



VICTORIAN INSPECTORATE

Submission of the Victorian Inspectorate:

In relation to the external oversight and investigation
of police corruption and police misconduct in Victoria

August 2017

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1. Introduction

The terms of reference of the Independent Broad-based Anti-corruption Committee's inquiry are to –

1. Examine the current system for the oversight of police corruption and misconduct in Victoria, in particular the role of IBAC and the Victorian Inspectorate.
2. Identify and assess best-practice models for the oversight of police.
3. Identify and review the main challenges to the effective oversight and investigation of complaints and disclosures about police in Victoria. This will involve an examination of the legal framework for the oversight of police in Victoria. The review will encompass both the legal responsibilities of those overseeing police as well as the perspectives and experiences of complainants, including marginalised Victorians.
4. Consider best-practice strategies to improve the oversight and investigation of police corruption and misconduct and how they may be implemented in Victoria.

This inquiry invites Victorians to consider improvements to the external oversight of police corruption and misconduct in Victoria. This submission is made by the Victorian Inspectorate (VI) in order to assist the IBAC committee by providing knowledge relevant to the inquiry that it has gained from its monitoring of the IBAC's activities since it commenced operations in early 2013. The VI is responsible for overseeing the compliance of the IBAC with its police oversight functions under the IBAC Act. This submission will focus on the insights the VI has gained from monitoring IBAC's police complaints and investigation practice particularly through the exercise of the VI's complaint function. The VI will outline the legislative framework for the oversight of police in Victoria and address some of the challenges to improving public confidence in the oversight of Victoria Police including opportunities for IBAC to enhance communications with people who make complaints about police conduct to IBAC. Whilst the latter is relevant to the best practices models and strategies for the purpose of the second and fourth terms of reference, this submission is confined to addressing the first and third terms of reference.

2. The current system for the oversight of police corruption and misconduct in Victoria

The first term of reference of the Committee is to examine the current system for oversight of police corruption and misconduct in Victoria, with particular emphasis on the roles of the IBAC and the VI.

The roles played by those two bodies can only properly be understood in the context of the system as a whole. Specifically, Victoria Police itself has very significant responsibilities in respect of police misconduct and corruption. The *Victoria Police Act* 2013 contains, in Parts 7 and 9, detailed provisions relating to discipline, complaints and investigations. Part 10 deals with Victoria Police's investigation of protected disclosure complaints, which is relevant in particular because a complaint by a police officer or protective services officer (PSO) made to a police officer or PSO of more senior rank about the alleged misconduct of another police officer or PSO is deemed to be a protected disclosure: see section 176(3) of the *Victoria Police Act* and section 3 of the *Protected Disclosure Act* 2012. The Professional Standards Command within Victoria Police is considerably larger than the whole of the IBAC.

The Independent Broad-based Anti-corruption Commission (IBAC)

The objects of the IBAC Act (section 8) include providing for the identification, investigation and exposure of police personnel misconduct and assisting in the prevention of police personnel misconduct. IBAC, pursuant to its objectives and functions under the IBAC Act, oversees police corruption and misconduct in Victoria by receiving and assessing complaints and notifications about police personnel conduct, and assessing those complaints and notifications and determining whether they should be dismissed, investigated by the IBAC or referred to another body that is better placed to investigate or deal with the complaint.¹

The IBAC also has a function under the IBAC Act to ensure that the highest ethical and professional standards are maintained by police

¹ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act) ss 8, 15.

officers and PSOs.² The IBAC achieves this objective by, in addition to performing its other functions already mentioned, providing advice, training and education services to the public sector to assist the public sector to increase its capacity to prevent corrupt conduct and police personnel misconduct.³

Part of this ‘assistance’ also includes the IBAC reviewing some of the complaints that it refers to the Chief Commissioner for investigation to ensure that those complaints are handled and investigated appropriately, and undertaking strategic research projects to examine and investigate systemic issues in police personnel misconduct to enable better prevention of police corruption and misconduct. The IBAC also undertakes activities to educate the community about the detrimental effects of police personnel misconduct and ways in which such misconduct can be prevented.

