

Independent Broad-based Anti-corruption Commission

Victorian Parliamentary Greens position

Executive summary

The Victorian Parliamentary Greens have expressed serious concerns with Victoria's Independent Broad-based Anti-corruption Commission (IBAC) since its inception.

We note that the Coalition recently introduced another bill into Parliament to amend the IBAC legislation, however it was not considered before the 29 November 2014 Election. In any event the Greens are of the opinion that the Coalition proposed amendments in that bill did not go far enough to broaden the jurisdiction of IBAC so that it could effectively investigate corruption in this state, nor did it give IBAC the appropriate powers necessary for conducting preliminary investigations.

The Greens position and the major actions taken by the Greens from the inception of IBAC up until November 2013 are as follows.

1. IBAC was set up secretly and haphazardly and has serious structural issues

The consultation, advice and legislative drafting processes for creating IBAC were highly secretive. The government took a piecemeal approach to creating IBAC, resulting in confusion and significant limits to its functions.

The Victorian Parliamentary Greens:

- Pushed in Parliament for the public release of consultation documents and expert recommendations in relation to IBAC;
- Put a number of amendments to IBAC Bills in the Legislative Council, including making the "public interest" IBAC's paramount concern and a requirement for a review of IBAC's operation after three years;
- Put a motion to Parliament in mid-2011 calling for an independent commissioner to oversee public appointments, such as the IBAC Commissioner.

2. The "corruption" IBAC can investigate is extremely limited

IBAC can only investigate "serious corrupt conduct" that involves perverting the course of justice, bribery or an indictable offence. Its jurisdiction excludes misconduct per se (except for police) or a breach of an MPs' or Ministerial Code of Conduct in itself.

The Greens attempted to amend the IBAC Act to cover breaches of MPs' and Ministerial Codes of Conduct and to remove the absolute restriction of IBAC's jurisdiction to "serious" corrupt conduct only.

The Greens also introduced a Bill in Parliament to create an offence relating to misconduct in public office by MPs, with significant fines and imprisonment but this bill was defeated.

3. Whistleblower protection does not apply to IBAC

The IBAC Act explicitly excludes the protection of whistleblowers legislation for people who go to IBAC with a complaint. The Greens have said that this will mean people will not take the risk of going to IBAC.

4. IBAC has hazy relationships with other agencies

IBAC's powers to refer complaints or notifications to other bodies such as the Ombudsman or Chief Commission of Police don't adequately detail what matters it will refer, how it should consult prior to referring a matter and the recommendations it should give when making a referral.

The Greens sought to amend the IBAC Act to specify that IBAC may recommend an action or timeline when making a referral, and that it must appropriately consult with an agency prior to referring a matter.

5. IBAC's hearing functions are weighted against witness rights and open justice

The Act requires that IBAC's examinations be private. Public hearings are only possible where there is an exceptional circumstance, in the public interest and it will not affect a personal safety or reputation.

There are issues with how IBAC deals with witnesses. The protection of witnesses against self-incrimination is abrogated, including for those aged 16 and 17. While witnesses are entitled to legal representation, there are no criteria as to when legal assistance will be granted, and there is no right for legal representatives to undertake cross-examination. Also, IBAC can issue confidentiality notices requiring a person not to disclose that he or she has been summonsed to appear at IBAC, without providing reasons to its overseeing body, the Victorian Inspectorate.

The Greens believe public hearings are an important part of open justice and public scrutiny and that having default private examinations unless there are "exceptional circumstances" limits IBAC's functions totally unjustifiably.

The Greens proposed amendments to the IBAC Act to require reasons for a confidentiality notice being issued, allow cross-examination by legal representatives and provide the criteria for grants of legal assistance.

6. IBAC's role and powers in relation to Victoria Police could be vastly improved

IBAC in part is intended to subsume the Office of Police Integrity's functions when the OPI is dismantled. A combined integrity body for police and the rest of the public sector has been shown to not be the ideal model for addressing police integrity.

Police misconduct and corruption are covered under the Act, making IBAC's jurisdiction broader than the general corrupt conduct provisions, reflecting the unique corruption and misconduct risks in the police force. However there is unnecessary confusion in the drafting of the provisions.

The Act is positive in some human rights aspects, including the requirements on police in terms of human rights and reasonable requirements for search warrants being issued.

The Greens key concern with aspects of IBAC relating to police is that yet another opportunity has been missed to create an independent investigator for all police shootings, incidents involving serious injury, deaths and serious injury in police custody, and complaints against police that involve allegations of human rights abuses. This is a serious issue and one which Greens have continued to pursue in Parliament.

