, stop and search powers, specialised training for police who work in service areas with a significant Indigenous population, covert human source management, and issues related to police IT systems.

[30] See sections 159(1) and (6) of the IBAC Act. Note: section 161 relates to the obligations of the CCP.

[31] Note: two of the 18 recommendations are 'pending' – ie. Victoria Police needs to advise IBAC whether they will be actioned or not.

# 4. Prevention and education

IBAC's prevention and education functions are specifically mandated in the objects of the IBAC Act, which include:

- preventing corrupt conduct and police personnel misconduct
- educating the public sector and the community about the detrimental effects of corrupt conduct and police personnel misconduct on public administration, and ways in which such conduct can be prevented
- improving the capacity of the public sector to prevent corrupt conduct and police personnel misconduct.

Specifically, section 15(6) of the IBAC Act states that IBAC's prevention and education functions include but are not limited to:

- examining public sector systems and practices
- providing information to, consulting with and making recommendations to the public sector
- providing advice, training and education services to the public sector
- providing information and education services to the community
- publishing information on ways to prevent corrupt conduct.

IBAC's jurisdiction for identifying and preventing corrupt conduct extends across the entire Victorian public sector[32], including members of Parliament, the judiciary, statutory authorities and state and local government[33]. IBAC also has a broad role in relation to police personnel misconduct[34].

IBAC's initial prevention and education activities have included:

- research to gather intelligence and inform strategy development
- engagement at various forums that include public sector employees and private providers of state and local government services
- reviewing current integrity frameworks, including corruption prevention policies, procedures and practices, in various sectors
- training state and local government employees
- publishing information, tools, resources, articles, forms and guides
- advising on particular ethical, integrity or conduct issues as they arise.

As a new organisation and Victoria's first anti-corruption agency with a broad-based jurisdiction, an early focus has been to gain a comprehensive understanding of the operating environment and to identify where IBAC's prevention and education activities are most efficiently and effectively directed.

At this stage of operation, IBAC has limited data on corruption issues and risks across the whole public sector in Victoria (including state and local government authorities, parliamentary officers and the judiciary). Such information is critical to ensuring IBAC effectively delivers both its statutory investigative, and prevention and education functions. IBAC is building its information and intelligence holdings through its early operations, as well as by conducting focused research and a strategic intelligence assessment.

[32] The Victorian public sector includes some 3,600 agencies and bodies, employing approximately 270,000 public servants.

[33] There are 79 councils employing more than 38,000 people.

[34] Victoria Police includes 14,800 employees (including police members, public servants, protective services officers, forensic scientists and other specialists).

# 4. Prevention and education

## Researching corruption in Victoria

In 2012, IBAC engaged the Australian National University (ANU) to conduct foundation research on corruption in Victoria. The initial focus was to examine perceptions of corruption in Victoria.

A national poll was conducted by the ANU in September 2012, in which a larger number of Victorians were surveyed so that a specific data set could be compiled for this state. This was followed in November 2012 by a number of focus groups, held in Melbourne and regional Victoria.

The results for Victorians showed a strong community perception that corruption had increased, although few respondents could provide examples of a personal experience of corrupt conduct.

For the second phase of the research project, the ANU surveyed more than 800 senior public sector employees on their perceptions of corruption in the Victorian public sector. The survey results suggested that many senior Victorian public sector employees would have trouble identifying corruption risks, and would not know where to report corruption.

The majority of the respondents either did not know or preferred not to identify any emerging corruption risks for their organisation. One fifth of respondents did not know where to report corruption and almost half said they would not feel protected if they reported corruption. Conducted before IBAC commenced full operations, the research highlights that there is much work to be done to encourage people to report suspected wrongdoing within the Victorian public sector, safe in the knowledge that they will be protected when they do so.

In September 2013, IBAC published a research paper summarising the research findings. The paper, *Perceptions of corruption in Victoria,* can be found on the IBAC website at www.ibac.vic.gov.au.

### Perceptions of corruption research

**Victorian community perceptions**

- 43 per cent believe that corruption has increased in the past three years
- If corruption is suspected or observed, half of the respondents would not know where to report it
- If they were to report, 55 per cent would report to the police, and 19 per cent to the Ombudsman
- One in five report that state and local government are affected by corruption; one in three report that federal government is affected by corruption
- Institutions that people believe are most affected by corruption are the media, trade unions and political parties
- Institutions that people believe are least affected by corruption are the armed forces, police and the public service

**Senior Victorian public servants' perceptions**

- 17 per cent thought that corruption had increased in Victoria in the past five years, while nine per cent thought it had decreased
- One in ten respondents were not aware of the existence of an integrity framework within their department/agency
- Respondents generally suspected more corruption in departments/agencies other than their own
- One in ten respondents had reported corruption; 42 per cent thought their report of corruption had been handled effectively
- Almost half of the respondents did not feel confident they would be protected from victimisation should they report corruption

Source: *Perceptions of corruption in Victoria,* IBAC 2013.

