A section 25(2) report concerning the constitutional validity of aspects of Victoria’s new integrity legislation

October 2013

Ombudsman Act 1973
Letter to the Legislative Council and the Legislative Assembly

To
The Honourable the President of the Legislative Council
and
The Honourable the Speaker of the Legislative Assembly


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OMBUDSMAN
15 October 2013
Contents

Constitutional validity concerns 3
Background 5
  My November Letter 5
  My December Report 5
Legal Advice 6
  Mr Moran QC’s first advice 7
  Solicitor-General’s advice 8
  Mr Moran QC’s second advice 8
The nature of the difficulties facing the State 9
Conclusion 11
Attachment A - Memorandum of Advice - Eamonn Moran PSM QC 8 March 2013 13
Attachment B - Joint Memorandum of Advice - Stephen McLeish SC and Graeme Hill of Counsel 22 March 2013 41
Attachment C - Memorandum of Advice - Eamonn Moran PSM QC 3 June 2013 59
Attachment D - Letter from the Hon Dr Denis Napthine MP 29 August 2013 65
Constitutional validity concerns

This report is made pursuant to section 25(2) of the Ombudsman Act 1973 and follows my earlier report to Parliament in December 2012 on the proposed integrity system. Section 25(2) allows me to: ‘at any time make a report to Parliament on any matter arising in connection with the performance of’ my functions.

I provide this report due to provisions in the Integrity Accountability Legislation Amendment Act 2012, (the IALAA) which undermine and hamper my ability to perform my independent role. Those provisions in the IALAA are of concern for that reason and because I have been advised that those provisions appear to be inconsistent with entrenched provisions in the Constitution Act 1975. If this advice is correct, the IALAA appears to be invalid in total.

My functions under the Ombudsman Act are broad. My primary function is to ‘enquire into or investigate any administrative action taken by or in an authority’. My other functions also include ‘any other functions conferred by or under this or any other Act’. This includes investigating protected disclosure complaints under the Protected Disclosure Act 2012.

I have consulted with two Queen’s Counsel regarding my concerns about the validity of the IALAA and how this impacts on the functions of my office.

The advice provided concerns the apparent constitutional invalidity of certain aspects of the Ombudsman Act as a result of the constitutional invalidity of the IALAA. The IALAA purports to have effected numerous amendments to the Ombudsman Act, the Audit Act 1994 as well as other Acts within the IBAC suite of legislation.

This apparent invalidity of the IALAA arises from the inconsistency between provisions in the IALAA and section 94E of the Constitution Act 1975, which provides that the Ombudsman is an ‘independent Officer of the Parliament’. Section 94E of the Constitution Act is ‘entrenched’ by section 18(1B) of the same Act, so that any Bill which seeks to repeal, alter or vary it must be passed by both Houses and ‘approved by the majority of the electors voting at a referendum’.

The IALAA was not approved at a referendum. As a result, if provisions in the IALAA are inconsistent with section 94E of the Constitution Act then not only will those inconsistent provisions in the IALAA be invalid, but the entire IALAA will be invalid.

This presents a significant difficulty to the effectiveness and operations of my office; but it also strikes at the heart of the new integrity system in the State, as the invalidity of the IALAA will strike down numerous new provisions in other pieces of integrity legislation, particularly:

- the Audit Act
- the Victorian Inspectorate Act 2011
- the Independent Broad Based Anti-Corruption Commission Act 2011.

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1 Section 13(1) Ombudsman Act 1973.
4 Part IV Division 1A Ombudsman Act 1973.
Pending a definite resolution of this matter, either by the courts or by legislation, the validity of various actions of integrity organisations will be exposed. It is essential, in my view, for this uncertainty to be resolved at an early date so as to ensure that the integrity system for the State operates on a sound basis.
Background

My November Letter

On 14 November 2012, The Hon Andrew McIntosh, MP second read the IALAA and the Protected Disclosure Bill in the Legislative Assembly. As I had not been consulted regarding either of those Bills and my requests for access to the draft legislation prior to their introduction had been rejected, it was not until that date that I had the opportunity to consider the Bills.

Having examined those Bills I was concerned as to elements of what was then the proposed integrity scheme for the State. As the Bills were to return to the Assembly in December 2012 to complete their enactment, I considered it necessary to write to the then Premier, The Hon Ted Baillieu, MP to advise him of my concerns and to recommend that consideration of the Bills be deferred until February 2013 in order that I might make a comprehensive report to the Parliament.

On 26 November I provided the letter to Mr Baillieu, with copies sent to the Presiding Officers of the two houses of Parliament and the leaders of the other parties. In it I outlined my initial views regarding the difficulties of the IBAC scheme and raised my concerns as to the inconsistency between elements in the IALAA and section 94E Constitution Act:

If the Bills are enacted in their current form, I do not consider that it will be possible to properly refer to the office of the Ombudsman as being ‘independent’ or as being an ‘independent officer of the Parliament’. Accordingly, if the Bills are not to be amended, section 94E of the Constitution Act 1975 should be repealed to recognise the new reduced status of my office and to avoid misuse of the terminology ‘independent officer of Parliament’.

My December Report

As my recommendation to defer the consideration of the Bills until February 2013 was not adopted, I considered it necessary to present a report to Parliament detailing my concerns about the content of the Bills to ensure that the Parliament was fully informed.

I tabled my report on 10 December 2012. It discussed my concerns about the weaknesses and defects in the IBAC suite of Bills. Prior to the completion of the report my office consulted with a Queen’s Counsel experienced in State Constitutional law regarding the constitutional inconsistency between the IALAA and section 94E of the Constitution Act. In that report I stated, using words endorsed by that Queen’s Counsel, the following:

5 Despite the assurances provided to Mr McIntosh (see Hansard 27 November 2012).
6 A section 25(2) report to Parliament on the proposed integrity system and its impact on the functions of the Ombudsman, December 2012.
Section 94E(1) of the Constitution Act 1975 provides that the Ombudsman is an ‘independent officer of Parliament’. That provision is ‘entrenched’ by section 18(1B)(o) of the Constitution Act so that section 94E cannot be repealed, altered or varied without approval at a referendum. Accordingly, any ordinarily passed legislative provision which seeks to alter section 94E(1) is invalid to the extent of the inconsistency between that provision and section 94E.

Any provisions in the IBAC legislation which seek to require the Ombudsman to act in a manner inconsistent with the essential elements of being an ‘independent officer of the Parliament’ will be seeking to alter or vary section 94E(1) and, to that extent, will be invalid or inoperative unless approved at a referendum.

This is the effect of legal advice recently provided by Queen’s Counsel, an experienced State constitutional law expert. Counsel considers that there are provisions in the Integrity Accountability Legislation Amendment Bill that could, if enacted, require the Ombudsman, an entrenched independent officer of the Parliament, to act in manner that is inconsistent with the status and role of an independent officer of the Parliament. Counsel also considers that those provisions may be constitutionally invalid if enacted without approval by a referendum. However, because of the limited time available to undertake a full analysis and the complexity of the various Bills, Acts and provisions involved, the extent of that invalidity is not clear at this time.

I went on to state that ‘given the importance and ramifications of this advice, it would be unwise to finalise the Parliament’s consideration of the Bills until this issue is clarified’ and I considered it was in the ‘public interest to defer consideration of the two IBAC Bills [then before the House] until February 2013’. This was to allow further consideration to be given to the constitutional validity of those Bills before the passage of those Bills.

