

**Submission  
No 40**

**REPUTATIONAL IMPACT ON AN INDIVIDUAL BEING ADVERSELY  
NAMED IN THE ICAC'S INVESTIGATIONS**

**Organisation:** Victorian Inspectorate

**Date Received:** 2 September 2020

# VICTORIAN INSPECTORATE

2 September 2020

Ms Tanya Davies MP  
Chair  
Committee of ICAC  
Parliament House  
6 Macquarie Street  
SYDNEY NSW 2000

Dear Chair

## **Inquiry into reputational impact on an individual being adversely named in the ICAC's investigations**

1. On behalf of the Victorian Inspectorate (**VI**), I am pleased to make this submission to the Committee on practices in Victoria relevant to the Inquiry's terms of reference. Our submission is limited to information in the public domain.
2. The VI provides oversight of other Victorian integrity, accountability and investigatory bodies and officers, including the Independent Broad-based Anti-corruption Commission (**IBAC**).
3. The VI does not express a view on whether an exoneration protocol should be introduced in New South Wales, nor whether existing safeguards and remedies available to the ICAC and the Inspector of ICAC are adequate. Our submission addresses the situation in Victoria, focussing on the legislation applicable to IBAC, and highlights some productive practices we observe operating in other jurisdictions.

### **Introduction**

4. The VI's submission gives expression to the following key observations:
  - ICAC and IBAC are tasked with *exposing* corruption.<sup>1</sup> This objective must be reconciled with any reputation rights of individuals.<sup>2</sup>

---

<sup>1</sup> *Independent Commission Against Corruption Act 1988* (NSW), s 13 ('the ICAC Act'); *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), ss 8, 15 ('the IBAC Act').

<sup>2</sup> In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter') provides that a person has the right not to have his or her reputation unlawfully attacked: s 13.

- Allegations of corruption can attract substantial media attention, rapidly reach a wide audience and, thanks to digital media, remain publicly accessible in perpetuity, even if later discredited.
  - There is benefit in the legislation governing anti-corruption bodies, and their protocols and procedures, including measures aimed at *limiting* reputational impact, rather than being relied upon to repair it.
  - A requirement that anti-corruption bodies publish details of the outcomes of prosecutions and disciplinary actions is a simple and fair counterweight to powers to name persons in investigations and publish adverse findings, comments or opinions.
5. The VI is currently considering whether agencies in the Victorian integrity system might be assisted by the publication of a guidance note on how investigation findings and outcomes can be effectively reported without making pronouncements of guilt.

### ***Existing safeguards and remedies in Victoria***

6. It might be said that Victoria has greater safeguards against reputational impact resulting from IBAC's investigations than New South Wales has in respect of ICAC's. IBAC's more limited power to report adverse findings or opinions and its less frequent use of public examinations to date may have reduced the potential for reputations to be damaged. However, these factors on their own cannot remove the possibility of irretrievable reputational damage and, for the person affected, this is a serious matter.
7. Unlike the ICAC Act in respect of ICAC, the IBAC Act does not expressly assign IBAC a function to make findings or form opinions. Without direct identification of, and provision for, IBAC's capacity to make findings about the conduct of individuals, there may be occasions where the extent of IBAC's powers or the content of its procedural fairness obligations is a complex interpretive task.
8. The VI draws attention to those of IBAC's significant powers – public examinations (paragraph 14) and disclosing the fact of, or results from, an investigation to senior officers and Ministers (paragraph 17.3) – that must not be used if to do so would cause unreasonable damage to a person's reputation.

### ***Restrictions on IBAC's power to report findings***

9. IBAC's power to report findings is far more restricted than the ICAC's. IBAC may adversely name persons and public bodies in Special Reports<sup>3</sup> and Annual Reports<sup>4</sup>, subject to important limitations and procedural fairness measures.
10. IBAC must not include in a Special or Annual Report a finding or an opinion that a specified person is guilty of or has committed any criminal offence or disciplinary

---

<sup>3</sup> IBAC Act, s 162.