The IBAC’s functions in overseeing, identifying, exposing and investigating police corruption and misconduct in Victoria are also balanced with the IBAC’s function to prioritise the investigation and exposure of corrupt conduct which the IBAC considers may constitute serious or systemic corrupt conduct.⁴

The Victorian Inspectorate

The VI is identified as a focus of this inquiry into the external oversight of police corruption and misconduct in Victoria although the VI has no direct role in that oversight. External oversight of police misconduct is the responsibility of the IBAC. The VI indirectly plays a role through its oversight of the IBAC, but it is important to understand the nature of the VI’s role.

The VI was created as a watchdog to oversee other integrity bodies that are able to exercise coercive powers, particularly the power to summon a person to give evidence about a matter that the other body is

² Ibid ss 15(3)(b)(ii).

³ Ibid ss 15(5)-(6).

⁴ Ibid ss 15(1A).

investigating. Thus, in relation to the IBAC, the first thing that the Minister responsible (The Hon Andrew McIntosh) said when introducing the Victorian Inspectorate Bill in 2011 was (Hansard 27 October 2011 p 4976):

*“Given the nature of IBAC's role, which the government intends will include investigating corruption, **and the powers that will be required to fulfil those functions effectively**, such as the power to summons witnesses and examine them under oath, and telecommunications interception, IBAC must also be subject to scrutiny by a body capable of robust and effective oversight.”*
(Emphasis added.)

It is not the function of the VI to direct the IBAC in the performance of its police oversight functions, nor to tell the IBAC how it should go about performing them. The functions of the VI set out in section 11 of the VI Act make this clear. Section 11(2)(a) and (c) of the VI Act provide that the functions of the VI include –

- (a) to monitor the compliance of the IBAC and IBAC personnel with the IBAC Act and other laws;
- (b) to oversee the performance by the IBAC of its functions under the Protected Disclosure Act 2012;
- (c) to assess the effectiveness and appropriateness of the policies and procedures of the IBAC which relate to the legality and propriety of the IBAC's activities.

The VI also has a function of receiving complaints about the conduct of IBAC personnel under section 43(1) and (2) of the VI Act.

It may be seen that the emphasis is on monitoring the IBAC's compliance with legislation and the legality and propriety of its activities. It is the role of the VI to monitor the IBAC's activities and take such action as is available to it when it considers that the IBAC is not complying with legislation or is not acting lawfully and properly; but it is

not a partner with the IBAC in the oversight of police misconduct or otherwise in the performance of the IBAC's functions. Thus the VI is removed from the direct oversight of police misconduct, and its focus is not on the conduct of police, but on the conduct of the IBAC.

The objects of the VI Act (section 5) include enhancing the compliance of the IBAC and IBAC personnel with the IBAC Act and other laws and assisting in improving the capacity of the IBAC and IBAC personnel in the performance of their duties and functions and the exercise of their powers, and those objects are achieved by the performance of the VI's functions set out above.

Of course the VI must work, and does work, closely with the IBAC in order to monitor the IBAC's activities, but the functions of the two bodies are quite separate. The role of the IBAC in relation to police misconduct is to identify and investigate such misconduct;⁵ the role of the VI is to monitor that the IBAC is doing so lawfully and properly and in compliance with applicable legislation.

The VI carries out its monitoring of the IBAC's activities, pursuant to the VI Act, by:

- receiving and assessing complaints about the conduct of the IBAC and its personnel;
- reviewing all coercive examinations conducted by the IBAC;
- where applicable, investigating the conduct of the IBAC and its personnel;
- reviewing selected parts of the IBAC's activities including reviewing relevant policies and procedures that relate to those activities.

⁵ Ibid ss (8)(a)(ii), 15(3)(b).

IBAC Parliamentary Committee

The IBAC Parliamentary Committee is made up of representatives of Parliament and, pursuant to section 12A(1) of the *Parliamentary Committees Act 2003*, has functions as follows in relation to the IBAC–

- to monitor and review the performance of the duties and functions of the IBAC;
- to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the IBAC that require the attention of the Parliament;
- to examine any reports made by the IBAC.