I note that Mr McIntosh advised the Assembly on 11 December 2012 that:

The government does not accept the Ombudsman’s categorisation of its integrity reforms. The government has considered this matter at all stages of its legislative program and has taken significant advice about all those matters. As I said, the government disagrees with the Ombudsman’s interpretation. The government has developed the reforms taking into account the independence of the officers of Parliament such as the Auditor-General and the Ombudsman, and the government is confident that the proposed legislation is valid.

Both Bills were passed by both Houses of Parliament in December 2012 before the issue of constitutional validity had been clarified. Assent was provided on 18 December 2012.

**Legal Advice**

Given my continuing concerns about the inconsistency between section 94E of the Constitution Act and the IALAA, I sought advice from a second Queen’s Counsel, also with considerable State Constitutional law experience, Mr Eamonn Moran PSM QC. Mr Moran previously had been the Chief Parliamentary Counsel for the State.

That is, it cannot be changed or repealed in the same way as normal legislation, but, in this case, it requires the passage of a referendum.
Mr Moran QC’s first advice

Mr Moran provided his advice on 8 March 2013. This advice confirmed the advice of the first Queen’s Counsel consulted and echoed the concerns that I held regarding the inconsistency between the IALAA and section 94E Constitution Act. Mr Moran’s conclusion was that he considered that the entire IALAA was invalid.

Mr Moran’s advice is attached (See Attachment A). Mr Moran considers that the better view is:

- Section 94E of the Constitution Act 1975 is validly entrenched by section 18(1B) of that Act
- Section 94E of the Constitution Act 1975 is purportedly altered or varied by at least the following sections of the Integrity Accountability Legislation Amendment Act 2012: section 227 (inserting a new section 13AB in the Ombudsman Act 1973), section 243 (inserting a new section 25A in the Ombudsman Act) and section 278 (inserting new sections 82 and 83 (as renumbered) in the Victorian Inspectorate Act 2011)
- The Integrity Accountability Legislation Amendment Act 2012 is a law “respecting the constitution, powers or procedure of the Parliament” within the meaning of section 6 of the Australia Act 1986
- The Integrity Accountability Legislation Amendment Act 2012 was not made in the “manner and form” required by section 18(1B) of the Constitution Act 1975
- Consequently, the whole of the Integrity Accountability Legislation Amendment Act 2012 is of no force or effect with resulting implications not only for the Ombudsman but for the Victorian Inspectorate, the Independent Broad-based Anti-corruption Commission, the Auditor-General and the Freedom of Information Commissioner among others. [My emphasis]

I also note that Mr Moran stated (at page 17 of his advice), in relation to the inconsistencies between the IALAA and section 94E, that:

- It may also be argued that the overall scheme of oversight of the Ombudsman by the Victorian Inspectorate alters or varies that section.
- The oversight is not being carried out directly by the Parliament or a parliamentary committee. The Victorian Inspector is an independent officer of the Parliament. If it is accepted that an attribute of such a status is that the officer is independent from directions from Parliament and its committees then necessarily the oversight is not been [sic] controlled by the Parliament and, accordingly, the independent status of the Ombudsman as an officer responsible only to, and accountable directly to, Parliament is interfered with. [My emphasis]

There is also a similar inconsistency between the IALAA and section 94B Constitution Act which concerns the Auditor-General and changes to the Audit Act.

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8 Which requires that I do not perform or exercise my powers and duties in a way that would prejudice criminal proceedings or investigations or IBAC or Victorian Inspectorate investigations.

9 Which prevent me including in my any reports certain types of finding or Cabinet information, even if had been voluntarily provided to me.

10 This provision allow the Inspectorate to make recommendations to the Ombudsman for actions that the Ombudsman should take; make public recommendations if the Ombudsman has failed to ‘take appropriate action’ in relation to recommendations; and to ‘require’ the Ombudsman to make a report justifying why he has not adopted any recommendation.

11 This provision allows the Inspectorate to refer a complaint regarding Ombudsman officers to the Police, the DPP and certain other offices.
Solicitor-General’s advice

I provided the opinion of Mr Moran QC to the Premier and to the Attorney-General who sought the opinion of the Solicitor-General, Mr Stephen McLeish SC. Mr McLeish with the assistance of Mr Graeme Hill of Counsel provided an advice dated 22 March 2013 which disagreed with Mr Moran’s conclusions. That opinion was provided to me and is attached (See Attachment B).

Mr Moran QC’s second advice

Mr Moran was asked to consider the Solicitor-General’s advice and inform my office whether this caused any alteration to his views. Mr Moran provided a second advice on 3 June 2013 which confirmed his earlier advice. This opinion is also attached (See Attachment C).

At the Attorney-General’s suggestion, Mr Moran and Mr McLeish met to discuss this issue on 12 June 2013. However, they were not able to reach any common views on this issue.
The nature of the difficulties facing the State

Eminent and experienced legal counsel have reached different views as to the constitutional validity of the IALAA. While I express no opinion as to who is correct, such a disagreement concerning the validity of one of the central elements of the State’s integrity system is indicative of fundamental uncertainties inherent in that system. These uncertainties in my view require early resolution.

The consequences are serious if the legal advice provided to me are correct, particularly as Mr Moran is of the view that section 94E of the Constitution Act and the IALAA are inconsistent and this inconsistency causes the entire IALAA to be invalid.

The result of this invalidity is that all of the amendments purportedly made by the IALAA to over more than forty Acts of Parliament, including the Independent Broad-based Anti-corruption Commission Act, the Victorian Inspectorate Act, the Ombudsman Act and the Audit Act will be ineffective. That invalidity will fundamentally undermine the effectiveness of the new integrity scheme. Further, the uncertainty as to the validity will place integrity agencies in the undesirable position of either acting in accordance with legislation that Queen’s Counsel have advised is invalid, or to treat the IALAA as invalid and function as if it had not been passed.

This problem is not merely a difficulty presented to heads of integrity agencies in operating those agencies. It also places individuals within those offices in a difficult position when their duties necessitate that they undertake certain actions, the legality of which is dependent on provisions added by the IALAA to protect them from any liability that would otherwise arise in relation to those actions.

For example, section 97 of the IALAA seeks to add a provision to section 130 of the Firearms Act 1996 to allow authorised senior IBAC officers to carry or use a loaded firearm without breaching that provision12. If the IALAA is invalid, officers relying on the new provision by carrying weapons appear to be breaching the Firearms Act and at risk of being penalized under that Act. Similarly, Division 3 of Part 4 of the IALAA purports to amend the Crimes (Controlled Operations) Act 2004 so as to allow IBAC to conduct controlled operations, being operations for which otherwise persons would or may be criminally liable. The Crimes (Controlled Operations) Act provides protections from prosecution for activities authorised in relation to those controlled activities. If the IALAA is invalid, IBAC officers and others involved in those operations may be criminally liable for their activities.

The IALAA also purports to allow integrity agencies to undertake certain activities, including:

- The Victorian Inspectorate’s jurisdiction over the Chief Examiner, the Auditor-General and the Ombudsman purportedly provided for by Part 3, Division 2 of Part 6 and Division 5 of Part 7;

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12 The maximum for breaching section 130 Firearms Act is 60 penalty units or 12 months imprisonment.
• The considerable alterations to the Ombudsman Act purportedly made by Part 7. Those alterations concern the structure of the Act, my functions and powers, bodies subject to my jurisdiction, confidentiality obligations, sharing of information, exempt bodies, investigation powers and processes and my interrelationship with IBAC and the Victorian Inspectorate; and

• The ability of IBAC to allow persons to acquire or use an assumed identity purportedly allowed by amendments made to the *Crimes (Assumed Identities) Act 2004* by Division 2 Part 4 IALAA.