<sup>4</sup> IBAC Act, s 165.

offence.<sup>5</sup> It must not recommend that a specified person be prosecuted for a criminal or disciplinary offence.<sup>6</sup>

- 10.1. The VI notes that “disciplinary offence” is not defined in the IBAC Act, and there may be circumstances in which it is necessary for IBAC to take care when reporting its opinions about types of conduct that might result in disciplinary processes or actions, such as breaches of Codes of Conduct.
11. As anti-corruption bodies in other jurisdictions are required to do, if IBAC intends to include a comment or opinion adverse to a person, IBAC must give them a reasonable opportunity to respond, and fairly set out each element of their response in its report.<sup>7</sup> Where adverse findings are made about a public body, the opportunity is afforded to the relevant principal officer.<sup>8</sup>
12. If an anti-corruption body failed to consider and evaluate relevant evidence presented as part of the adverse comments process that was said to undermine a tentative finding, such failure may be characterised as a failure to afford procedural fairness. The VI acknowledges that whether a body has met its procedural fairness obligations in the reporting process, including that of ‘fairly setting out each element’ of a response in a report, may be complex to determine.

*Obligations on IBAC to consider reputational impact when exercising certain coercive powers*

13. IBAC is required to consider, variously, ‘unreasonable damage’, ‘harm’ or ‘prejudice’ to a person’s reputation, when exercising certain coercive powers during an investigation. These are important preventative measures.
14. IBAC may only hold a public examination where it considers on reasonable grounds that it is in the public interest, and that it can be held without causing unreasonable damage to a person’s reputation, safety or wellbeing.<sup>9</sup> Furthermore, IBAC is now required to notify the VI of its intention to hold a public examination prior to announcing it publicly, and must provide a written report to the VI on its reasons.
  - 14.1. IBAC must notify the VI of its intention to hold a public examination not less than 10 business days before a public examination is held. Its written report must set out the reasons for IBAC’s decision, which will include the grounds on which it considers:
    - there are exceptional circumstances;
    - it is in the public interest;
    - it can be held without causing unreasonable damage to a person’s reputation, safety or wellbeing; and

---

<sup>5</sup> IBAC Act, ss 162(6)(a), 165(6)(a).

<sup>6</sup> IBAC Act, ss 162(6)(b), 165(6)(b).

<sup>7</sup> IBAC Act, ss 162(3), 165(3).

<sup>8</sup> IBAC Act, ss 162(2), 165(2).

<sup>9</sup> IBAC Act, s 117(1). IBAC must also consider there are exceptional circumstances, and the conduct that is being investigated must be serious or systemic corrupt conduct or serious or systemic police personnel misconduct.



- the conduct being investigated may constitute serious or systemic corrupt conduct or police personnel misconduct.
- 14.2. The public interest to be considered is not confined to the public interest in the subject matter of the inquiry and the exposure of corruption, but also encompasses the public interest in the observance of procedures that protect persons from having their reputations unfairly attacked.<sup>10</sup>
  - 14.3. During a public examination, a person can apply to IBAC to have any part of it held in private. In deciding whether to hold part of an examination in private, IBAC may have regard to whether that is necessary to prevent unreasonable damage to a person's reputation, safety or wellbeing.<sup>11</sup>
  - 14.4. IBAC is not obliged to prevent damage being caused to reputations by public examinations. IBAC may consider that the reputational damage that might be caused - or even damage *likely* to be caused - is a reasonable cost of putting credible evidence to witnesses that IBAC considers warrants public examination. IBAC may also consider that it can take steps to conduct the public examination in a way that limits the damage caused to a person's reputation to a 'not unreasonable' level, such as by issuing suppression orders or conducting parts of the examinations in private.
  - 14.5. In some Special Reports, IBAC has included a statement explaining the Commissioner's decision to hold public examinations, including a description of the exceptional circumstances that led to the decision, the public interest in them, and the consideration given to risks that any person's reputation will be damaged. The VI considers such a statement a desirable inclusion to strengthen the public's confidence in the justification of public examinations.<sup>12</sup>
  - 14.6. Public examinations will in most cases raise a risk of reputational damage, but where a person has been the subject of public allegations or suspicion, a public examination may also present an opportunity for them to refute those claims and restore their reputation.
  15. During a public examination, IBAC may issue a suppression order prohibiting or restricting the publication of evidence if it considers that is necessary to prevent prejudice or hardship being caused to any person, including *harm* to their safety or reputation.<sup>13</sup>

---

<sup>10</sup> *ICAC v Chaffey & Ors* 30 NSWLR 21 at 46.

<sup>11</sup> IBAC Act, s 117(3A) and (3B).

<sup>12</sup> Two examples are IBAC, *Operation Dunham: An investigation into the conduct of officers of the Department of Education and Training including Darrell Fraser, in connection with the Ultranet project and related matters*, January 2017, p 15; and IBAC, *Operation Fitzroy: An investigation into the conduct of former employees of the Department of Transport/Public Transport Victoria, Barry John Wells and Hoe Ghee (Albert) Ooi, and others*, October 2014, pp 12-13.

