

**PROSECUTIONS ARISING FROM INDEPENDENT  
COMMISSION AGAINST CORRUPTION  
INVESTIGATIONS**

**Organisation:** Independent broad-based anti-corruption Commission (ibac)  
**Name:** Mr Stephen O'Bryan QC  
**Position:** Commissioner  
**Date Received:** 31/07/2014

**From the Office of the Commissioner**

Our ref: CD/14/26833

31 July 2014

Mr Greg Smith SC MP  
Committee Chair  
The Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Smith

**Prosecutions arising from Independent Commission Against Corruption investigations**

I write in relation to your letter dated 27 June 2014 inviting the Independent Broad-based Anti-corruption Commission (IBAC) to make a submission to the Committee on the Independent Commission Against Corruption (ICAC Committee) regarding the inquiry into prosecutions arising from ICAC investigations.

The terms of reference for this inquiry include arrangements for the prosecution of corrupt conduct in other jurisdictions. Please find attached information that outlines the arrangements in place for prosecuting corrupt conduct in Victoria.

As the Committee would be aware, I note that the performance of an anti-corruption agency should not be assessed solely according to the number of prosecutions that result from its investigations, as not all investigations will result in adequate evidence to support charges. In addition, the absence of charges does not mean that disciplinary or other actions have not been taken by the agency involved in the investigation where an allegation is proven.

It is also important to note that anti-corruption agencies have an equally vital role in preventing and deterring corrupt conduct. Under the *Independent Broad-based Anti-corruption Commission Act 2011*, IBAC's prevention and education functions are to:

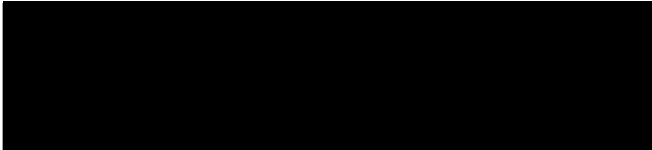
- assist in the prevention of corrupt conduct and police personnel misconduct
- facilitate the education of the public sector and the community about the detrimental effects of corrupt conduct and police personnel misconduct on public administration and the community, and the ways in which corrupt conduct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

IBAC reports publicly on the outcomes of our work in exposing and preventing public sector corruption and police personnel misconduct, through our annual report and special reports to Parliament.

More information on IBAC's role and functions is outlined in the attached 'About IBAC' fact sheet.

I trust this information is of assistance to the ICAC Committee.

Yours sincerely



Stephen O'Bryan QC  
Commissioner

## Arrangements for prosecuting corrupt conduct in Victoria

The *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act) provides the Independent Broad-based Anti-corruption Commission (IBAC) with responsibility for identifying and preventing serious corrupt conduct across the public sector including Parliament, the judiciary, and state and local government. IBAC also has a broad oversight role in relation to police personnel misconduct. IBAC can receive complaints about the conduct of sworn officers of Victoria Police and unsworn officers; police recruits and Protective Service Officers.

Within this context, the IBAC Act prescribes two definitions of corruption relevant to each of its two broad jurisdictions. In relation to corruption involving public servants and public bodies, section 4 of the IBAC Act sets out a definition of 'corrupt conduct'. With respect to corruption involving members and employees of Victoria Police, section 5 of the IBAC Act sets out a definition of 'police personnel conduct'.

The terms 'corrupt conduct' and 'police personnel conduct' are set out in **Appendix A**.

The purpose of defining 'corrupt conduct' and 'police personnel conduct' in the IBAC Act is to inform IBAC's statutory functions and objects. The definitions circumscribe IBAC's jurisdiction with respect to its investigative, preventative and educative functions. Accordingly, conduct that comes to the attention of IBAC that meets these definitions will provide a legal basis for IBAC to exercise its powers, perform its functions, and undertake its duties.

### Corruption offences in Victoria

As outlined above, sections 4 and 5 of the IBAC Act are purely enabling in nature in that they inform IBAC's jurisdiction and the exercise of its statutory powers. Those sections do not create any type of corruption offence. The IBAC Act does not contain any other provisions that create offences relating to corruption.

There is no general, overarching or all-encompassing offence of 'corruption' in Victoria. Rather, there exists various common law and statutory offences which, depending on the conduct in question, could encompass a form of 'corrupt' activity. These offences include:

- misconduct in public office (contrary to the common law)
- bribery of a public official (contrary to the common law)
- obtaining property by deception (contrary to s 81 of the *Crimes Act 1958* (Vic))
- obtaining financial advantage by deception (contrary to s 82 of the *Crimes Act 1958* (Vic))
- false accounting (contrary to s 83 of the *Crimes Act 1958* (Vic))



- falsification of documents (contrary to s 83A of the *Crimes Act 1958* (Vic))
- secret commission offences (contrary to ss 176, 177, 178, 179, 180 of the *Crimes Act 1958* (Vic))
- (attempt to) pervert the course of justice (contrary to the common law).