1. IBAC was set up secretly and haphazardly and has serious structural issues

- In 2011, the government commissioned a confidential report by Stephen Charles QC on the establishment of an anti-corruption commission. We know that this involved – at least – stakeholder submissions and a final report to cabinet. None of these documents or any related documents are publicly available. No public consultation ever has taken place regarding the establishment of IBAC.
- The establishment of IBAC has been confusing and piecemeal, requiring several Bills between late-2011 and mid-2012:
 - Independent Broad-based Anti-corruption Commission Bill 2011 (IBAC Bill): ostensibly the principal Act, establishing IBAC and giving it education and anti-corruption functions. However this Bill was bare-bones and did not create a functional body;
 - Independent Broad-based Anti-corruption Commission Amendment (Investigative Powers) Bill 2011 (IBAC Amdt (Investigative Powers) Bill): this Bill amended the principal Act beyond recognition, inserting provisions on investigative powers, firearms, reports and recommendations. IBAC was still not a functional body after these extensive amendments;
 - Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012 (IBAC Amdt (Examinations) Bill): this again substantially amended the principal Act, inserting important provisions on referrals and examinations. While the government says is the final Bill, many of IBAC's functions and powers still remain unclear. The Greens did not support this Bill in Parliament;
 - The Victorian Inspectorate Bill 2011 and Victorian Inspectorate Amendment Bill 2012, which created the body that oversees IBAC's performance of its functions.
- IBAC has limited jurisdiction over Members of Parliament. In particular, breaches of MP's Codes of Conduct per se cannot be investigated by IBAC.
- There are no plans for a review of the operation of IBAC in its early years, despite the many concerns with the IBAC model. (A review was carried out on the WA Crime and Corruption Commission.)
- The government announced a four year budget of \$170 million. IBAC's budget for 2012-13 is \$34 million (Budget Paper 3, Chapter 2, p 178). The budget paper says:

"The 2012-13 [cost] Target reflects the first year of funding for the newly established IBAC, including a phased start up that will result in a lower than expected initial cost when compared to the original election commitment."

It is unclear whether the \$170 million budget over four years, and whether it is intended to fund only IBAC or if it is also intended to meet the costs of the

oversight bodies, namely, the Victorian Inspectorate and the IBAC Parliamentary Joint Committee, should be clarified.

- The relationship of IBAC with the Victorian Inspectorate exhibits some problems. Despite the intention of the VI being entirely separate to IBAC, to ensure independent oversight, both bodies report to the same Parliamentary Committee. In addition, the Law Institute of Victoria expressed concern that the lack of clarity in the VI's oversight powers, including its ability to make recommendations, may mean the VI is able to influence IBAC proceedings while they are on foot.
- There has been a lot of commentary in the media on the difficulties with IBAC, including on ABC's 7.30 Victoria in May 2012.

The Greens position

Consultation, public review and the public interest

- The Greens believe that an anti-corruption body should serve the public interest, and that its establishment should have involved broad public consultation.
- Sue Pennicuik has endeavoured to have the secret Charles consultation documents publicly released. Pennicuik put a Question on Notice to the government in October 2011 requesting details of the Charles consultation and report. In February 2012, the government's response was that the documents were cabinet-in-confidence and would not be released. In May 2012, Pennicuik put a motion in the Legislative Council calling for submissions, briefings, reports and other documents or information of the Charles consultation to be tabled. The motion was unanimously passed, however these documents have never been tabled.
- Sue Pennicuik put an amendment to IBAC Amdt (Investigative Powers) Bill to make public interest the paramount consideration in IBAC exercising its functions (similarly to the NSW ICAC Act).
- Sue Pennicuik then put an amendment to the IBAC Amdt (Examinations) Bill to provide for a review of the operation of IBAC after three years, with the resulting report to be tabled in Parliament (as was the case with the WA CCC).

2. The “corruption” IBAC can investigate is extremely limited

The way that the IBAC legislation has been drafted severely limits the type of corruption that IBAC can investigate.

Most significant is the definition of “corrupt conduct” under the IBAC Act. For conduct to be “corrupt conduct” under the Act, a “relevant offence” is required, which is defined as perverting the course of justice, attempting to pervert the course of justice, bribery or any indictable offence.

In addition to this, IBAC is only able to investigate “serious corrupt conduct”. Again this limits the type of corruption that IBAC can investigate, but without a definition of “serious”, it also brings great confusion. How will IBAC know whether or not something is “serious corrupt conduct” before undertaking some sort of investigation to find out if that is the case? And how “serious” must conduct be to reach the threshold required by the Act? This remains uncertain.

Conversely, in NSW the ICAC Act requires its commission to, as far as practicable, “direct its attention to serious corrupt conduct and systemic corrupt conduct”. The NSW legislation makes the intended focus of ICAC clear, and without strictly limiting how it exercises its investigative powers.

