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Our ref: VI3953
Your ref:

Committee Secretary
Select Committee on a National Integrity Commission
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

Submission of the Victorian Inspectorate to the Senate Select Committee on a National Integrity Commission

Thank you for the opportunity to provide a submission to the Senate Select Committee on the proposal for a National Integrity Commission.

The Victorian Inspectorate (VI) makes the following submissions:

- (1) If the proposed National Integrity Commission is vested with coercive powers to carry out its investigative functions, such powers should be overseen to ensure they are used effectively and appropriately and in compliance with applicable legislative requirements.
- (2) An oversight body with functions and powers similar to those that the VI has in relation to the Victorian Independent Broad-based Anti-Corruption Commission (IBAC) should be considered for the proposed National Integrity Commission.

Why should there be oversight of the use of coercive powers?

This submission uses the term "coercive power" to mean the power to summon a person to be examined and/or to produce documents or things for the purposes of an investigation being carried out by the National Integrity Commission, with the person summoned being required to answer all questions put to him or her in the course of the examination, and to produce all documents and things summoned, even if to do so may tend to incriminate him or her. The IBAC may also compel confidentiality. Such powers are possessed in Victoria by the IBAC and also by the Chief Examiner under the Major Crime (Investigative Power) Act 2004 (Vic).

Coercive powers are vital to the work of the IBAC. The number of coercive examinations conducted by the IBAC has increased from 53 in 2013-14 to 119 in 2014-15 and 179 in 2015-16. This exponential increase in the use of coercive powers by the IBAC shows the importance of coercive powers for the investigation of anti-corruption matters in Victoria.

Coercive powers abrogate fundamental rights possessed by all citizens. They represent a major infringement of civil liberties. Their use is justified for the IBAC on the grounds that they are available only in the course of investigating public sector corruption, and that their use is subject to scrutiny by an external, independent body with extensive investigatory powers of its own, i.e., the VI. The IBAC is responsible to the Parliament and also reports to a special Parliamentary Committee. The VI reports to the same Committee. The VI is effectively the "eyes and ears" of the Parliament.

In addition, there are a number of safeguards built into the legislation, including the right of any person summoned to be legally represented, rights preventing examination of persons under 16, translation for persons whose knowledge of English is deficient, etc.

Given the significant intrusions upon the civil liberties that coercive powers allow for, if the proposed National Integrity Commission is to be vested with coercive powers, there should be oversight and accountability mechanisms to ensure that it uses such powers for the purposes for which they were conferred and otherwise lawfully and with propriety. The VI provides transparency and accountability, and through its complaint function a means for those aggrieved by the IBAC's conduct to be heard.

What powers should an inspectorate have?

In introducing the *Victorian Inspectorate Bill* into the Victorian House of Representatives in 2011, the Minister (Mr McIntosh) said¹:

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.** IBAC will be overseen by two bodies: a joint house committee, which will be created by the IBAC Bill, and the Victorian Inspectorate. (Emphasis added)

The Minister also referred to the need for the oversight body to have appropriate powers²:

This Bill provides the Victorian Inspectorate with duties, functions and powers appropriate and necessary to ensure that the IBAC will itself be the subject of robust oversight. The Bill gives the Inspectorate the broad ability to inquire into all aspects of IBAC's performance of its functions, duties and exercise of its powers. Such an investigation can occur regardless of whether an IBAC investigation is on foot. The Inspectorate is empowered to take on a broad range of actions and make a broad range of findings, including relating to IBAC's process in arriving at a finding or recommendation...

In the 2005 Independent review of the *Independent Commission against Corruption Act 1988* (NSW) by Bruce McClintock SC, some of the attributes of an effective inspectorate model as a mechanism for oversight and accountability of coercive powers were identified as –

¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 27 October 2011, 4976

² Victoria, *Parliamentary Debates*, Legislative Assembly, 27 October 2011, 4980

- The independence of the Inspector;
- The security of confidential information;
- The ability to access operational material without compromising investigations;
- The proactive auditing powers;
- Its complaint handling role.

In addition to those referred to, the VI would add that it is necessary for an inspectorate to have coercive powers similar to those of the anti-corruption body itself, because only with such powers can the inspectorate be sure that it can get to the bottom of anything that needs to be investigated.

How does the VI oversee IBAC?

The VI is responsible for the oversight of IBAC to ensure that it carries out its functions under the *Independent Broad-based Anti-Corruption Act 2011* (IBAC Act) lawfully and with propriety.

The functions of the VI with respect to the IBAC are set out in section 11 of the VI Act and 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 IBAC's activities;
- (d) to receive complaints in accordance with this Act about the conduct of the IBAC and IBAC personnel;
- (e) to investigate and assess the conduct of the IBAC and IBAC personnel in the performance or exercise or purported performance or purported exercise of their duties, functions and powers; and
- (f) to monitor the interaction between the IBAC and other integrity bodies to ensure compliance with relevant laws.

In Victoria the IBAC is required –

- to report to the VI within 3 days of the issue of any summons, stating the reasons for its issue
- to make audio and video recordings of all coercive examinations
- to provide a copy of each recording to the VI as soon as practicable after the examination is concluded.

The VI reviews every recording in full, checking compliance with the legislative requirements and assessing the questioning for relevance, legality and propriety. The VI may receive complaints about the IBAC and may conduct investigations. The VI may make recommendations to the IBAC and may report to the Victorian Parliament. The VI has extensive powers in relation to the IBAC, including coercive powers similar to those of the IBAC.

The VI has a vital role to play, particularly where the IBAC is able to issue summonses that require the production of documents or witness examinations on oath, which are unprotected by the right against self-incrimination.

Through such reviews, the VI has identified various issues relating to the exercise of those powers, which it has raised internally for improvement and reported to the IBAC Committee during regular meetings. This has assisted the IBAC to improve both the IBAC's compliance with its legislation, as well as the quality of matters reported to the VI. Without such oversight, the exercise of coercive powers by the IBAC would remain largely unscrutinised.

What are the benefits of an Inspectorate mechanism to oversee integrity bodies?

A powerful and independent inspectorate provides assurance to Parliament and the public that the invasive powers used by an anti-corruption authority are subject to critical scrutiny, and that any misuse of those powers is "called out" publicly. The VI does not have power to require the IBAC to take any step, but it has power to recommend and power to require the IBAC to explain, in writing, the reasons for not accepting any recommendation. It is often said that sunlight is the best disinfectant, and an independent inspectorate with appropriate powers has the ability to shine light where it needs to be shone.

Conclusion

For these reasons the VI makes the submissions set out above. The VI would be happy to provide any further information that may assist the Select Committee.

Yours sincerely,

Robin Brett QC
Inspector