<sup>13</sup> IBAC Act, s 129A(1)(a).

16. IBAC may issue a confidentiality notice to a person, restricting them from disclosing restricted matters where it considers that would be likely to prejudice the reputation of a person.<sup>14</sup>

*Prohibition on disclosing information that would cause unreasonable damage*

17. IBAC is prevented from disclosing information in certain circumstances where it would otherwise be permitted, if to do so would cause unreasonable damage to a person's reputation. Those circumstances are as follows.
- 17.1. When notifying a complainant (or a person who made a notification) of IBAC's decision to dismiss, refer or investigate their complaint, or that IBAC has deferred taking that action while the subject matter of the complaint is being investigated by another person or body.<sup>15</sup>
- 17.2. When providing information to a complainant about the results of an investigation, including any action taken by IBAC and any recommendations it has made.<sup>16</sup>
- 17.3. When providing 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 one or more of:
- the relevant principal officer or any other appropriate senior officer;
  - the responsible Minister;
  - the Premier.<sup>17</sup>
- 17.4. When notifying a complainant or a person who made a notification that IBAC has withdrawn its referral of a complaint or notification, having decided that it will investigate the matter.<sup>18</sup>
18. Where IBAC does provide information to a complainant in the circumstances described in paras 17.1 or 17.2 above, IBAC must give a written statement to the complainant that it is an offence under s 184 of the IBAC Act to disclose that information, except when IBAC is notifying that it has decided to dismiss a complaint.<sup>19</sup>

---

<sup>14</sup> IBAC Act, s 42.

<sup>15</sup> IBAC Act, s 59.

<sup>16</sup> IBAC Act, s 163(1).

<sup>17</sup> IBAC Act, s 163(3). For the purposes of s 163, 'senior officer' means a person who holds a position or is a member of a class of positions that is prescribed by Regulation 5(3) of the *Independent Broad-based Anti-corruption Commission Regulations 2013* (Vic). Those positions and classes of position are (a) an executive employed under Div 5 of Pt 3 of the *Public Administration Act 2004*; a Deputy Commissioner of Police, Assistant Commissioner of Police or commander appointed under the *Victoria Police Act 2013*; a senior officer employed under Div 3 of Pt 4 of the *Local Government Act 1989*; a Court Chief Executive Officer employed under Div 2 of Pt 4 of the *Court Services Victoria Act 2014*.

<sup>18</sup> IBAC Act, s 80(2).

<sup>19</sup> IBAC Act, ss 59(5) and 163(8).

### *Other provisions that support confidentiality*

19. The *Public Interest Disclosures Act 2012* (Vic) ('the PID Act') provides an array of protections designed to keep private the content of public interest disclosures. It is a criminal offence for a person who receives a disclosure, or has any information about one, to tell others of its content or information about its content (subject to some exceptions).<sup>20</sup>
20. There are certain other provisions of the IBAC Act that may assist to prevent reputational impact by safeguarding proper confidentiality and information security arrangements.
  - 20.1. IBAC cannot disclose information that might identify a person whose complaint has met the threshold under the PID Act as an 'assessable disclosure', subject to exceptions.<sup>21</sup>
  - 20.2. IBAC officers are bound to secrecy. They cannot disclose information they acquire in the course of their official duties, excepting to do their work, and for the purposes of a criminal or disciplinary proceeding.<sup>22</sup>
  - 20.3. Any document that relates to an IBAC investigation, investigation report (including draft report) or a recommendation by IBAC, no matter who possesses it, is not required to be released under the *Freedom of Information Act 1982* (Vic).<sup>23</sup> Also excluded are any documents held by IBAC to the extent that they contain information about a complaint, mandatory notification, preliminary inquiry or information received under s 56 of the IBAC Act.<sup>24</sup>

### *Reputation rights under the Charter*

21. As a public authority, IBAC is required by the Charter not to act incompatibly with a relevant human right, and in making decisions it must not fail to give proper consideration to a relevant human right.<sup>25</sup> These obligations form a 'key provision' by which the Charter ensures that human rights are observed in administrative practices and the development of policy within the public sector, without the need for recourse to the courts.<sup>26</sup> The public authority's action is not unlawful under the Charter if, as a result of another law, it could not reasonably have acted differently or made a different decision.<sup>27</sup>
22. While the IBAC Act does not require IBAC to be satisfied that the reputation of a person who is adversely named won't be damaged by a report, the Charter recognises a right not to have their reputation unlawfully attacked.<sup>28</sup> The VI believes the Charter plays a role in underscoring the distinction between comments and opinions that are

---

<sup>20</sup> PID Act, s 52.