# 4. Prevention and education

## Examining integrity frameworks

With the assistance of the ANU, IBAC has reviewed integrity frameworks – the systems, policies and procedures instituted to minimise corruption risks – across state and local government bodies in Victoria.

The clear conclusion drawn from this research with state government agencies is that corruption is generally not on the radar of those agencies surveyed. While there is considerable awareness of fraud and of misconduct, corruption itself is not a focus. This reinforces the findings from the survey of senior Victorian public servants noted earlier.

The research has yielded valuable data and information on gaps, good practices and areas where IBAC can assist state government agencies to strengthen their resistance to corruption. Detailed findings will be published by IBAC this year.

IBAC is also undertaking research with a small group of councils to examine integrity frameworks in local government.

Each year in Victoria, local government collects around $7 billion in operating revenue, expends $6 billion, and manages assets with a total value of $60 billion[35]. These resources are at risk if councils are not active, vigilant and effective in managing corruption risks.

This research project aims to identify good practice, as well as areas where there is scope to work with the local government sector to strengthen corruption prevention.

Each participating council has completed an organisational survey of current policies, procedures and corruption prevention strategies. Following IBAC's analysis of the survey responses, council staff will be surveyed to gauge their awareness of policies and procedures, perceptions of corruption risks and willingness to report suspected corrupt conduct. IBAC plans to report on the results of this project later this year.

## Building strong partnerships

IBAC is working with other integrity agencies and public sector bodies to achieve the best anti-corruption outcomes and to ensure that agencies retain primary responsibility for preventing corruption and promoting integrity in their own organisations.

In October 2013, IBAC convened an inaugural meeting of the IBAC Commissioner, the Victorian Inspector, the VO, the Auditor-General, the Chief Municipal Inspector, the Public Sector Standards Commissioner and the Commissioner for Law Enforcement Data Security. These meetings aim to strengthen cooperation and coordination across Victorian integrity agencies, whilst also respecting each agency's distinct functions.

A Prevention and Education Advisory Group involving IBAC, the VO, VAGO, the Local Government Investigations and Compliance Inspectorate (LGICI) and the State Services Authority[36], has also been established at senior officer level.

In September 2013, IBAC co-hosted a Corrupt Conduct and Investigations Symposium with the Institute of Public Administration Australia (IPAA) Victoria. The symposium, which was attended by more than 200 people, focused on the new integrity system in Victoria, including misconduct and corruption case studies. IBAC is working with IPAA Victoria and other integrity agencies to hold a second symposium in 2014.

[35] *Fraud Prevention Strategies in Local Government,* VAGO, 6 June 2012, p vii.

[36] Now known as the Victorian Public Sector Commission (VPSC).

# 4. Prevention and education

## Building awareness of IBAC and our role

IBAC has sought to raise its profile across the public sector and the community to assist people to understand the new integrity system, as well as provide guidance on how to recognise and report public sector corruption and police misconduct.

IBAC has built on work commenced by the former State Services Authority to develop a guide to the Victorian integrity system, in partnership with the VO, VAGO and the LGICI. The guide aims to help Victorian public sector employees to better understand the functions of integrity agencies, and to reinforce the role each employee plays in ensuring ethical conduct and preventing misconduct and corruption.

A series of information sheets have been published on IBAC's role and functions, making a complaint about suspected corruption, and on making a protected disclosure. Specific information has also been developed for heads of agencies and public bodies. A fraud prevention checklist was also published to coincide with international fraud awareness week in November 2013. Further information and resources are being developed.

The Commissioner, CEO and senior officers of IBAC have spoken at a range of events, to audiences ranging from lawyers to public servants, councils and community organisations. Briefings on IBAC's role have also been held with the Victorian Secretaries Board and the Deputy Secretaries of state government departments.

A regional outreach program is being developed to provide structured information and awareness raising across Victoria during 2014.

## Developing targeted education programs

A generic training package has been developed to assist public officers and the community to understand IBAC's role and functions. Between 10 February 2013 and 10 February 2014, more than 600 participants have attended this training.