### **IBAC's power to bring criminal proceedings**

IBAC's statutory functions are defined broadly in section 15 of the IBAC Act. These functions are set out in **Appendix A**.

It is not one of IBAC's express statutory functions to bring criminal proceedings for alleged offences relating to corrupt conduct that arise out of an IBAC investigation. However, section 190 of the IBAC Act provides IBAC with a power to do so. In this context, criminal proceedings may be brought by IBAC<sup>1</sup> 'for an offence in relation to any matter arising out of an IBAC investigation'.<sup>2</sup>

While commencing and conducting criminal proceedings is not one of IBAC's statutory functions, its power to bring criminal proceedings can assist with fulfilling IBAC's statutory functions of identifying and exposing serious corrupt conduct and police personnel conduct. The prosecutorial process also has a deterrent and educative function.

It follows from section 190 that IBAC cannot bring criminal proceedings for corruption-related offences that are unrelated to IBAC investigations (e.g. corrupt activity occurring in the private sector; corruption investigations conducted independently by Victoria Police).

### **Prosecution arrangements in Victoria for corruption offences**

#### **IBAC's prosecutorial discretion**

IBAC's power to commence criminal proceedings is discretionary and is carefully exercised.

In considering the exercise of the prosecutorial discretion, the following two broad considerations are relevant to IBAC's decision to commence a prosecution:

- Whether the available evidence is sufficient to justify the laying of charges – i.e. whether there is a reasonable prospect of success/conviction
- Whether, in light of the evidence and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued.

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<sup>1</sup> Proceedings may also be brought by a sworn IBAC officer who is authorised to do so by the Commissioner of IBAC, or member of Victoria Police.

<sup>2</sup> IBAC also has the power to bring proceedings for offences under the IBAC Act or the *Independent Broad-based Anti-corruption Commission Regulations 2013* [IBAC Act, s 189], as well as for offences under the *Protected Disclosure Act 2012* (Vic) and Protected Disclosure Regulations 2013 [Protected Disclosure Act 2012, s 75].

As indicated above, IBAC's power to bring proceedings in respect of corrupt conduct extends only to an offence that relates to a matter arising out of an IBAC investigation. The power to bring charges for corrupt activity outside of IBAC's jurisdiction resides with Victoria Police (or the relevant investigating agency).

### **Referrals to prosecutorial bodies for action/advice**

Under section 74 of the IBAC Act, IBAC may at any time, if it considers it appropriate, refer to the Victorian Director of Public Prosecutions (VDPP) any matter that IBAC considers relevant to the performance of the prosecutorial duties and functions, or the exercise of the prosecutorial powers, of the VDPP. Matters that may be referred include any matter under investigation by IBAC, or any matter that is raised in a report of the Chief Commissioner of Victoria Police to IBAC.<sup>3</sup>

In addition, under section 75 of the IBAC Act, if IBAC receives a report from the Chief Commissioner of Victoria Police, IBAC may refer to the VDPP for advice any matter that IBAC considers is relevant to the performance of the VDPP's duties and functions or the exercise of its powers.

In addition, IBAC has in place a protocol with the Victorian Office of Public Prosecutions (which is instructed by the VDPP) (the Protocol). The Protocol similarly recognises that IBAC may request that the VDPP provide advice in relation to (amongst other things) the appropriateness of indictable charges and/or the sufficiency of evidence.

### **The responsible prosecuting agency**

While IBAC may bring criminal proceedings for an offence arising out of an IBAC investigation, the nature of the criminal charge will determine the agency that is ultimately responsible for conducting the prosecution. These arrangements arise primarily as a result of the statutory framework in Victoria under the *Public Prosecutions Act 1994* (Vic), which governs the conduct of prosecutions. These arrangements are reflected in the Protocol.

In general terms:

- In relation to summary offences and indictable offences where IBAC has initiated proceedings in the summary jurisdiction:
  - IBAC will retain responsibility for prosecution.
  - IBAC may request that the VDPP take over such matters, however the VDPP is not bound to do so.
- In relation to indictable offences where IBAC has initiated proceedings in the indictable jurisdiction:

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<sup>3</sup> Similarly, IBAC may refer such matters to other prosecutorial bodies, being the Victorian WorkCover Authority, the Commonwealth Director of Public Prosecutions, the Director of Public Prosecutions of another State or Territory, or other prescribed person or body.

- The VDPP will prosecute such charges.
- IBAC will transfer the matter to the VDPP after the filing of criminal charges.