<sup>21</sup> IBAC Act, ss 41(3), (4) and (4B).

<sup>22</sup> IBAC Act, s 40. This includes former IBAC officers.

<sup>23</sup> IBAC Act, s 194(1).

<sup>24</sup> IBAC Act, s 194(2).

<sup>25</sup> The Charter, s 38(1).

<sup>26</sup> Second reading speech in the Legislative Assembly 4 May 2006 (Hon. Rob Hulls).

<sup>27</sup> The Charter, s 38(2).

<sup>28</sup> The Charter, s 13.



lawfully reported by IBAC under ss 162 and 165 of the IBAC Act, and those that would be beyond power.

#### *Relevant discretionary practices*

23. IBAC can and does use its discretion to deal with, and prevent, reputational impact.

23.1. In many of its reports, IBAC has not named individuals about whom adverse comments or opinions are made. De-identifying individuals does not remove the risk that their identity will be known to many people, including their work colleagues, friends, or even others who might piece together publicly available information. There may still be an obligation to provide those persons with a reasonable opportunity to respond to the adverse material and fairly set out each element of their response.<sup>29</sup> It is appropriate that IBAC makes selective use of its power to name individuals in reports, particularly where the purpose of its investigation was to expose systemic failures.

23.2. In the past, IBAC has described raising concerns about the provision of information to IBAC in a public manner. In a 2013 report, IBAC cited the need for fairness and the effects of significant media coverage as reasons for it expressing the view to the government of the day that heads of public bodies should, whenever possible, provide information to IBAC privately.<sup>30</sup>

Appendix A to that report contained an 'IBAC policy around fairness to persons named publicly as subject to a complaint'. It stated that:

There is always a risk of tarnishing reputations when someone makes public the reporting or notification of alleged corrupt conduct to IBAC. Should IBAC remain silent, despite a favourable outcome for the subject of a complaint, unfair damage may result.

As a result, where the fact of a complaint or notification to IBAC of possible corrupt conduct becomes public, IBAC may either make public any favourable outcome for the person(s) whose conduct is impugned, or otherwise inform those with a direct interest in the matter (without any confidentiality restrictions).

#### *Complaints to the Victorian Inspectorate*

24. The VI can receive complaints from persons who have suffered reputational impact as a result of IBAC's performance or exercise of its duties, functions or powers in relation to any matter.<sup>31</sup> For the purpose of making a complaint, a person is not prevented from providing the VI with information they have received from IBAC that

---

<sup>29</sup> The VI notes in relation to the use of de-identification or pseudonyms, the report of the Queensland Parliamentary Crime and Corruption Committee, *Report No. 99, Report on a complaint from Mr Darren Hall*, November 2016.

<sup>30</sup> IBAC, *Special report concerning certain operations in 2013*, November 2013.

<sup>31</sup> *Victorian Inspectorate Act 2011* (Vic), s 43(1) ('the VI Act').



it would otherwise be an offence to disclose,<sup>32</sup> or information covered by a confidentiality notice issued to them by IBAC.<sup>33</sup>

25. The VI also has functions to:

- monitor the compliance of IBAC and IBAC personnel with the IBAC Act and other laws; and
- assess the effectiveness and appropriateness of the policies and procedures of IBAC which relate to the legality and propriety of IBAC's activities.

The VI can therefore respond to any action IBAC takes, or fails to take, that might breach any one of the provisions of the IBAC Act that safeguard reputations, as enumerated in this submission.

26. The VI can at any time make recommendations to IBAC, including those to prevent future conduct, and those that would remedy a harm or loss arising from conduct. Such a recommendation would need to be in private, if not contained in a report, but could be made public if IBAC fails to take appropriate action on the recommendation.<sup>34</sup>

#### *Other existing remedies*

27. Judicial review concerning IBAC's exercise of statutorily conferred coercive, investigative or reporting powers may be sought to restrain it from going beyond those powers.

28. In Victoria, the Standing Orders of the Legislative Assembly include a procedure for a citizen's right of reply, enabling a person to seek to reply to allegations made in Parliament.<sup>35</sup> However, the right of reply currently does not extend to the content of tabled reports unless that content was incorporated by a member into a speech given in Parliament.