IBAC has developed a series of practitioner forums for public sector staff to provide information, resources, best practice and practical advice about corruption prevention. The first forum, conducted in February 2014, focused on fraud prevention and was attended by 35 people from the state and local government sectors.

Ensuring public sector workers in regional Victoria have equal access to training is important. In 2013, four protected disclosure seminars were held in regional Victoria, with 26 participants. One general training session about IBAC's role and function was also delivered to a region with 20 participants.

IBAC also participates in the probationary Constables' training program at the Victorian Police Academy. From 10 February 2013 to 10 February 2014, IBAC delivered 17 sessions about its role in relation to police misconduct. Discipline investigators (police who undertake internal investigations across Victoria) have also been provided with information about IBAC's role and functions at their monthly course.

# 4. Prevention and education

## Supporting protected disclosures

Targeted training has been provided for protected disclosure coordinators on their obligations under the PD Act.

Between 10 February 2013 and 10 February 2014, 11 training sessions for coordinators were delivered with 142 out of 154 coordinators attending. A further six sessions about the new protected disclosure regime were delivered to public sector agencies to increase employee awareness.

Guidelines were also published on making and handling protected disclosures and welfare management.

In February 2014, protected disclosure coordinators who undertook IBAC training on the implementation of the new protected disclosure regime were surveyed about how they had applied the knowledge from the training in their workplace, and to identify further training needs. Over 76 per cent of respondents reported having good or high levels of knowledge about the essential elements of the protected disclosure regime six months after training.

Education programs are being run bi-annually for new protected disclosure coordinators, with further training being identified for existing coordinators to build knowledge and support practice sharing among existing coordinators. Further work will also be informed by an initial review of public bodies' implementation of the PD Act which will be completed later this year.

Encouraging people to report corruption and making them aware of the protections available to them under the PD Act will be an important ongoing focus of IBAC's work, especially given the 'Perceptions of corruption' research, which showed almost half of the senior public service employees who responded did not feel confident they would be protected from victimisation should they report corruption.

## Developing a longer term strategy

Building on our early work, IBAC is developing a three to five year prevention and education strategy which will outline how IBAC will work across the public sector to build capacity to prevent corruption and police misconduct.

Part of this work involves mapping existing corruption prevention and education strategies and initiatives across the public sector, identifying where there are gaps or emerging risk areas, and looking at the most efficient and effective way that IBAC can contribute. This work will be completed over the next 12 months.

Work has also commenced on projects to provide online training and to build communities of practice.

As IBAC's complaints management and investigations mature, further information will be collected about the risks, behaviours and culture enabling corruption in the public sector and more targeted education will be developed. These activities will also inform the development of case studies and lessons learnt for practitioners.

### Education initiatives 10 February 2013 – 10 February 2014

| | |
|---|---|
| **Number of education initiatives** | 73 |
| **Number of participants** | >1,600 |
| **Customer satisfaction rating** | 95.96% |

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# 5. New integrity scheme legislation

IBAC and other Victorian integrity agencies, in particular the VO and VAGO, are navigating new and complex legislation.

IBAC's *Annual Report 2012-13* expressed confidence that the IBAC Act provided a solid initial framework for Victoria's new integrity regime and that, as with any such legislation, it would not be until it was applied in practice that areas for improvement would be identified[37].

In its November 2013 special report, IBAC further explained its role as being to implement the legislation and engage Parliament and the government on any proposed refinements and amendments, based on a body of work made up of experience and case load[38].

This discussion explains IBAC's approach to aspects of the legislation following IBAC's first year of being fully operational, highlights areas that may benefit from amendment, and identifies some aspects of the legislation that restrict the performance of IBAC's investigative functions.

## The IBAC Act

### Good practice powers not found in the IBAC legislation

Some powers commonly found in equivalent legislation in other jurisdictions are not found in the IBAC legislation.

There is nothing, for example, in the IBAC Act which expressly permits preliminary enquiries or preliminary investigation[39]. However, these are often necessary in deciding whether or not a matter should be investigated by IBAC, referred to another body for investigation, or dismissed in accordance with section 58 of the IBAC Act. Accordingly, IBAC undertakes preliminary enquiries and investigations, without using coercive and some other powers[40].

Other examples of powers not found expressly in the IBAC Act relate to notifying persons of interest who are exonerated or cleared by an investigation[41], or reviewing its own prior decisions. Accordingly, IBAC has adopted a practical approach and exercised discretion in doing so, where appropriate, by reference to good practice in other jurisdictions.