A broad range of activities and behaviours are also excluded from IBAC’s jurisdiction. Misconduct per se is not grounds for an IBAC investigation (except for sworn police officers – see below). One of the most concerning implications of this is that breaches of MPs’ or Ministers’ Codes of Conduct cannot be considered corrupt conduct unless a relevant offence is also involved. This severely limits IBAC’s anti-corruption role as far as MPs and Ministers go. Again, it compares unfavourably with the NSW ICAC jurisdiction which, while not completely unrestricted, at least covers “substantial” breaches of Codes of Conduct by MPs and Ministers.

The Greens position

As Sue Pennicuik said during the IBAC Amdt (Examinations) Bill Parliamentary debate, the scope of “corrupt conduct” is “a basic problem on which the whole regime rests”. IBAC’s limited jurisdiction, especially its confinement to “serious corrupt conduct”, where “serious” is an uncertain threshold, will severely hamper its ability to investigate corruption.

The Greens also raised concerns that if IBAC determines that a particular conduct is likely to lead to an indictable offence (although it’s unclear how it is going to find that out if it is not allowed to embark on any sort of investigation) it is difficult to understand why it would not be referred to Victoria Police, who deal with indictable offences.

Sue Pennicuik put amendments to the Legislative Council to the IBAC Amendment (Investigative Powers) Bill to include coverage substantial contravention of MP’s and Ministerial Codes of Conduct.

The Greens also put amendments to the IBAC Amendment (Investigative Functions) Bill to remove the absolute restriction of IBAC’s jurisdiction to

“serious” corrupt conduct, while retaining the emphasis on serious and systemic corruption, similarly to the NSW ICAC.

The government voted down both of these practical amendments.

Aside from the IBAC model, in order to address corruption by MPs the Leader of the Victorian Parliamentary Greens, Greg Barber, introduced a private members Bill to deal with serious misconduct by Members of Parliament.

The Members of Parliament (Serious Misconduct) Amendment Bill 2011 would have helped to ensure that corruption does not rear its head in Parliament, by increasing the threat of imprisonment or serious penalties. The indictable offence created by this Bill is based upon the common law offence of “misconduct in public office”. The Crime and Misconduct Commission in Queensland, with the support of the Director of Public Prosecutions recommended such an offence be put into statute. This Bill used the same recommendations as the basis for the elements of the offence. The offence carries a level 6 maximum penalty of 5 years imprisonment, 600 penalty units (\$73,284 this financial year) or both.

3. Whistleblower protection does not apply to IBAC

The original IBAC Bill 2011 excluded protection of people making disclosures under the Whistleblowers Protection Act 2001 in relation to IBAC. Whistleblowers were completely ignored in the various amendment Bills and there have been no amendments to the Whistleblowers Protection Act in relation to IBAC.

While there are some protections for witnesses at IBAC, there appears to be no legislative protection for whistleblowers who may not become witnesses. The deterrent effect for people considering reporting corruption to IBAC, and how this will impact on IBAC’s performance of its role, can’t be understated.

It contrasts with the fact that new shield laws for journalists will strengthen protection of whistleblowers who go to the media to expose corruption. In short, if a person wants to expose corruption, it seems that they are better protected if they go to the media than to IBAC.

The Greens position

In the Parliamentary debate on the IBAC Amdt (Examinations) Bill, Sue Pennicuik said:

“It is very important to ensure that whistleblowers, the people who are making the notifications or complaints to the IBAC, are protected... They certainly will not take the risk if they are not protected by the Whistleblowers Protection Act 2001, and they are certainly not protected by it in this regime so far, unless the government wants to tell me otherwise.”

4. IBAC has hazy relationships with other agencies

The drafting of IBAC's referral powers makes the nature of its jurisdiction and the guidance it must provide when making referrals ambiguous.

The Act has a long list of bodies that IBAC can refer to, such as the Ombudsman, the Chief Commissioner of Police, government departments, the Environment Protection Authority and WorkCover, but with inadequate detail as to what matters will be referred (as the LIV has stated).

There is also minimal direction as to what IBAC should do when making a referral of a complaint or notification to another body.

First, the Act simply requires that IBAC "may" consult with the agency prior to making a referral to it, as opposed to the NSW ICAC Act which provides that the commission "must" appropriately consult with a body before it makes a referral.

Second, it does not specify that IBAC recommend any action or timeline when making a referral.

The Greens position

The Greens have said that IBAC's referral powers should be clearer on what matters can be referred, IBAC's consultation prior to referrals, and the recommendations it gives when making a referral.

To address the lack of clarity in how IBAC deals with agencies, Sue Pennicuik put amendments to the IBAC Amdt (Examinations) Bill to provide that:

- IBAC may recommend an action and time when referring a complaint or notification;
- IBAC "must" consult appropriately with an agency before it makes a referral to it, similarly to the NSW ICAC requirement.