The ability to undertake these activities will be uncertain until the validity of the IALAA is resolved.

In addition, the jurisdiction of the Parliamentary Accountability and Oversight Committee over the Ombudsman is dependent on the IALAA\(^\text{13}\) and, accordingly, its function must also be in doubt until the validity of the IALAA is resolved.

The potential invalidity of the IALAA is also of relevance to those subject to the actions of integrity bodies and can provide means by which their jurisdiction could be challenged. As an example, if the IALAA is invalid, my ability to receive and act on matters referred by IBAC would be in doubt, as this function derives from section 16B of the Ombudsman Act, a provision added by section 231 of the IALAA. A subject of such an investigation may seek to challenge my jurisdiction on that basis.

The consequences of such a challenge, if successful, would be considerable. It could impact not only on the matter disputed, but also on all elements in the integrity scheme added by the IALAA. This could potentially invalidate many integrity agency actions taken since 10 February 2013, the commencement day of the IALAA. It is, therefore, clearly in the public interest for remedial action to be taken as early as possible to ensure the continuation of an effective integrity scheme.

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13 Division 4 Part 7 of the IALAA.
Conclusion

There are two apparent means to overcome the uncertainties regarding the potential validity of the IALAA.

First, for a declaration to be sought from the Supreme Court as to the validity of the IALAA and the provisions it purports to add to various Acts. Should such a declaration be granted, this would remove any concern regarding any invalidity of the IALAA. The difficulty with this course is that it will take some time to complete, during which time the uncertainty will remain unresolved. Indeed, due to the nature and complexity of the issues involved this matter may require resolution by the High Court. It will also require a public airing of the apparent deficiencies of the legislation. Furthermore, if the declaration is not granted, an urgent legislative solution will be required at the completion of the litigation process.

The other and I believe preferred option is the passage of remedial legislation. This legislation would not seek to amend the IALAA to remove the provisions inconsistent with sections 94E and 94B of the Constitution Act, as it not possible to amend an invalid Act. Instead it would repeal the IALAA and replace the IALAA with new legislation to re-enact the IALAA other than the provisions considered inconsistent with sections 94E and 94B of the Constitution Act. That replacing legislation would need to operate retrospectively, from the same date as the IALAA so as to ensure that there is no hiatus in the coverage of the integrity system.

In my view, the latter option is preferable as it will allow the earliest resolution of this potential invalidity.

I provided a draft version of this report to the Premier, The Hon Denis Napthine, MP who advised that ‘the Government will be relying on the advice of the Solicitor-General, who has given clear advice that the State’s integrity legislation is constitutionally valid’ (See Attachment D).

Given the consequences to the independence of my office and that of the Auditor-General arising from the IALAA; and given the consequences to the validity of actions taken within the integrity scheme if a court were to find that the Solicitor General’s opinion is incorrect, I consider that I have no option but to draw these matters to the attention of the Parliament.
report concerning the constitutional validity of aspects of Victoria’s new integrity legislation
IN THE MATTER OF THE INTEGRITY AND ACCOUNTABILITY
LEGISLATION AMENDMENT ACT 2012
AND
IN THE MATTER OF THE CONSTITUTION ACT 1975

MEMORANDUM OF ADVICE

My advice is sought on the constitutional ramifications of the enactment of the IBAC suite of Acts and in particular the enactment of the Integrity Accountability Legislation Amendment Act 2012 (IALAA).

A constitutional issue arises because of the amendments made to the Constitution Act 1975 by the Constitution (Parliamentary Reform) Act 2003 (Act No. 2/2003). Section 19 of the latter Act inserted a new section 94E in the Constitution Act 1975 in the following terms:

94E Independence of the Ombudsman

(1) The Ombudsman appointed in accordance with the Ombudsman Act 1973 is an independent officer of the Parliament.

(2) The functions, powers, rights, immunities and obligations of the Ombudsman are as specified in this section, the Ombudsman Act 1973 and other laws of the State.

(3) There are no implied functions, powers, rights, immunities or obligations arising from the Ombudsman being an independent officer of the Parliament.

(4) The powers of the Parliament to act in relation to the Ombudsman are as specified in the Ombudsman Act 1973.

(5) There are no implied powers of the Parliament arising from the Ombudsman being an independent officer of the Parliament.

(6) Subject to this section, the Ombudsman Act 1973 and other laws of the State, the Ombudsman has complete discretion in the performance or exercise of his or her functions or powers.

(7) The Ombudsman is not to be removed or suspended from office except in accordance with the provisions of sections 3 and 4 of the Ombudsman Act 1973 as in force immediately before the commencement of section 19 of the Constitution (Parliamentary Reform) Act 2003 or provisions substituted for those sections which have the same effect.

Section 94E is located in Part VA of the Constitution Act 1975. Section 17(2) of the Constitution (Parliamentary Reform) Act 2003 also inserted a new section 18(1B) in the Constitution Act 1975. That subsection purports to carry out a double entrenchment, an entrenchment both of section 94E and of itself. It provides (so far as relevant) as follows:

(1B) It shall not be lawful to present to the Governor for Her Majesty’s assent any Bill by which—
(a) this subsection or subsection (1A), (1BA), (1C) or (3); or
(b) Part VA; or
(c) any provision substituted for any provision specified in paragraphs (a) to (c)—
may be repealed, altered or varied unless the Bill has been passed by the Assembly and the Council and approved by the majority of the electors voting at a referendum.
To advise on the constitutional ramifications of the enactment of the IBAC suite of Acts it is necessary to consider the following issues:

1) What is the meaning of section 94E of the Constitution Act 1975?
2) Has that section been repealed, altered or varied by the IALAA or any other Act included in the IBAC suite of Acts?
3) If yes, was the Bill for the Act by which that section was repealed, altered or varied passed in accordance with the special procedure set out in section 18(1B) of the Constitution Act 1975?
4) If no, was that Bill required to follow that special procedure?
5) In any event, what course of action should the Ombudsman take?

Summary of advice

The better view is that:

- Section 94E of the Constitution Act 1975 is validly entrenched by section 18(1B) of that Act
- Section 94E of the Constitution Act 1975 is purportedly altered or varied by at least the following sections of the Integrity Accountability Legislation Amendment Act 2012: section 227 (inserting a new section 13AB in the Ombudsman Act 1973), section 243 (inserting a new section 25A in the Ombudsman Act) and section 278 (inserting new sections 82 and 82 (as renumbered) in the Victorian Inspectorate Act 2011)
- The Integrity Accountability Legislation Amendment Act 2012 is a law “respecting the constitution, powers or procedure of the Parliament” within the meaning of section 6 of the Australia Act 1986
- The Integrity Accountability Legislation Amendment Act 2012 was not made in the “manner and form” required by section 18(1B) of the Constitution Act 1975
- Consequently, the whole of the Integrity Accountability Legislation Amendment Act 2012 is of no force or effect with resulting implications not only for the Ombudsman but for the Victorian Inspectorate, the Independent Broad-based Anti-corruption Commission, the Auditor-General and the Freedom of Information Commissioner among others.