### Dismissing complaints

It is unclear whether complaints and notifications can be dismissed by IBAC on discretionary grounds other than the sole one prescribed in the IBAC Act[42]. This lack of clarity stems from the wording of section 58, which provides that IBAC must, in accordance with the IBAC Act, either dismiss (if there are grounds to do so), investigate or refer a complaint or notification.

The legislation effectively provides that complaints or notifications stand dismissed following a decision by IBAC that a matter does not warrant investigation[43], as distinct from any IBAC decision to dismiss matters on more general discretionary grounds.

Nevertheless and again taking a practical approach, IBAC considers itself generally able to dismiss matters under section 58(a) for other than the one prescribed ground, based on a reasonable exercise of discretion.

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37 *IBAC Annual Report 2012–13,* p 13.

38 *IBAC Annual Report 2012–13,* p 21.

39 Compare section 13A of the *Ombudsman Act 1973* and section 20A of the *Independent Commission Against Corruption Act 1988* (NSW).

40 Drawing on legislative provisions allowing the receipt of information eg. sections 15 and 56 of the IBAC Act.

41 Section 163 expressly gives IBAC power only to notify complainants and other prescribed persons in government about the results of investigations.

42 See section 68(4) of the IBAC Act. Section 68(3) also prescribes a non-discretionary basis for dismissal, being a protected disclosure complaint that no other prescribed body can investigate.

43 See subsections 68(1) and (2) of the IBAC Act in particular.

# 5. New integrity scheme legislation

## Coercive examinations

The IBAC Act also lacks clarity in relation to coercive examinations, which are an important part of IBAC's investigative functions.

In particular, the power for IBAC to 'hold' examinations[44] may or may not be intended to restrict who may preside over (ie. conduct) them. If that is the intent, then relevant delegation provisions[45] mean that the choice beyond IBAC Commissioner would be limited to the Deputy Commissioner(s) and the CEO, who may not have legal qualifications yet may need to make important legal rulings.

In contrast, section 68 of the former *Police Integrity Act 2008* used clear language in that the Director of OPI could 'conduct' examinations (a function delegable to any person qualified to be a judge).

It is arguable that section 115 of the IBAC Act relates only to the decision to hold, and the physical holding of, examinations – as distinct from who presides over examinations. Nevertheless IBAC is limiting those who so preside in order to avoid any risk of invalidity.

The IBAC Act provides that IBAC may give directions as to who may be 'present' during an examination[46]. But it does not clearly indicate whether a non-IBAC officer permitted by IBAC to view the examination live on a remote monitor – something commonly done by other investigative bodies for a number of sound reasons – can be said to be 'present'.

There is then uncertainty whether a direction[47] needs to be given by IBAC, whether an examinee is entitled to be informed, and whether the subject of the direction needs to be named (there may be good reasons not to). Accordingly, and because there is nothing to prevent IBAC allowing a third party to view a live internal broadcast of an examination, IBAC is proceeding on the basis that non-IBAC officers may do so where appropriate without triggering legislated obligations[48].

## Confidentiality notices

An important investigative tool is the ability to bind persons who have provided certain information to ongoing confidentiality, and thereby reduce the risk of prejudicing an investigation.

The IBAC Act provides for confidentiality notices in respect of 'restricted matters', defined as including *inter alia* evidence 'given' or the contents of documents 'produced' to IBAC[49].

The IBAC Act, however, is not clear whether documents or evidence provided voluntarily (as opposed to under compulsion) to IBAC would constitute a 'restricted matter'. If not, then a confidentiality notice cannot be issued by IBAC.

As IBAC considers it important that all relevant material to an investigation, regardless of how it is provided, should be considered 'restricted matter' and where appropriate made the subject of a confidentiality notice, it is proceeding on that basis.

[44] See section 115 of the IBAC Act.

[45] See subsection 32(2)(a) of the IBAC Act

[46] See section 119(1) of the IBAC Act.

[47] Per subsection 119(1)(a) of the IBAC Act.

[48] See section 119 of the IBAC Act.

[49] See section 42(3) and definition of 'restricted matter' in section 3 of the IBAC Act.

# 5. New integrity scheme legislation

## Threshold for corrupt conduct investigations

Concerns have been raised publicly that the legislative threshold for IBAC to commence an investigation[50] in its public sector jurisdiction is vague, too high and therefore liable to challenge in the Supreme Court.