5. IBAC's hearing functions are weighted against witness rights and open justice

Unlike NSW's ICAC, IBAC only conducts examinations (aka hearings) privately, except where there is an "exceptional circumstance" or it is the public interest, and it would not affect a person's safety or reputation to hold a public examination.

As well as the hearing process lacking transparency, there are limits to or removal of the rights of witnesses appearing at IBAC. Some significant issues are:

- The IBAC Act and VI Act abrogate the protection of witnesses against self-incrimination, including for minors aged 16 and 17;
- While witnesses are entitled to legal representation, there is no right for witnesses' legal representatives to cross-examine at hearings, unlike in the NSW ICAC;

- Also there are no criteria in the IBAC Act for when a grant of legal assistance will be given to a witness called to IBAC, which is not conducive to equitable access to legal representation.
- IBAC can issue confidentiality notices, which can for example prevent a witness disclosing that he or she has been summonsed to appear before IBAC. IBAC must provide the Victorian Inspectorate with copies of such notices, however it does not need to provide the VI with reasons for the notice being issued.

The Greens position

- Public hearings are an important principle of open justice. IBAC examinations being private by default means less possibility for public scrutiny of its legal processes. The “exceptional circumstance” requirement for holding a public examination sets the bar too high and further limits IBAC’s functions. The IBAC Act should be amended to remove this requirement and to reflect NSW’s ICAC Act.
- Sue Pennicuik put amendments to the IBAC Amdt (Examinations) Bill to:
 - require IBAC to provide the VI with reasons for any confidentiality notice being issued (the LIV also stated that IBAC should be required to justify the issuance of a notice);
 - enable the legal representatives of witness at IBAC to conduct cross-examinations during hearings, as is the case with the NSW ICAC;
 - provide criteria for grants of legal assistance to witnesses called to give evidence at IBAC (this suggested amendment was sent to the Legislative Assembly as it involved expenditure therefore would need to originate in the lower house).

6. IBAC’s role and powers in relation to Victoria Police could be vastly improved

It appears IBAC has been established to subsume the Office of Police Integrity’s functions. This means IBAC’s functions will span the police force as well as the public sector more generally. The problems with this integrated structure, instead of a structurally separate policy corruption body, were raised in Parliament by Sue Pennicuik (see below). Also, because of the combined functions of IBAC, certain IBAC officers can use firearms and defensive equipment (as with the Office of Police Integrity officers, whose functions IBAC officers effectively takeover), unlike NSW ICAC officers.

The IBAC Act specifically defines “police personnel conduct”, “police personnel misconduct” and “police personnel conduct complaint”, effectively setting a different investigative jurisdiction for IBAC in relation to police.

While the coverage of police is broader, including misconduct of sworn officers, because of the distinct and increased risks within the police force, the LIV has stated that the drafting of these provisions is unnecessarily confusing.

There are however several positive aspects of the IBAC Act provisions relating to police in terms of human rights. One is that members of the police force are required to have regard to the human rights set out in Victoria's Charter of Human Rights and Responsibilities Act. Also, there are reasonable checks on search powers, for example IBAC can search police personnel premises with a warrant from the IBAC Commissioner, but requires a warrant from the Supreme Court to search vehicles or homes of police personnel. The higher requirement for searches of vehicles and homes provides a more extensive check when IBAC intends to curb the rights of citizens in their private lives.

The Greens position

The main concern with IBAC is that it does not have the jurisdiction to investigate serious incidents involving human rights abuses, injury and death as a result of police contact.

The Greens have long held that investigation of police by police (in Victoria by the Ethical Standards Division) hugely increases the risk of a compromised investigation.

Sue Pennicuk put a motion in Parliament in 2010 for the establishment of an independent body to investigate all police shootings, incidents involving serious injury, deaths and serious injury in police custody, and complaints against police that involve allegations of human rights abuses.

In the Parliamentary debate on the IBAC Amendment (Investigative Functions) Bill, Sue Pennicuk reiterated the Greens' call for independent investigations of these types of serious incidents involving police.

In Parliament, Sue Pennicuk has pointed to the NSW model for police integrity, where a separate Police Integrity Commission was created because the Wood Royal Commission into the NSW Police Force reported in 1996 that the NSW ICAC was not focused on the police force. In short – a previous problem that was rectified in NSW has instead been replicated in Victoria.

The Greens expressed support in Parliament for the requirement for police to have regard to human rights, and for a Supreme Court warrant to be required for searching vehicles and homes of police personnel. On these two matters the IBAC Act protects human rights.

The Greens put an amendment to the IBAC Amendment (Investigative Powers) Bill to extend it to cover police conduct that "does not meet a standard of conduct that the community reasonably expects of a member of the police force". This improvement was not supported by the government.