Section 94E of the Constitution Act 1975

Section 94E(1) states that the Ombudsman is an independent officer of the Parliament. In his second reading speech on the Constitution (Parliamentary Reform) Bill 2003, the Premier Mr Bracks stated that making the Ombudsman an independent officer of the Parliament
meant that the Ombudsman would be responsible to the Parliament, not the Government, and could only be dismissed by the Parliament.\(^1\)

The Ombudsman is not a Parliamentary officer within the meaning of the Parliamentary Administration Act 2005. The Ombudsman is appointed by the Governor in Council for a term of 10 years and may only be removed from office on an address of both Houses praying for that removal.\(^2\)

The extensive research carried out by my instructing solicitor has revealed that in Australia the first office holder declared to be an independent officer of the Parliament was the Commonwealth Auditor-General.\(^3\) This apparently was motivated by a desire to emphasise the relationship between the Auditor-General and the Parliament.

In February 2006 the Public Accounts and Estimates Committee of the Victorian Parliament delivered its "Report on a Legislative Framework for Independent Officers of Parliament". Among its recommendations relating to the Ombudsman was a recommendation that a designated committee of the Parliament have the principal responsibility for ensuring the independence and accountability of the Ombudsman and his or her office.\(^4\)

Paragraph 4.1.6 of that Report stated:

To be effective, the officers of Parliament not only need to be independent from the executive government but also require statutory protection from directions from Parliament and its committees. The Auditor-General, the Ombudsman and the Electoral Commissioner are safeguarded from interference in their functions by sections 94B(6), 94E(6) and 94F(6) of the Constitution Act that provides that they have complete discretion in the performance or exercise of their functions and powers. Further, the Auditor-General is not subject to direction from anyone in relation to audits. This Committee strongly supports this constitutional safeguard and considers that the legislation governing the operations of the officers of Parliament should also state that the officers cannot be directed by Parliament or its parliamentary committees on operational matters.

Accordingly Recommendation 8 in that Report was that the legislation governing the operations of officers of the Parliament explicitly state that Parliament and its parliamentary committees cannot direct these officers of Parliament on operational matters but can request them to undertake specific investigations.

At paragraph 4.1.7 the Committee expressed the view that the Ombudsman should be directly accountable to Parliament for the proper and efficient management of staff and financial resources.

Leaving aside issues of appointment and removal, it would seem clear that a core characteristic of an independent officer of the Parliament is their accountability (in terms of

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\(^1\) Victoria, Parliamentary Debates, Legislative Assembly, 27 February 2003, 162.
\(^2\) Ombudsman Act 1973, section 3.
\(^3\) Auditor-General Act 1997 (Cth.).
\(^4\) Recommendation 7(b).
reporting and oversight) to the Parliament, and not the Executive, and their independence in operational matters. While oversight might be vested in the Parliament or a parliamentary committee, that should not involve direction or control of operational matters.

While the Public Accounts and Estimates Committee Report recommended changes in the legislative arrangements relating to the appointment and operation of the Ombudsman, including outlining in the Constitution Act the core principles underpinning the operations of independent officers of the Parliament, it considered, as noted above, that the Ombudsman was safeguarded from interference in the performance of his or her functions or the exercise of his or her powers by section 94E(6) of the Constitution Act.

Indeed, pre-IBAC, while the Ombudsman was required to make an annual report to Parliament on the performance of his or her functions, no parliamentary committee had any oversight responsibility let alone capacity to direct or control operational matters.

Section 31 of the Ombudsman Act 1973 has, since its original enactment, authorised the making of Rules of Parliament for the guidance of the Ombudsman in the exercise of his or her functions and required the Ombudsman to exercise his or her functions in accordance with those Rules. No such Rules have ever been made.

It might therefore be concluded that pre-IBAC the functional relationship of the Ombudsman with the Parliament was limited to receiving reports and playing a role in any decision to remove him or her from office. The Parliament did have power to make binding Rules of Parliament but choose not to exercise that power. Pre-IBAC such were the “powers of the Parliament to act in relation to the Ombudsman” as described in section 94E(4) of the Constitution Act 1975.

However, section 94E of the Constitution Act did contain two important operational safeguards. In declaring the Ombudsman to be an independent officer of the Parliament and to have complete discretion in the performance of his or her functions or the exercise of his or her powers, the Ombudsman was protected, post appointment, from interference both by the Executive and the Parliament in operational matters.

The only capacity for the Executive to have any influence on the operations of the Ombudsman was through the fact that it controlled the budget for the Ombudsman’s office, an undesirable situation for an independent officer of the Parliament.

While section 94E(6) was subject to the Ombudsman Act, in the absence of Rules of Parliament, there was nothing in that Act pre-IBAC to interfere with his or her discretion in the performance or exercise of his or her functions or powers. Nor was the Ombudsman

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5 Ombudsman Act 1973 s. 25
accountable to any entity other than the Parliament (and of course the courts on a judicial review) with respect to the performance or exercise of his or her functions or powers.

Has section 94E been repealed, altered or varied?

In Attorney-General for Western Australia v Marquet⁶ Gleeson CJ and Gummow, Hayne and Heydon JJ in their joint judgment stated that it "may readily be accepted that the central meaning of “amend” is to alter the legal meaning of an Act or provision, short of entirely rescinding it, and that the central meaning of “repeal” is to rescind the Act or provision in question.

As section 18(1B) of the Constitution Act, in seeking to entrench section 94E, uses the composite expression “repealed, altered or varied”, it is not necessary to seek to distinguish the individual labels.

The text of section 94E has not been directly altered by the IBAC suite of Acts. However, "It is possible to effect a change to an Act by legislation that does not alter the text. Where a later Act changes the way in which an existing Act is to operate, that later Act may be considered to be a repealing Act if the existing Act has no further operation or an amending Act if the Act continues in force but in a different way".⁷

That section 18(1B) intends to cover implied, as well as express, repeals or amendments in relation to section 94E is clear when that section is compared with section 18(1BA). Section 18(1B) seeks to entrench not just Part VA, in which section 94E is located, but a number of other provisions including Part IIA. Section 18(1BA) then provides as follows:

(1BA) For the purposes of subsection (1B), a provision of a Bill is not to be taken to repeal, alter or vary Part IIA unless the Bill expressly refers to that Part in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary Part IIA.

It would therefore seem clear that for the purposes of subsection (1B) a provision of a Bill may be taken to repeal, alter or vary section 94E by implication without expressly changing in any way the text of that section.

Pre-IBAC section 94E operated to confer independent officer status on the Ombudsman and to give him or her, subject to the Ombudsman Act 1973 and other laws of the State, “complete discretion in the performance or exercise of his or her functions or powers”.

Post-IBAC the legislative regime relating to the Ombudsman is now very different. The Ombudsman and members of the Ombudsman’s staff are now subject to oversight by the Victorian Inspectorate which may make recommendations as to action that it considers should be taken by the Ombudsman. The Ombudsman himself or herself is subject to

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⁷ Statutory Interpretation In Australia, Pearce & Geddes, 7th ed. at 259.
oversight by the Accountability and Oversight Committee of the Parliament. The Ombudsman is prohibited from enquiring into or investigating certain kinds of administrative action, is prevented from reporting on certain matters to the Parliament and is to some extent regulated as to how to perform his or her functions or duties or exercise his or her powers. Finally, the Ombudsman now has reporting obligations to the Victorian Inspectorate as well as to the Parliament. I would submit that the effect of these changes on the operation of section 94E of the Constitution Act 1975 is to alter or vary that section.

In the remainder of this section I shall set out the key provisions underlying this changed legislative landscape.