Under the IBAC Act, IBAC is required to identify conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a prescribed indictable offence. Additionally, IBAC must be reasonably satisfied that alleged corrupt conduct constitutes serious corrupt conduct.

Parliament has clearly sought to balance the need for an effective integrity system against the need to protect individuals and public sector entities from arbitrary invasions of their privacy and property. When a statute prescribes reasonable grounds for a state of mind, it requires facts which are sufficient to induce that state of mind in a reasonable person[51].

Read in context, the 'conduct' in question is taken to include the conduct in a complaint[52] or notification[53], about which the complainant or notifier has a relevant belief. Due to IBAC having 'own motion' investigation powers under subsection 60(1)(c), it may also be conduct IBAC has otherwise become aware of. Finally, it may be conduct which is the subject of compulsory notifications[54] (ie. that appears to the notifying entity to involve corrupt conduct).

As seen above, the IBAC Act prescribes varying states of mind to complainants and notifiers to IBAC regarding alleged corrupt conduct. Nevertheless, a uniform outcome is achieved with IBAC reaching (or not reaching) the requisite state of mind of being reasonably satisfied about the existence of serious corrupt conduct.

Applicable legal authority has it that being satisfied is reasonable if it is based on facts or inferences supported on logical grounds. It does not need to be based on material that would constitute admissible court evidence, nor on a standard as high as 'beyond reasonable doubt'[55]. It is a higher standard than 'suspicion', and an approximate equivalent of 'belief'.

The High Court in *George v Rockett*[56] referred to suspicion and belief as different states of mind, with suspicion a state of conjecture or surmise where proof (ie. evidence) is lacking, and belief being an inclination to assent to, rather than reject, a proposition.

As other integrity bodies have often noted, corrupt conduct normally occurs covertly, using sophisticated means, including false records and documentation. To uncover such behaviour often requires good inside information and painstaking, resolute investigation.

IBAC therefore commences investigations where there are reasonable grounds for it believing corrupt conduct[57] was or is occurring, and which it considers is serious enough to warrant attention.

There have been corrupt conduct allegations where IBAC has not felt able to commence investigations because of threshold restrictions in the IBAC Act[58]. Not all of these were suitable for referral elsewhere. This constraint has possibly undermined IBAC's ability to perform and achieve its principal objects and functions.

Whilst the balance between an effective integrity system and civil liberties is quite properly a matter for the Parliament to determine, this constraint should be a matter of concern and further consideration.

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[50] See in particular sections 4 and 60(2) of the IBAC Act.

[51] See judgement of High Court of Australia in *George v Rockett* [1990] 170 CLR 104.

[52] Refer section 51 of the IBAC Act, where a person may make a complaint about conduct the person believes may be corrupt conduct.

[53] Refer section 57(1) of the IBAC Act, where a public sector entity head may notify IBAC of any matter believed on reasonable grounds to constitute corrupt conduct.

[54] As contained, for example, in section 16E of the *Ombudsman Act 1973* and section 19A of the *Audit Act 1994* respectively.

[55] Were the threshold for commencement of an IBAC investigation so high, investigation would seem to be a waste of resources as the matter presumably could immediately be channelled towards prosecution, an approach that would be at odds with principal objects and functions of IBAC that include 'exposure' of serious corrupt conduct. Furthermore, IBAC could hardly be expected to be seen to fairly and open-mindedly investigate, and potentially publicly report on afterwards, allegations or evidence of corrupt conduct when required at an earlier stage to be convinced of same on the criminal standard.

[56] See judgement of High Court of Australia in *George v Rockett* [1990] 170 CLR 104.

[57] As defined in section 4 of the IBAC Act.

[58] See sections 4 and 60(2) of the IBAC Act.

# 5. New integrity scheme legislation

## Misconduct in public office

The IBAC Act does not include the common law offence of misconduct in public office (MIPO) as something IBAC can investigate in its corrupt conduct jurisdiction. This contrasts with other integrity regimes in Australia, and has been criticised publicly.

According to Hansard, MIPO was not included as an offence that IBAC itself could investigate principally because it can be based on less than serious offences. Furthermore, as IBAC is intended to investigate only serious corrupt conduct, other bodies such as Victoria Police and the VO can and should investigate credible allegations of MIPO.

However, the offence of MIPO can be serious indeed[59]. And whilst the legislation is clear that IBAC should investigate only the most serious allegations or concerns of corrupt conduct, MIPO clearly can fall into this category and less serious instances of possible MIPO could still be referred by IBAC to other prescribed bodies for investigation.