The functions of both the IBAC Committee and the VI in respect of the oversight of police misconduct by the IBAC are forms of oversight. However there is major difference between the roles of the two bodies, in that while the VI can and does receive and investigate the conduct of the IBAC in relation to particular complaints or notifications, the IBAC Committee is expressly prevented from doing that by section 12A(1A), which provides that the IBAC Committee cannot –

- investigate a matter relating to the particular conduct the subject of a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*;
- review any decision by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011* to investigate, not to investigate or to discontinue the investigation of a particular complaint or notification;
- review any findings, recommendations, determinations or other decisions of the IBAC in relation to a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011* or a particular investigation conducted by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*.

The defining feature of the VI is its independence from the political process. Members of the IBAC Committee, being members of the Parliament, risk not being perceived as having the same degree of independence, however inaccurate that perception may be.

3. Challenges to the effective oversight and investigation of complaints and disclosures about police in Victoria.

An effective police oversight system is one that the public has confidence in. Presently in Victoria that confidence has been questioned with some stakeholders calling for a system that does not involve police investigating police. The IBAC Committee in its 2016 report *Strengthening Victoria's key anti-corruption agencies* identified that “an issue that reoccurred was the extent to which complaints about police should be investigated independently.”⁶ The Law Institute of Victoria in its submission to the IBAC Committee 2016 Inquiry stated, “Police misconduct needs to be investigated independently of Victoria Police. While the IBAC has the ability to investigate complaints of police misconduct, it currently refers police complaints overwhelmingly to Victoria Police”.⁷ The IBAC has also acknowledged “there is continuing debate nationally about how to ensure the most efficient and effective model of independent police oversight”.⁸

The VI considers that the main challenge to effective police oversight is deciding where to draw the line or find the balance between what complaints are appropriate for Victoria Police to investigate, with the IBAC overseeing those investigations through review and audit tools, and what complaints ought to be investigated by the IBAC itself, as a completely independent body. That balance, once found, is required to be effectively communicated to the community. The VI considers that the statutory purpose and statutory priorities of the IBAC guide our hand in drawing that line. The IBAC has a statutory purpose to prioritise serious and systemic corrupt conduct.⁹ If the line is moved

⁶ Independent Broad-based Anti-corruption Commission Committee, *Strengthening Victoria's key anti-corruption agencies*, Parliament of Victoria Paper No 126, Session 2014 – 2016, (2016), 96.

⁷ Ibid 79.

⁸ Independent Broad-based Anti-corruption Commission, *Annual Report 2015/2016 - Exposing Corruption*, (2016) 4.

⁹ IBAC Act s 8(aa).

so as to require the IBAC to conduct more investigations itself, there will necessarily be resourcing implications in order to avoid other areas of the IBAC's work suffering.

Effective communication involves community recognition that the Chief Commissioner is ultimately accountable for the professional conduct of Victoria Police and that certain types of police misconduct are appropriate for internal police investigation. It also involves the communication by IBAC to complainants and members of the public generally of the criteria it utilises in deciding which police misconduct complaints to refer to Victoria Police for internal investigation, and the oversight mechanisms utilised by IBAC over such internal investigations. The VI considers that there are opportunities for improvement in IBAC's present communication practice which in the VI's view would enhance the public confidence in IBAC's complaint referral practice.

IBAC recognises the accountability of the Chief Commissioner in its police oversight practice. The IBAC Commissioner stated in the IBAC Annual Report for 2015-2016 :

“The majority of police complaints are assessed by IBAC as appropriate for investigation by Victoria Police, as they primarily concern customer service or operational performance issues (such as poor communication or slow/inadequate response) or lower level misconduct. This approach is consistent with established best practice oversight principles that police managers must retain primary responsibility for ensuring the integrity and professional conduct of their own employees.”