Victorian Inspectorate

The Victorian Inspectorate Act 2011 (VIA) establishes a Victorian Inspectorate. The Victorian Inspectorate consists of one Inspector appointed by the Governor in Council. Section 17 of the VIA makes provision with respect to the Inspector similar to that made by section 94E of the Constitution Act 1975 with respect to the Ombudsman. In particular the Inspector is stated to be “an independent officer of the Parliament” and, subject to the VIA and other laws of the State, to have “complete discretion in the performance or exercise of his or her duties, functions or powers”. The VIA goes further, however, and states that “the Inspector is not subject to the direction or control of the Minister in respect of the performance or exercise of his or her duties, functions or powers”.

Section 5(e)⁸ of the VIA states that it is an object of the Act to “provide for the independent oversight of Ombudsman officers”. That term covers the Ombudsman and members of Ombudsman staff⁹.

Section 11(4)¹⁰ of the VIA gives the Victorian Inspectorate the following functions in respect of Ombudsman officers:

(a) to monitor—

(i) the exercise of coercive powers by Ombudsman officers; and

(ii) compliance by Ombudsman officers with procedural fairness requirements in the performance of functions under the Ombudsman Act 1973 or any other Act, including in the conduct of enquiries and investigations and the making of reports and recommendations under the Ombudsman Act 1973 or any other Act;

(b) to receive complaints in accordance with this Act about the conduct of Ombudsman officers;

(c) to investigate and assess in accordance with this Act the conduct of Ombudsman officers;

(d) to report on, and make recommendations as a result of, the performance of its functions under paragraphs (a) to (c).

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⁸ Inserted by IALAA s. 262(b).
⁹ Definition inserted by IALAA s. 261.
¹⁰ Inserted by IALAA s. 264.
Section 42(1) of the VIA empowers the Victorian Inspectorate to require the Ombudsman to provide a written report containing certain specified information in relation to “an appearance by a person before the Ombudsman in an investigation under the Ombudsman Act 1973 or any other Act (whether in response to a witness summons or otherwise)”. Section 42(2) requires the Ombudsman to comply with such a requirement.

This is supplemented by section 18A of the Ombudsman Act which requires the Ombudsman to give a written report to the Victorian Inspectorate within 3 days after issuing a witness summons specifying the name of the person summoned and the reasons why the summons was issued. Under section 18C(6) of the Ombudsman Act the Ombudsman must inform the Victorian Inspectorate in writing of the giving of any direction not to seek legal advice or representation from a specified legal practitioner and the reasons for giving it.

Section 43(5) of the VIA enables any person to make a complaint to the Victorian Inspectorate about the conduct of an Ombudsman officer in respect of the exercise or purported exercise of coercive powers in relation to any matter or the compliance with procedural fairness requirements in the performance of functions under the Ombudsman Act 1973 or any other Act, including in the conduct of enquiries and investigations and the making of reports and recommendations.

Section 43(6) expressly states that a complaint may be made on the basis that the conduct of the Ombudsman officer was contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, based on improper motives, an abuse of power or otherwise improper.

Under section 44 of the VIA the Victorian Inspectorate may investigate the complaint and, if it does decide to investigate it, under subsection (4) must notify the Ombudsman in writing “unless the Victorian Inspectorate reasonably believes that giving notice of the investigation could prejudice the investigation of the complaint”.

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11 Inserted by IALAA s. 266.
12 Inserted by IALAA s. 266.
13 Inserted by IALAA s. 234.
14 Inserted by IALAA s. 234.
15 Inserted by IALAA s. 267.
16 Inserted by IALAA s. 267.
17 Inserted by IALAA s. 268.
Under section 46(3)\textsuperscript{18} of the VIA the Victorian Inspectorate may on its own motion investigate the conduct of an Ombudsman officer in respect of the same range of matters that a person may complain about. There would not appear to be any requirement to notify the Ombudsman of such an own motion investigation.

Section 47(3)\textsuperscript{19} of the VIA then provides:

(3) For the purposes of conducting an investigation in relation to an Ombudsman officer, the Victorian Inspectorate—

(a) may investigate any aspect of the operations of the Ombudsman or any conduct of an Ombudsman officer;

(b) has full and free access to all the records of the Ombudsman and may copy any record or part of any record of the Ombudsman;

(c) may require an Ombudsman officer to give the Victorian Inspectorate any information in the Ombudsman officer's possession which the Victorian Inspectorate considers is relevant to the investigation;

(d) may require an Ombudsman officer to attend before the Victorian Inspectorate to answer questions or to produce documents or other things relating to operations of the Ombudsman or any conduct of an Ombudsman officer.

Under section 47(8)(b)\textsuperscript{20} of the VIA the Victorian Inspectorate may conduct an investigation in relation to an Ombudsman officer even though the Ombudsman is investigating a related matter.

Section 48(3)\textsuperscript{21} of the VIA then provides:

(3) The Ombudsman must—

(a) give any assistance; and

(b) ensure that Ombudsman officers give any assistance—


to the Victorian Inspectorate which the Victorian Inspectorate reasonably requires to enable the Victorian Inspectorate to conduct any investigation in relation to an Ombudsman officer under this Part.

Section 49 of the VIA empowers the Victorian Inspectorate to hold an inquiry into any matter arising out of the investigation. In conducting such an inquiry the Victorian Inspectorate may enter and search Ombudsman premises\textsuperscript{22} and inspect, copy and seize any

\textsuperscript{18} Inserted by IALAA s. 269.

\textsuperscript{19} Inserted by IALAA s. 270(1).

\textsuperscript{20} Inserted by IALAA s. 270(2).

\textsuperscript{21} Inserted by IALAA s. 271.

\textsuperscript{22} Reference to Ombudsman premises inserted by IALAA s. 272(1).
document or thing in accordance with section 63. Section 63(5) and (6) of the VIA provide as follows:

(5) Subject to subsection (6), if the Victorian Inspectorate considers on reasonable grounds there are documents or other things that are relevant to an inquiry in relation to an Ombudsman officer which are on Ombudsman premises, the Victorian Inspectorate may authorise a Victorian Inspectorate Officer, with such assistance as the Victorian Inspectorate Officer thinks fit, to—
(a) enter those premises at any time; and
(b) search those premises for documents or other things that are relevant to the inquiry; and
(c) inspect or copy any document or other thing found at those premises; and
(d) seize any document or other thing found at those premises that is relevant to the inquiry and keep it until the Victorian Inspectorate has completed its inquiry.

(6) The Victorian Inspectorate must not exercise the power conferred by subsection (5) unless the Victorian Inspectorate considers on reasonable grounds that the Ombudsman or any Ombudsman officer has willfully failed to give assistance in accordance with section 48(3).

Witness summonses can be issued for the purposes of such an inquiry (section 53). Under section 54(4)(g)(iv) of the VIA if an Ombudsman officer is issued with such a summons neither the Ombudsman nor the Office of the Ombudsman is entitled to assert any privilege.

Section 68(7) and (8) of the VIA provide:

(7) If a person is an Ombudsman officer, any obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or provided to the person in his or her service as an Ombudsman officer imposed by any enactment or any rule of law—
(a) is overridden; and
(b) does not apply to the disclosure of information under this Part.

(8) If a person is an Ombudsman officer—
(a) neither the Ombudsman nor the Office of the Ombudsman is entitled to assert any privilege in relation to any requirement for that person to produce a document or other thing or give information under this Part; and
(b) any privilege referred to in paragraph (a) is abrogated.

Section 70 of the VIA abrogates any privilege against self-incrimination in respect of a person answering a witness summons.