In this context, section 22 of the *Public Prosecutions Act 1994* (Vic) establishes that the VDPP has the function of (amongst other things) preparing and conducting proceedings in respect of any indictable offence in the County Court of Victoria, Supreme Court of Victoria and High Court of Australia. Under law, therefore, the VDPP retains the function of prosecuting indictable charges arising out of IBAC investigations that proceed via a committal proceeding (and later on indictment). In addition, the VDPP may, under section 22 of the *Public Prosecutions Act 1994* (Vic), take over and conduct proceedings in respect of any summary offences, if it considers it desirable to do so (although this rarely occurs in practice).

Although there is a distinction between the agencies that are ultimately responsible for prosecuting a particular charge, it is IBAC which determines the appropriateness and nature of the charges to be laid in all cases.

While IBAC may seek advice from the VDPP about the appropriateness of an indictable charge and the sufficiency of evidence, it is not required to do so prior to laying any charge. However, where the VDPP prosecutes an indictable offence on IBAC's behalf, the VDPP will have the final determination of prosecutorial decisions.



## Appendix A.

### Corrupt Conduct and Police Personnel Conduct

#### 4 Corrupt conduct

(1) For the purposes of this Act, corrupt conduct means conduct—

- (a) of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or
- (b) of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body; or
- (c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust; or
- (d) of a public officer or a public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or
- (e) that could constitute a conspiracy or an attempt to engage in any conduct referred to in paragraph (a), (b), (c) or (d)—

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

(2) Conduct may be corrupt conduct for the purposes of this Act if—

- (a) all or any part of the conduct occurs outside Victoria, including outside Australia; and
- (b) the conduct would be corrupt conduct if it occurred in Victoria.

(3) This Act does not apply to any conduct of any person that can be considered by the Court of Disputed Returns in proceedings in relation to a petition under Part 8 of the *Electoral Act 2002*.

#### 5 Meaning of police personnel conduct, police personnel conduct complaint and police personnel misconduct

For the purposes of this Act—

***police personnel conduct*** means—

- (a) in relation to a public officer who is a police officer or protective services officer—

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

## **15 Functions of the IBAC**

- (1) The IBAC has the functions conferred on the IBAC under this Act or any other Act.
- (2) Without limiting the generality of subsection (1), the IBAC has the following functions—
- (a) to identify, expose and investigate serious corrupt conduct;
  - (b) to identify, expose and investigate police personnel misconduct;
  - (c) to assess police personnel conduct.
- (3) Without limiting the generality of subsection (2), the IBAC has the following functions under subsection (2)—
- (a) to receive complaints and notifications to the IBAC in relation to corrupt conduct;
  - (b) in relation to police personnel conduct—
    - (i) to receive police personnel conduct complaints and notifications to the IBAC;
    - (ii) to ensure that the highest ethical and professional standards are maintained by police officers and protective services officers;



- (iii) to ensure that police officers and protective services officers have regard to the human rights set out in the Charter of Human Rights and Responsibilities Act 2006;
- (c) to hold examinations;
- (d) to make referrals to other persons or bodies.
- (4) Without limiting subsections (2) and (3), the IBAC has the following functions in relation to protected disclosure complaints—
  - (a) to investigate any of those complaints that it may investigate in accordance with—
    - (i) its corrupt conduct investigative functions; or
    - (ii) its police personnel conduct investigative functions;
  - (b) to refer the complaints to other persons or bodies to investigate;
  - (c) to dismiss the complaints.
- (5) The IBAC has education and prevention functions for the purpose of achieving the objects of this Act.
- (6) Without limiting the generality of subsection (5), the IBAC has the following functions under subsection (5)—
  - (a) to examine systems and practices in the public sector and public sector legislation;
  - (b) to provide information to, consult with and make recommendations to, the public sector;
  - (c) to assist the public sector to increase capacity to prevent corrupt conduct and police personnel misconduct by providing advice, training and education services;
  - (d) to provide information and education services to the community about the detrimental effects of corruption on public administration and ways in which to assist in preventing corrupt conduct;
  - (e) to provide information and education services to members of police personnel and the community about police personnel conduct, including the detrimental effects of police personnel misconduct and ways in which to assist in preventing police personnel misconduct;
  - (f) to publish information on ways to prevent corrupt conduct and police personnel misconduct.
- (7) For the purpose of achieving the objects of this Act, the IBAC has the following functions—



- (a) to receive information, conduct research and collect intelligence, and to use that information, research and intelligence in support of investigations;
- (b) to report on, and make recommendations as a result of, the performance of its duties and functions.

(8) The IBAC has the monitoring and review functions set out in Part 8.

**Note**

See also Part 8 of the *Protected Disclosure Act 2012* which sets out the functions of the IBAC under that Act.

# About IBAC

## INFORMATION SHEET

The Independent Broad-based Anti-corruption Commission (IBAC) is Victoria's first anti-corruption body with responsibility for investigating and preventing corrupt conduct across the whole public sector. The Victorian public has a right to expect that the people working for the public sector perform their duties with integrity, fairly and honestly. Corrupt activities left unchecked can lead to a waste of public money and resources, undermine people's trust and respect in government, and damage the reputation of the public sector as a whole.