Once this is appreciated, it must follow that a body like IBAC, whose primary functions include the exposure of serious corrupt conduct within the public sector, should be able to investigate allegations of serious MIPO.

## Protected disclosures

### Notifications and protected disclosure status

The new whistleblower protection regime, which IBAC now principally administers, raises issues concerning the intended threshold for disclosures to qualify for relevant protections[60]. In this regard, it is presumed that Parliament intended that people who come forward, often bravely, with credible information of improper conduct within an organisation, should be protected[61].

The primary express purpose of the PD Act is to encourage and facilitate disclosures of improper conduct within the public sector by providing protections and confidentiality for those who make disclosures[62]. The main definition of protected disclosure is one made in accordance with Part 2 of the PD Act[63]. That requires, *inter alia*, a disclosure to be made in accordance with the prescribed procedure[64] and to an entity that can receive same[65].

However, there are situations where persons who have disclosed information appear not to qualify for protection[66]. IBAC interprets the PD Act such that persons cannot be considered for protected disclosure status if they first make a disclosure to another public sector entity, and where IBAC is not notified under the PD Act by an entity that is prescribed for the purpose of receiving such a disclosure.

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

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[59] *Blackstock v R* [2013] NSWCCA 172; *Cannon v Tahche* [2002] VSCA S4; *Jaturawong v R* [2011] NSWCCA 168. See also *DPP v Marks* [2005] VSCA 277; *DPP v Armstrong* [2007] VSCA 34; *R v Bunning* [2007] VSCA 205; and *R v Quach* [2010] VSCA 106.

[60] For a disclosure to qualify as a 'protected disclosure complaint' it must, *inter alia,* satisfy section 9(1) of the PD Act as information that shows or tends to show (or that the discloser so believes on reasonable grounds) that improper conduct (as defined) or detrimental action (against a protected disclosure complainant) has occurred.

[61] The principal protections are confidentiality and sanctions against reprisal or victimisation.

[62] See section 1 of the PD Act.

[63] See section 3 of the PD Act.

[64] See section 12(1) of the PD Act. The prescribed procedure for making a disclosure to IBAC is governed by the *Protected Disclosure Regulations 2013.*

[65] See section 13 of the PD Act.

[66] For example, corrupt conduct notifications, whether mandatory or voluntary, as well as notifications from the VO about police related complaints.

# 5. New integrity scheme legislation

### Investigating Members of Parliament

There seems to be a misconception that because potential protected disclosures about Members of Parliament can only be made to Parliament's Presiding Officers, IBAC can only investigate possible serious corrupt conduct by a Member once notified by a relevant Presiding Officer.

IBAC does not read the relevant legislation in that way[67]. Upon such a complaint being made directly to it, IBAC will inform the complainant of the need to direct the complaint to the relevant Presiding Officer should PD Act protections be sought. IBAC otherwise regards itself as able to investigate such matters (ie. whether or not IBAC is subsequently notified of a possible protected disclosure by a Presiding Officer).

### Limitations on referrals of protected disclosure complaints

Under section 73 of the IBAC Act, IBAC can only refer protected disclosure complaints to a limited number of entities, being the VO, Victoria Police, and the VI.

In some cases, it has been that the matters would be better referred to another more specialist integrity body[68] or to the head of the relevant public sector entity. Consideration therefore should be given by Parliament to broadening the choices available to IBAC for its referrals of such matters[69]. At the very least, it seems desirable the VO should have that choice for such referrals from IBAC.

## IBAC or police to investigate?

Another area of uncertainty concerns whether or not Victoria Police may investigate police misconduct or unlawful conduct without reference to IBAC. Under current legislative arrangements, some of which predate the new integrity scheme legislation[70], the circumstances in which police must notify IBAC (and await referral) are unclear.

Nevertheless IBAC reads the relevant legislation[71] as requiring Victoria Police not only to notify IBAC promptly of possible protected disclosures, but also to await a referral from IBAC before commencing any investigation. In the past, Victoria Police has taken a different view regarding its ability to commence such investigations without such a referral.

This issue was discussed constructively in late 2013 between the IBAC Commissioner and the CCP. As a consequence, new procedures are being implemented to ensure a consistent approach between the two agencies.

[67] See section 19 of the PD Act in particular.

[68] Such as the LGICI and the Racing Integrity Commissioner.

[69] A much broader choice of referral bodies is prescribed in respect of referred matters that are not protected disclosures.