The above provisions might be characterised as appropriate for a body with oversight responsibilities and it might be said that their existence does not compromise the discretion of the Ombudsman in the performance or exercise of his or her functions or powers.

\[21\text{ Inserted by IALAA s. 275.}\]

\[24\text{ Inserted by IALAA s. 273(a).}\]

\[25\text{ Inserted by IALAA s. 276.}\]

\[26\text{ Amended by IALAA s. 277.}\]
Do they, however, compromise the Ombudsman’s status as an independent officer of the Parliament? The answer to that question is not free from doubt but a strong argument can be made that they do. While the Victorian Inspector is also an independent officer of the Parliament, the Victorian Inspectorate is not merely engaged on a fact-finding mission on behalf of the Parliament about which it will report solely to the Parliament.

Sections 82 and 83\(^{27}\) of the VIA provide as follows:

82 **Recommendation to the Ombudsman**

1. The Victorian Inspectorate may at any time make recommendations to the Ombudsman in relation to any action that the Victorian Inspectorate considers should be taken.

2. Without limiting subsection (1), the Victorian Inspectorate may recommend taking action—
   a. to prevent specified conduct from continuing or occurring in the future;
   b. to remedy any harm or loss arising from the conduct of any Ombudsman officer.

3. A recommendation to the Ombudsman which is not contained in a report must be made in private.

4. Subsection (3) does not limit the power of the Victorian Inspectorate to make a public recommendation if the Victorian Inspectorate considers that the Ombudsman has failed to take appropriate action in relation to the recommendation.

5. The Victorian Inspectorate may require the Ombudsman to give a report to the Victorian Inspectorate, within a reasonable specified time, stating—
   a. whether or not the Ombudsman has taken, or intends to take, action recommended by the Victorian Inspectorate; and
   b. if the Ombudsman has not taken the recommended action, or does not intend to take the recommended action, the reason for not taking or intending to take the action.

6. The Ombudsman must comply with a requirement of the Victorian Inspectorate under subsection (5).

83 **Recommendation for further action in respect of Ombudsman officers**

1. The Victorian Inspectorate may at any time recommend in private to the Ombudsman the undertaking of a disciplinary process or action against any Ombudsman officer other than the Ombudsman.

2. Subsection (1) does not limit the power of the Victorian Inspectorate to make a public recommendation if the Victorian Inspectorate considers that the Ombudsman has failed to take appropriate action in relation to the recommendation.

3. If the Victorian Inspectorate is satisfied that any conduct of any Ombudsman officer which has been the subject of a complaint, investigation or other finding should be the subject of any further investigatory or enforcement action, the Victorian Inspectorate may make a recommendation to that effect to any or all of the following—
   a. the Chief Commissioner of Police;
   b. the Director of Public Prosecutions;
   c. the Australian Federal Police;
   d. the IBAC;
   e. the Victorian WorkCover Authority;
   f. any other person or body prescribed for the purposes of this subsection.

\(^{27}\) Inserted by IALAA s. 278.
The intention behind sections 82 and 83 of the VIA would seem to be to ensure that recommendations, that have not been forwarded to the Parliament or about which the Parliament has not been consulted, are complied with by the Ombudsman under the threat of a failure to comply being made public by the Victorian inspectorate. Further, the conduct of an Ombudsman officer may be brought to the attention of a range of public officials for further investigatory or enforcement action. This would not seem to be consistent with the status of the Ombudsman as an independent officer of the Parliament, similar in that status to the Victorian Inspectorate, with complete discretion in the performance or exercise of his or her functions or powers.

While under section 87 of the VIA the Victorian inspectorate may report to Parliament at any time on any matter relating to the performance of its duties and obligations, there is no obligation to promptly report to the Parliament on the conduct of the Ombudsman officer or the Victorian Inspectorate's recommendations.

Section 91\textsuperscript{28} of the VIA does, however, require the Victorian inspectorate to include the following in its annual report except to the extent that to do so would prejudice an investigation that it is aware is being, or has been, conducted by the Ombudsman in relation to a matter or person:

(j) details of the results of the Victorian inspectorate's monitoring of—
   (i) the exercise of coercive powers by Ombudsman officers; and
   (ii) compliance by Ombudsman officers with procedural fairness requirements in the performance of functions under the Ombudsman Act 1973 or any other Act, including in the conduct of enquiries and investigations and the making of reports and recommendations under the Ombudsman Act 1973 or any other Act;

(k) details of the comprehensiveness and adequacy of reports made to the Victorian Inspectorate by the Ombudsman under this Act;

(l) details of the extent to which action recommended by the Victorian Inspectorate to be taken by the Ombudsman has been taken;

There is now established by section 5 of the Parliamentary Committees Act 2003 a Joint House Committee of the Parliament called the Accountability and Oversight Committee. Section 6A\textsuperscript{29} sets out its functions and (so far as relevant) provides as follows:

6A Accountability and Oversight Committee

(1) The functions of the Accountability and Oversight Committee are—

(f) to monitor and review the performance of the duties and functions of the Victorian Inspectorate in respect of Ombudsman officers; and

(g) to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the Victorian Inspectorate in respect of Ombudsman officers that require the attention of the Parliament; and

\textsuperscript{28} Amended by IALAA s. 281.
\textsuperscript{29} Amended by IALAA s. 260.
(h) to examine any reports made by the Victorian Inspectorate in respect of Ombudsman
officers; and

(i) the functions conferred on the Committee by the Ombudsman Act 1973.

(2) Despite anything to the contrary in subsection (1), the Accountability and Oversight Committee
cannot—

c) investigate a matter relating to particular conduct the subject of any report made by the
Victorian Inspectorate in respect of an Ombudsman officer; or

d) review any decision to investigate, not to investigate or to discontinue an investigation
of, a particular complaint made to the Victorian Inspectorate in accordance with the
Victorian Inspectorate Act 2011 in respect of an Ombudsman officer; or

e) review any findings, recommendations, determinations or other decisions of the
Victorian Inspectorate in relation to a particular complaint made to, or investigation
conducted by, the Victorian Inspectorate in accordance with the Victorian Inspectorate
Act 2011 in respect of an Ombudsman officer; or

(f) disclose any information relating to the performance of a duty or function or exercise of
a power by the Victorian Inspectorate which may—

(i) prejudice any criminal proceedings or criminal investigations; or

(ii) prejudice an investigation being conducted by the Ombudsman, the IBAC or the
Victorian Inspectorate; or

(iii) contravene any secrecy or confidentiality provision in any relevant Act.

Section 26H of the Ombudsman Act 1973 sets out the functions of the Accountability and
Oversight Committee under that Act. It provides as follows:

26H Oversight by Accountability and Oversight Committee

(1) The functions of the Accountability and Oversight Committee under this Act are—

(a) to monitor and review the performance of the duties and functions of the Ombudsman;

(b) to report to both Houses of the Parliament on any matter connected with the performance
of the duties and functions of the Ombudsman that requires the attention of the
Parliament;

(c) to examine any reports by the Ombudsman that are laid before a House of the
Parliament.

(2) Despite anything to the contrary in subsection (1), the Accountability and Oversight Committee
cannot—

(a) investigate a matter relating to particular conduct the subject of any particular complaint,
protected disclosure complaint, referred complaint or referred matter;

(b) review any decision to investigate, not to investigate or to discontinue an investigation
of, a particular complaint, protected disclosure complaint, referred complaint or referred
matter;

(c) review any findings, recommendations, determinations or other decisions of the
Ombudsman in relation to a particular complaint, protected disclosure complaint,
referred complaint or referred matter or an investigation conducted by the Ombudsman;

(d) disclose any information relating to the performance of a function or duty or the exercise
of a power by the Ombudsman which may—

Inserted by IALAA s. 245.
(i) prejudice any criminal proceedings or criminal investigations, or investigations by the Ombudsman, the IBAC or the Victorian Inspectorate; or

(ii) contravene any secrecy or confidentiality provision in any relevant Act.