#### ***Measures adopted in other jurisdictions***

29. Looking at the practices followed in some other jurisdictions, the VI sees merit in the following measures:

- The mandatory publication of the progress of prosecution and disciplinary outcomes where a person is adversely named.
- The publication of procedures for receiving and disclosing exculpatory evidence, such as ICAC's '*Section 31B Guidelines*'.

---

<sup>32</sup> IBAC Act, s 184(d).

<sup>33</sup> IBAC Act, s 44(3).

<sup>34</sup> VI Act, s 78.

<sup>35</sup> Chapter 25, Citizen's right of reply, Standing Orders of the Victorian Legislative Assembly.

- Explanatory statements in reports as to the standard of proof, presentation of evidence and the effect of findings and comments made.

#### *The publication of details of outcomes*

30. The VI considers the detailed information published by ICAC in its annual reports and website on the progress of prosecution and disciplinary matters to be a positive transparency measure. As the media are less likely to publish outcomes that clear people of allegations that were earlier publicised, it is appropriate that anti-corruption bodies – which have an interest, to a degree, in that earlier publicity – ‘balance the ledger’.
31. We therefore consider a provision along the lines of s 203 of the *Integrity Commission Act 2018* (ACT), which would require an anti-corruption body to publish outcomes of prosecutions and termination actions, may be beneficial.<sup>36</sup>

#### *Procedural fairness guidelines*

32. The VI considers ICAC’s ‘*Section 31B Guidelines*’ to be a positive development. The document clarifies and makes known the procedures by which ICAC seeks to ensure it considers relevant evidence, including exculpatory evidence, and discloses it to affected persons.

#### *Explaining the purpose and effect of report findings or opinions*

33. The inclusion in a report of explanatory statements about findings, comments and opinions may clarify the import of them to the public. Such statements might highlight the applicable standard of proof, the limits of what is said about a person’s conduct, and the inferences made from the evidence gathered and presented. The report might clarify that comments made about the evidence are not factual findings that bind other entities called upon to assess the same evidence. The VI notes this is an existing practice of Commissions in some jurisdictions.<sup>37</sup>

#### ***Exoneration protocols***

34. The VI is not aware of any discussion of an exoneration protocol or any other measure to repair reputational damage that has cohered into a proposal in Victoria.
35. The VI agrees with other commentators where they have argued that the findings made by anti-corruption bodies following their investigations are made to a different standard of proof from criminal courts and may be based on evidence that is not

---

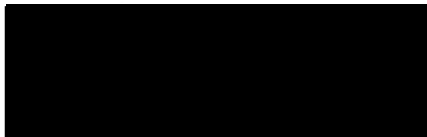
<sup>36</sup> Noting that IBAC is empowered to bring criminal proceedings for offences arising out of its investigations: IBAC Act, s 190.

<sup>37</sup> By way of two examples: the sections entitled ‘Why make this report public’ and ‘Caution regarding the drawing of adverse inferences’ in a recent report by the Queensland Crime and Corruption Commission, *An investigation into allegations relating to the appointment of a school principal* and Appendix 2, ‘Making corrupt conduct findings’ in ICAC’s recent report *Investigation into the alleged corrupt practices of a headlease coordinator at the NSW Department of Family and Community Services*,

admissible.<sup>38</sup> The fact that evidence would be inadmissible in criminal or disciplinary proceedings does not render it unlawful for anti-corruption bodies to rely on that evidence or to include it in reports. The acquittal of a person of criminal or disciplinary offences does not necessarily exonerate them from the conduct that was reported, or which led to a report's conclusions.

36. The VI has not formed a view on whether some other repair protocol or remedial mechanism should be available in Victoria, but we place considerable importance on measures that will prevent unfair damage to reputations in the first place. It is possible that each occasion where reputational repair would seem to be appropriate will present sufficiently unique circumstances that a bespoke solution is fitting. There are a range of actions an anti-corruption body may take in response to unfair reputational impact, each of which might be a properly proportionate solution depending on the circumstances.
37. We note in passing that in Victoria, the introduction of an exoneration protocol might interact with section 39(1) of the Charter. That section provides that if, otherwise than because of the Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of the Charter.

Yours sincerely



**Eamonn Moran PSM QC**  
Inspector

---

<sup>38</sup> For example, the comments made by the Inspector of the ICAC at para 17 of 'Appendix Q' of his report, *Report pursuant to sections 57B(5) and 77A of the Independent Commission Against Corruption Act 1988 concerning an audit under section 57B(1)(d) thereof into the Independent Commission Against Corruption's procedures for dealing with counsel assisting in investigations and inquiries under Part 4 of the Act*, December 2019.