The IBAC has advised the VI that PSC have approximately 208 full-time staff and complete around 150 investigations per year. By contrast, as at June 2016, the IBAC had a staff of 102.5.¹⁰ The IBAC opened 34 investigations during the 2015 – 2016 financial year,¹¹ of which 47% related to Victoria Police members.¹² While this staff resourcing imbalance remains, there will necessarily be difficulty in the IBAC conducting a greater proportion of police misconduct investigations.

¹⁰ IBAC Annual Report 2015/2016 above n 8, 40.

¹¹ Ibid 6.

¹² Ibid 19.

Presently the very large majority of complaints and notifications of police misconduct that come before the IBAC are referred to the Chief Commissioner for investigation. During the 2015 – 2016 year the IBAC received 2041 complaints in which it identified 4576 allegations.¹³ The IBAC has previously advised the VI that, since 2014, around 90% of police matters are referred to PSC for investigation.¹⁴

Whilst the majority of investigations are presently referred to Victoria Police, it is important to note in the VI's view that IBAC has effectively utilised other oversight tools in its reviews and audits of police investigations. As the IBAC Commissioner also stated in the IBAC Annual Report for 2015 – 2016 –

“Most importantly, IBAC’s powers enable independent oversight of all matters investigated by Victoria Police. We apply scrutiny to Victoria Police’s investigations of complaints by reviewing particular cases – returning 36 per cent of the 96 police investigations we reviewed last year as deficient (compared to 16 percent in 2014/15). We are also undertaking broader audits of Victoria Police complaints handling systems, with a public report imminent on an audit completed.”¹⁵

Referrals to the Chief Commissioner are made under section 73 of the IBAC Act. That section is expressed in mandatory terms, providing that a referral must be made by IBAC when –

the subject matter of the complaint or notification is relevant to the performance of the duties and functions or the exercise of powers of that person or body and it would be more appropriate for the complaint or notification to be investigated by that person or body rather than by IBAC.

The decision as to whether it is more appropriate for another body to investigate a matter is a matter of judgment and section 73 is central to the question of what types of allegation concerning police misconduct are more appropriately investigated by IBAC than Victoria Police. It may be said that part of the answer is provided by the statement by the IBAC Commissioner quoted above, to the

¹³ Ibid 6.

¹⁴ Independent Broad-based Anti-corruption Commission Committee, *Strengthening Victoria’s Key Anti-corruption Agencies*, Parliament of Victoria Paper No 126, Session 2014 – 2016, (2016), 79.

¹⁵ IBAC Annual Report 2015/2016 above n 8, 6.

effect that allegations concerning customer service or operational performance issues (such as poor communication or slow/inadequate response) or lower level misconduct are appropriate for internal investigation by Victoria Police. On the other hand, 'serious' or 'systemic' complaints and notifications of police corruption and misconduct consistent with the IBAC's general statutory priorities may be said to be less appropriate for referral.

The IBAC's statement that the majority of police complaints '*primarily concern customer service or operational performance issues*' is borne out by the VI's experience.¹⁶

Complaints made to the VI about the IBAC almost always arise from the manner in which the IBAC dealt with a complaint made to it. In the period from the commencement of operations by the VI in February 2013 and 31 July 2017, the VI has received a total of 133 complaints about the IBAC's handling of complaints made to it about some aspect of police conduct.¹⁷ Those complaints represented 55 per cent of the total number of complaints received by the VI in relation to the IBAC.

22 per cent of the total number of complaints concerning the IBAC's handling of police complaints concerned complaints that had been made to IBAC that the IBAC had referred to the Chief Commissioner of Victoria Police for investigation pursuant to s 73 of the IBAC Act. In no case did the VI consider that the IBAC had acted inappropriately in referring the complaint.

In addition, as part of a review of IBAC's handling of complaints about police conduct, the VI earlier this year reviewed 50 consecutive police complaint files from the first half of 2016. Again, in no case did the VI consider that the IBAC acted inappropriately in referring a complaint to the Chief Commissioner for investigation.

None of the police complaints that the VI has reviewed involved credible allegations of assault or serious corruption.

¹⁶ Ibid 5.