Both section 6A of the Parliamentary Committees Act and section 26H of the Ombudsman Act respect the principle that while the parliamentary committee has oversight of the duties and functions of the Ombudsman and of the Victorian Inspectorate in respect of Ombudsman officers it does not interfere in operational matters.

Is it relevant that the Victorian Inspector is also an independent officer of the Parliament and accordingly arguably acting on behalf of the Parliament? That might be a sufficient answer if the Victorian Inspectorate did not have the capacity to, in effect, direct the Ombudsman as to the conduct of operational matters and monitor aspects of those matters on an on-going basis. Such a capacity vested in the Victorian Inspectorate is inconsistent with the Ombudsman being an independent officer. As noted above, the 2006 report of the Public Accounts and Estimates Committee stated that “officers of Parliament not only need to be independent from the executive government but also require statutory protection from directions from Parliament and its committees”. It would seem logical that this sphere of protection would also extend to protection from another independent officer of the Parliament.

**IBAC**

The Independent Broad-based Anti-corruption Commission Act 2011 (IBAC Act) established the Independent Broad-based Anti-corruption Commission (IBAC) with a function of identifying, exposing and investigating serious corrupt conduct. The Act does not define serious corrupt conduct but by section 4 defines corrupt conduct.

Under section 14 of the IBAC Act, the IBAC consists of one Commissioner appointed by the Governor in Council. Section 19 of the IBAC Act makes provision with respect to the Commissioner similar to that made by section 94E of the Constitution Act 1975 with respect to the Ombudsman and by section 17 of the VIA in relation to the Inspector. In particular the Commissioner is stated to be “an independent officer of the Parliament” and, subject to the IBAC Act and other laws of the State, to have “complete discretion in the performance or exercise of his or her duties, functions or powers”. Like the VIA, the IBAC Act states that “the Commissioner is not subject to the direction or control of the Minister in respect of the performance or exercise of his or her duties, functions or powers”.

It is to be noted that section 94B(5) which states that the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers does also add that “In particular the Auditor-General is not subject to direction from anyone in relation to (a) whether a particular audit is to be conducted; (b) the way in which a particular audit is to be conducted; or (c) the priority to be given to any particular matter. I do not, however, consider the absence of an express “not subject to direction” statement in section 94E(6) of the Constitution Act in relation to the Ombudsman as being significant. Such a statement would appear to merely amplify what is meant by having complete discretion.
Under section 13\(^{32}\) of the Ombudsman Act administrative action taken by or in an authority that appears to involve corrupt conduct is excluded from the principal function of the Ombudsman.

Section 15\(^{33}\) of the Ombudsman Act requires the Ombudsman to refuse to deal with a complaint that appears to involve corrupt conduct or police personnel conduct other than to notify the IBAC or the Victorian Inspectorate. It further requires the Ombudsman to refuse to deal with a complaint about administrative action taken under the Freedom of Information Act 1982 other than to notify the Freedom of Information Commissioner. The section requires the Ombudsman to refuse to deal with certain other complaints including if to deal with it would be contrary to section 13AB\(^{34}\). Section 16A\(^{35}\) imposes similar restrictions on the Ombudsman with respect to own motion investigations.

Section 13AB of the Ombudsman Act provides:

13AB Ombudsman not to prejudice legal proceedings or investigations

(1) The Ombudsman must not perform his or her functions or duties or exercise his or her powers in a manner that would prejudice any—

(a) criminal proceedings or criminal investigations; or

(b) investigations by the IBAC or the Victorian Inspectorate.

(2) For the purposes of ensuring compliance with subsection (1), the Ombudsman may consult any of the following—

(a) the Director of Public Prosecutions;

(b) the Chief Commissioner of Police;

(c) the IBAC;

(d) the Victorian Inspectorate.

That section clearly limits the discretion of the Ombudsman in the performance of his or her functions or duties or the exercise of his or her powers. Further, while section 25 of the Ombudsman Act continues to require the Ombudsman to report annually to Parliament on the performance of his or her functions and enables the Ombudsman at any time to report to Parliament on any matter arising in connection with the performance of his or her functions, that section must now be read in the light of section 25A\(^{36}\) of that Act which provides as follows:

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\(^{32}\) Substituted by IALAA s. 227.

\(^{33}\) Substituted by IALAA s. 229.

\(^{34}\) Inserted by IALAA s. 227.

\(^{35}\) Inserted by IALAA s. 231.

\(^{36}\) Inserted by IALAA s. 243.
25A  Content of reports

(1) The Ombudsman must not include in a report under this Act—
(a) any information that the Ombudsman considers would prejudice any criminal proceedings or criminal investigations, or investigations by the Ombudsman, the IBAC or the Victorian Inspectorate; or
(b) any information, or information in any document, referred to in section 19, 19A or 19B; or
(c) a finding or an opinion that a specified person is guilty of or has committed, is committing or is about to commit an offence; or
(d) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for an offence.

(1A) The Ombudsman must not include in a report under this Act any information that—
(a) is likely to lead to the identification of a person who has made an assessable disclosure; and
(b) is not information to which section 53(2)(a), (c) or (d) of the Protected Disclosure Act 2012 applies.

(2) If the Ombudsman intends to include in a report under this Act a comment or opinion that is adverse to any person, the Ombudsman must first give the person a reasonable opportunity to respond to the adverse material and fairly set out the response in the report.

(3) The Ombudsman must not include in a report under this Act any information that would identify any person who is not the subject of any adverse comment or opinion unless the Ombudsman—
(a) is satisfied that it is necessary or desirable to do so in the public interest; and
(b) is satisfied that it will not cause unreasonable damage to the person’s reputation, safety or wellbeing; and
(c) states in the report that the person is not the subject of any adverse comment or opinion.

Section 25A also limits the discretion of the Ombudsman in the performance of his or her functions or duties or the exercise of his or her powers.

Under section 16E(1) of the Ombudsman Act 1973 the Ombudsman must notify the IBAC of a complaint that appears to involve corrupt conduct (as defined in section 4 of the IBAC Act) or police personnel conduct (as defined in section 3(1) of the IBAC Act). That section further requires the Ombudsman to notify the IBAC of any matter that appears to involve corrupt conduct or police personnel conduct of which the Ombudsman becomes aware in the course of dealing with a complaint, conducting an own motion investigation or performing any other functions under the Act. Section 16E(4) of the Ombudsman Act requires the Ombudsman to inform the IBAC of anything referred to him or her under section 73 of the IBAC Act that appears to involve serious corrupt conduct. Section 16E does not apply to corrupt conduct of the IBAC or IBAC personnel. Under section 16E of the

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37 Inserted by IAIAA s. 231.
38 Inserted by IAIAA s. 231.
39 Inserted by IAIAA s. 231.
Ombudsman is required to notify such conduct to the Victorian Inspectorate. Section 16C\textsuperscript{40} requires the Ombudsman to notify the Freedom of Information Commissioner of complaints that could be made the subject of a complaint under Part IVA of the Freedom of Information Act 1982.