[70] See Part IVA of the *Police Regulation Act 1958* (PR Act) in particular.

[71] Part IVB of the PR Act deals with protected disclosures within police ranks.

# 5. New integrity scheme legislation

## Corrupt conduct notifications

### Mandatory reporting

Mandatory reporting of apparent corrupt conduct contributes to the integrity system.

Mandatory reporting by the VO and VAGO of apparent corrupt conduct[72], for example, serves the system well. Similarly, mandatory reporting of corrupt conduct and police personnel misconduct to IBAC by the CCP[73] assists IBAC greatly in its role.

However, public sector body heads and CEOs of local councils[74], whilst having the power to report, are not obliged to notify IBAC of corrupt conduct they become aware of.

IBAC believes that the Parliament should consider whether such reporting by principal officers of public sector and local government entities – as is the case in other Australian jurisdictions – should be mandatory, at the very least for more serious matters within the public sector.

### Dismiss, investigate or make referral – another category

In receiving complaints and notifications, IBAC must dismiss, investigate or make a referral to another body[75]. There are practical issues, however, that warrant consideration of a fourth option, being to 'park' or suspend such a decision indefinitely.

For example, IBAC receives notifications from VAGO, pursuant to section 19A of the *Audit Act 1994,* of mandatory theft and loss reports[76] assessed as possibly involving corrupt conduct. Often these are already being investigated by police, because the relevant department or statutory entity has previously reported the matter to Victoria Police.

For notifications of this kind, to dismiss, investigate or refer is not ideal. Dismissal seems inappropriate, investigation by IBAC seems inefficient, and referral back to the investigating entity somewhat pointless and time consuming.

It seems sensible to consider a fourth general option that would permit IBAC, at its discretion, to suspend its decision and monitor progress, seek information as necessary, review the outcome, or even call in the investigation when appropriate.

### Confidentiality restrictions and notifying entities

A final issue arising in relation to corrupt conduct notifications is whether the confidentiality restrictions set out in section 184 of the IBAC Act are intended to apply to notifying entities as well as to complainants.

IBAC may notify the person who made a complaint or notification of the action taken by IBAC, namely whether to dismiss, investigate or refer it. Where IBAC has decided to either investigate or refer a notification, section 59(5) of the IBAC Act requires IBAC to notify the recipient in writing that it is an offence under section 184 to disclose the action taken.

The language of section 184 suggests however that confidentiality restrictions are intended only to apply to complainants (and persons to whom they are permitted to divulge the otherwise restricted information to) rather than to notifying entities.

The apparent inconsistency between sections 59(5) and 184 has already given rise to uncertainty and potential difficulty for one notifying entity. Legislative clarification therefore seems desirable.

[72] See, for example, section 16E of the *Ombudsman Act 1973* and section 19A of the *Audit Act 1994.*

[73] See section 86M(2) of the PR Act.

[74] See section 57(1) of the IBAC Act.

[75] See section 58 of the IBAC Act.

[76] Ministerial Standing Directions, made under the *Financial Management Act 1994*, require public sector bodies to provide written reports of all suspected or actual theft, arson, irregularity or fraud in connection with the receipt or disposal of money or other property, to VAGO and the Minister for Finance.

# 5. New integrity scheme legislation

Tending to confirm Parliament's present intention that section 184 should only apply to complainants, IBAC Act sections 163(1), (3) and (8) respectively provide that:

- IBAC may provide a complainant with information about the results of an investigation
- IBAC may provide written information about the commencement, conduct or results of an investigation, including any action taken and any recommendation that any action or further action be taken, to certain prescribed persons within government
- such information given to a complainant must include a written statement that it is an offence under section 184 to disclose the information.

It can be seen therefore that in the context of information relating to outcomes of IBAC investigations, confidentiality restrictions clearly apply only to complainants, and not government members or public service entities.

Any clarification in this area should allow notifying entities to remain flexible in the way they deal with section 59(1) information from IBAC to ensure that any potential corrupt conduct is fully and adequately addressed.

As stated in the November 2013 report[77], it is important that public sector bodies do not abrogate their primary responsibility for maintaining integrity and ensuring good governance and ethical conduct, and are able to maintain their own preventative and investigative capacity.

## Issues around referrals

IBAC may refer certain complaints or notifications to a public sector body head for investigation[78].