¹⁷ Complaints refers to complaints and enquiries as captured on the VI complaints data base as of 31 July 2017.

Opportunities for Improvement in IBAC's communications with complainants

The VI considers that there are opportunities for improvement in IBAC's communications with complainants. Such opportunities in the VI's view would enhance the public confidence in IBAC's complaint referral practice.

A significant percentage of complainants to the VI do not know why IBAC has referred their complaints to the very body they are complaining about, namely Victoria Police. Nor do a significant percentage of complainants to the VI know why IBAC decided their complaints about Victoria Police did not warrant investigation.

A common sentiment expressed to the VI is illustrated by the following extract from one complaint:

"I had understood that IBAC was intended to be an independent body, ... I am astounded that IBAC keep referring this back to the PSC – PSC is clearly not a body independent of Victoria Police."

It is not the role of the VI to communicate the basis of IBAC's decisions, but a great deal of time is spent by the VI providing explanations of the IBAC's decisions to complainants after examining the relevant IBAC complaint files. The VI does this because it considers that in explaining its own reasons for not taking action in respect of the complainant's complaint, it is necessary to point to the factors that made the IBAC's decision a reasonable one. The VI with few exceptions on analyzing the files has considered the basis for IBAC's decision to be appropriate and has been able to discern the main reason for the IBAC's decision, which the VI has then explained to the complainant without attributing the reason to the IBAC.

All of the complaints to the VI about the IBAC's handling of police complaints have arisen from decisions by the IBAC either to dismiss the complaint or refer it to PSC. The IBAC communicates those decisions to the complainants by template letters which state the decision. It is the view of the VI that IBAC's current process of communicating with complainants is an obstacle to effective communications about its referral practice and its

police complaint practice generally, and that community satisfaction with the IBAC's decisions would be improved if full reasons were given to complainants.

The issue of IBAC's communications was first reported by the VI in the VI's 2014-2015 Annual report in the context of IBAC not providing reasons for decisions, particularly with respect to complaints that are dismissed as not warranting investigation. It was acknowledged by the VI that the IBAC was under no statutory requirement to give reasons for its decisions, unlike its NSW counterpart, the Independent Commission against Corruption.¹⁸ However the VI expressed the view to the IBAC that as a matter of good practice, the IBAC ought to provide the complainant with an explanation for its decision not to investigate a complaint on the basis that:

1. it is reasonable for a complainant to expect to be provided an explanation for the IBAC's decision not to investigate a complaint;
2. where a person whose complaint has been dismissed by the IBAC complains about the dismissal to the Inspectorate, the task of the Inspectorate would be considerably assisted by the provision of a clearly articulated statement of reasons;
3. it would not be significantly onerous on the IBAC to provide reasons for its decision not to investigate a complaint;
4. not providing reasons to the complainant is likely to reduce public confidence in making a complaint to the IBAC and result in an increased amount of complaints made to the VI about the IBAC.

Furthermore, the provision of reasons or an explanation for decisions is consistent with best practice principles in exercising a complaint function. The applicable principle is that of transparency. Complainants who are given explanations for decision feel listened to and valued for their contribution even if such explanations result in their complaints not being investigated.

¹⁸ Victorian Inspectorate, Annual Report 2014 – 2015, (2015) 13-15.

4. Conclusion

The view of the VI is that the current legislative regime for the oversight of police corruption and misconduct is basically sound, with Victoria Police itself taking responsibility for customer service or operational performance issues (such as poor communication or slow/inadequate response) or lower level misconduct and the IBAC, as an independent body, investigating serious and systemic police misconduct. As stated at the beginning of this submission, neither the VI nor the IBAC Committee has a direct role in the investigation of police complaints and the VI does not consider that it should have.

The difficult question is where to draw the line between the lower level and the more serious complaints, and the resources available to the IBAC and Victoria Police respectively inevitably influence where it is drawn. The VI supports the continued role of the IBAC as the independent police oversight and investigation body. The VI however considers that the IBAC would enhance public confidence in its complaint referral practice by improving its policies and procedures with respect to its communications with complainants.