### IBAC's role and purpose

The primary purpose of IBAC is to prevent and expose public sector corruption and police misconduct in Victoria. IBAC is independent of the government of the day and is accountable to the people of Victoria through the Parliament of Victoria.

IBAC has responsibility for identifying and preventing serious corrupt conduct across the public sector, including members of Parliament, the judiciary and state and local government.

IBAC also has a broad oversight role in relation to police personnel misconduct and an important education function to proactively assist public sector agencies to improve their systems and processes to prevent corrupt conduct.

IBAC's key objectives are to:

- identify, investigate and expose serious corrupt conduct, and police personnel misconduct
- help prevent corrupt conduct and police personnel misconduct, and assist to improve the capacity of the public sector in their prevention strategies
- educate the public sector and the community about the detrimental effects of corrupt conduct and police personnel misconduct and the ways it can be prevented.

IBAC's jurisdiction includes:

- Victorian public service employees
- contractors undertaking work within/for the Victorian public sector
- members of the Parliament of Victoria
- local government staff and councillors
- magistrates, judges, coroners and members of tribunals
- sworn and unsworn members of Victoria Police.

### What IBAC does

IBAC receives and assesses complaints and notifications alleging public sector corruption and police misconduct.

All complaints are carefully considered on their merits by IBAC. Upon receiving your complaint, IBAC must assess the complaint to determine whether:

- it involves serious corrupt conduct or police personnel conduct, which IBAC will investigate
- it should be referred to another appropriate body for action, or
- it should be dismissed.

IBAC acts as a central clearing house for protected disclosures or 'whistleblower' complaints. IBAC may refer disclosures to other prescribed bodies for investigation or may investigate serious matters itself.

IBAC's prevention and education activities help build the capacity of the public sector to identify, respond to and prevent corruption and police misconduct. In these ways IBAC safeguards public confidence in the integrity of public sector bodies while assisting them to ensure the integrity of their own workplaces.



## IBAC's powers

The *Independent Broad-based Anti-corruption Commission Act 2011* (the IBAC Act) and other legislation provides IBAC with powers to:

- require people to give evidence at an examination
- compel the production of documents and things
- enter and search premises
- seize documents and things
- use surveillance devices
- intercept telecommunications.

IBAC must apply to the Supreme Court or other courts and tribunals before exercising some powers.

The Public Interest Monitor also plays an important role in reviewing and making submissions on applications for surveillance device warrants and telecommunications interception warrants.

## What IBAC cannot do

IBAC cannot investigate:

- the private sector
- issues arising in other states or territories
- federal parliamentarians, departments or agencies.

IBAC cannot investigate itself; determine entitlements or liabilities, nor whether people are guilty or innocent of criminal charges.

IBAC is not a court, nor can it discipline anyone as a result of an investigation. IBAC can, however, refer matters to the Office of Public Prosecutions with a view to criminal prosecution, to another entity to consider, or to the head of an agency to consider disciplinary action.

## How do matters come to IBAC?

Matters come to IBAC's attention in various ways: complaints from members of the public via letters, faxes, emails and telephone calls; from protected disclosures and anonymous sources; or from IBAC's own activities or intelligence sources.

IBAC may also initiate investigations on its 'own motion' without receipt of a complaint.

## Making a complaint to IBAC

Anyone can make a complaint to IBAC at any time via a secure online form at **[www.ibac.vic.gov.au](http://www.ibac.vic.gov.au)**. You can also lodge a complaint via email or in writing.

If you need help in making a complaint, have difficulty accessing the form, or you need the services of an interpreter, please contact IBAC on **1300 735 135**. You can remain anonymous, however this may affect IBAC's ability to investigate your complaint if more information is needed. For more information refer to information sheet *Making a complaint*.

## Accountability and performance

Important mechanisms have been established to ensure that IBAC is subject to appropriate scrutiny.

Together with the IBAC Parliamentary Committee, the Victorian Inspectorate ensures that IBAC's use of its powers is both appropriate and proportionate.

IBAC's performance is monitored and reported in various ways including:

- reporting and testimony to the IBAC Parliamentary Committee
- the IBAC annual report and reports to parliament
- public reports on outcomes of investigations, system reviews and corruption prevention initiatives.

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IBAC is Victoria's first anti-corruption body with responsibility for identifying and preventing serious corrupt conduct across the whole public sector, including members of Parliament, the judiciary and state and local government.

IBAC also has a broad oversight role in relation to police personnel misconduct and an important education function to proactively assist public sector agencies to improve their systems and processes to prevent corrupt conduct.

**To report corruption phone 1300 735 135 or visit [www.ibac.vic.gov.au](http://www.ibac.vic.gov.au)**