Issues have arisen between IBAC and other statutory body heads concerning these provisions. One involved a statutory body that had previously decided itself that the referred matter did not warrant investigation. In that case, IBAC had not been made aware by the complainant before its referral of the complaint that the referral body had already looked into the matter and reached that conclusion.

IBAC is proceeding on the basis that referral entities are to consider the matter referred to them in good faith, but are not required to undertake a fresh investigation. Such an approach seems especially sensible where IBAC has referred a matter without preliminary enquiry or investigation, leaving it to that body to determine whether a full investigation is warranted. Indeed, IBAC's own experience is that preliminary enquiries or investigation can be sufficient to establish that any further or full investigation is unwarranted.

In circumstances where a complainant is not satisfied with a decision by an entity not to investigate a matter, IBAC can withdraw a referral and investigate the matter itself[79].

On a separate issue, a situation arose in 2013 where, in its governing legislation, a department to whom a referral was made lacked express investigative functions or powers. As a result, the department initially felt unable to investigate alleged systemic theft of its property.

Whilst there is no doubt that many departments and statutory bodies lack such express functions and powers, any perceived inability of any public sector body, whether or not it receives a referral from IBAC, to investigate possible serious internal wrongdoing undermines the proper performance of its managerial functions, and would be cause for concern.

## Conclusion

The discussion of the new Victorian integrity framework legislation in this report reflects ongoing practical experience by IBAC, and is intended to contribute to further consideration of the issues by the Parliament, as deemed appropriate.

IBAC expects to further engage the Parliament, so that the legislation continues to enable IBAC to fully and effectively perform its functions in exposing and preventing police misconduct and corrupt conduct within the broader Victorian public sector.

[77] See Appendix B.

[78] See section 73 of the IBAC Act.

[79] Under section 79 of the IBAC Act.

# Appendices

## Appendix A – Public reporting requirements in section 162 of the IBAC Act

Nothing in this special report is considered to be covered by sections 162(2) to (4) (which require, respectively, that the principal officer of a public body that is the subject of adverse findings be afforded the opportunity to respond, and that non-adverse comment or opinion about any persons be shown to them in advance).

IBAC otherwise considers that no named individuals are the subject of adverse comment or opinion in this report such that section 162(3) obligations apply to them (which require their responses to be fairly set out).

To the extent that persons are identified in the report and are not the subject of adverse comment or opinion, IBAC is satisfied in accordance with section 162(7) that:

a) it is desirable to do so in the public interest

b) it will not cause unreasonable damage to any such person's reputation, safety or well-being

c) each such person is not the subject, nor for that matter intended to be the subject, of any adverse comment or opinion.

# Appendix B – Previous IBAC reports

| Report title | Publication date |
|---|---|
| *Annual Report 2012–13* | September 2013 |
| *Special report concerning certain operations in 2013* | November 2013 |
| *Special report concerning allegations about the conduct of Sir Ken Jones QPM in relation to his dealings with certain confidential Victoria Police information* | February 2014 |

These reports are available on IBAC's website at www.ibac.vic.gov.au

# Abbreviations

| | |
|---|---|
| CCP | Chief Commissioner of (Victoria) Police |
| CEO | Chief Executive Officer |
| DOJ | Department of Justice |
| ESD | Ethical Standards Department (Victoria Police) |
| FLS | Fitzroy Legal Service |
| GMCT | Greater Metropolitan Cemeteries Trust |
| IBAC | Independent Broad-based Anti-corruption Commission |
| IBAC Act | *Independent Broad-based Anti-corruption Commission Act 2011* |
| LGICI | Local Government Investigations and Compliance Inspectorate |
| MIPO | misconduct in public office |
| OMCG | outlaw motorcycle gang |
| OPI | Office of Police Integrity |
| OPP | Office of Public Prosecutions |
| PD Act | *Protected Disclosure Act 2012* |
| PR Act | *Police Regulation Act 1958* |
| PSC | Professional Standards Command (Victoria Police) |
| VAGO | Victorian Auditor-General's Office |
| VCAT | Victorian Civil & Administrative Tribunal |
| VI | Victorian Inspectorate |
| VO | Victorian Ombudsman |
| VOCAT | Victims of Crime Assistance Tribunal |
| VPSC | Victorian Public Sector Commission |

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**Independent Broad-based Anti-corruption Commission**
459 Collins Street, Melbourne VIC 3000
GPO Box 24234, Melbourne VIC 3001
Phone 1300 735 135 I Fax (03) 8635 6444
www.ibac.vic.gov.au

ibac independent broad-based anti-corruption commission
Victoria