Section 58 of the IBAC Act requires IBAC to dismiss a notification that a complaint appears to involve corrupt conduct or police personnel conduct if there are grounds to do so. Alternatively, IBAC must investigate it or make a referral of it, which may be to the Ombudsman. Under section 59 IBAC may notify the Ombudsman of the action taken under section 58 with respect to a notification.

Under section 72 of the IBAC Act the IBAC may conduct an investigation in coordination with the Ombudsman and for that purpose may enter into a memorandum of understanding or agreement with the Ombudsman in relation to the conduct of the coordinated investigation.

Under section 73 of the IBAC Act the IBAC must refer to the Ombudsman a complaint or notification if IBAC considers that its subject-matter is relevant to the Ombudsman’s duties and functions or powers and that it would be more appropriate for the Ombudsman to investigate the complaint or notification. Under section 78 the IBAC might then at any time require the Ombudsman to provide to it information regarding the investigation and any action taken in respect of the referred matter and the Ombudsman is required to comply with that requirement. Under section 79 the IBAC may at any time withdraw the referral at which point the Ombudsman must cease its investigation, provide IBAC with any evidence in the Ombudsman’s possession or control and cooperate with IBAC.

Corrupt conduct may therefore only be enquired into or investigated by the Ombudsman on a referral from IBAC under the IBAC Act. Such a referral may be withdrawn by the IBAC at any time.

Section 12A of the Parliamentary Committees Act also establishes an IBAC Committee which has among its other functions the function of monitoring and reviewing the performance of the duties and functions of the IBAC and of the Victorian Inspectorate (excluding the Victorian Inspectorate’s functions in respect of Ombudsman officers).

It may be strongly argued that the mere withdrawal of the investigation of certain conduct from the principal functions of the Ombudsman does not affect his or her status as an independent officer of the Parliament or impede his or her discretion in the handling of matters that he or she may enquire into or investigate. However, sections 13AB\textsuperscript{41} and 25A\textsuperscript{42}

\textsuperscript{40} Inserted by IALAA s. 231.

\textsuperscript{41} Inserted by IALAA s. 227.

\textsuperscript{42} Inserted by IALAA s. 243.
of the Ombudsman Act do impose restrictions on the Ombudsman’s discretion in the performance or exercise of his or her functions or powers. It is no answer to say that the restrictions are contained in the Ombudsman Act 1973 and as such are contemplated by section 94E(6) of the Constitution Act 1975. The inclusion of those restrictions in the Ombudsman Act has affected the operation of that section as fetters on the discretion of the Ombudsman, not in place when that section was enacted, have now been imposed.

Conclusion on whether section 94E been repealed, altered or varied

I would submit that, at a minimum, sections 82 and 83 of the VIA and sections 13AB and 25A of the Ombudsman Act purport to alter or vary section 94E of the Constitution Act 1975. The power to seek to direct and control the Ombudsman under sections 82 and 83 of the VIA is inconsistent with the Ombudsman’s independent status and his or her unfettered discretion in performing functions or exercising powers. Sections 13AB and 25A of the Ombudsman Act further limit the Ombudsman’s discretion in performing functions or exercising powers.

It may also be argued that the overall scheme of oversight of the Ombudsman by the Victorian Inspectorate alters or varies that section. The oversight is not being carried out directly by the Parliament or a parliamentary committee. The Victorian Inspector is an independent officer of the Parliament. If it is accepted that an attribute of such a status is that the officer is independent from directions from Parliament and its committees then necessarily the oversight is not been controlled by the Parliament and, accordingly, the independent status of the Ombudsman as an officer responsible only to, and accountable directly to, Parliament is interfered with.

Another entity is being charged with the responsibility of determining whether the conduct of the Ombudsman or of any of his or her officers in a particular case was contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, based on improper motives, an abuse of power or otherwise improper.43 Having come to an opinion about that, the Victorian Inspectorate can then seek to cause the Ombudsman to take a specified course of action or report the conduct to any of a range of public officials including the police and the Director of Public Prosecutions44. While the Victorian Inspectorate may at the same time report the matter to Parliament, there is no obligation to do so. It may be strongly argued that none of this is consistent with the concept of the Ombudsman as an independent officer of the Parliament responsible to, and accountable directly to, the Parliament.

The relevant provisions that purport to alter or vary section 94E of the Constitution Act 1975 were all included in the Integrity and Accountability Legislation Amendment Act 2012.

43 VIA s. 43(6).
44 ALAA s. 89(3).
Was the Bill for the Integrity and Accountability Legislation Amendment Act 2012 passed in accordance with the special procedure set out in section 18(1B) of the Constitution Act 1975?

The answer to this question is straightforward. The IALAA was passed by the Legislative Assembly on 29 November 2012 and by the Legislative Council on 11 December 2012. It was assented to on 18 December 2012 without having been submitted to a referendum. Accordingly the special procedure set out in section 18(1B) of the Constitution Act 1975 was not complied with.

Was the Bill required to comply with the special procedure?

The accepted constitutional theory is that Parliament is supreme and has the ability to make and unmake any law, including a law that purports to establish a particular procedure for its amendment or repeal (an entrenchment). One Parliament cannot bind a future Parliament.

This theory extends to a Constitution Act. Thus, the Privy Council in McCawley v The King45 stated in relation to an "uncontrolled" constitution (that is one "the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation") that "it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject-matter".

Against this constitutional theory how might the Victorian Parliament provide that some special procedure must be followed before any specified provision of the Constitution, such as section 94E, may be repealed, altered or varied?

Victoria was established as a separate colony on 1 July 1851 under the Australian Constitutions Act 1850, an Imperial Act which also contained Victoria's first Constitution. With the move to responsible government a new Constitution was enacted for Victoria in Schedule 1 to the Victoria Constitution Act 1855 (Imp.). The Victorian legislature was empowered by section 4 of that Act to alter or repeal the new Constitution "in the same Manner as any other Laws for the good Government of the Colony, subject, however, to the Conditions Imposed ... on the Alteration of the Provisions thereof in certain Particulars until and unless the said Conditions shall be repealed or altered by the Authority of the said Legislature". Those Conditions, set out in section 60, required an absolute majority for the alteration of certain specified provisions and the reservation of the relevant Bill for Royal Assent.

Thus from 1855 "manner and form" requirements were part of Victorian law. Conditions were imposed on the alteration of provisions contained in the Constitution itself. 10 years

45 (1920) AC 691 at 703.
later the *Colonial Laws Validity Act 1865* (Imp.) was enacted, section 5 of which, so far as relevant, provided:

> every Representative Legislature shall, in respect of the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

The proviso to section 5 allowed the entrenchment of "Laws respecting the Constitution, Powers and Procedure" of the Legislature. In this respect it was narrower than section 4 of the *Victoria Constitution Act 1855*. However, unlike the latter section the proviso to section 5 was not limited to provisions contained in the Constitution itself. The 1865 Act, being the later Act, likely had the effect of impliedly repealing section 4 of the 1855 Act.

In *Attorney-General (NSW) v Trehowan*⁴⁶ a majority of the High Court relied on the proviso to section 5 of the *Colonial Laws Validity Act 1865* to uphold the efficacy of section 7A of the Constitution Act 1902 (NSW) which provided that the Legislative Council could not be abolished, nor section 7A itself repealed or amended, unless the Bill for that purpose had been approved by the electors at a referendum. The majority decision was affirmed by the Privy Council in *Attorney-General for New South Wales v Trehowan*⁴⁷.

In that case in the High Court Dixon J stated⁴⁸:

> [Section 5] both confers power and describes the conditions to be observed in its exercise. It authorizes a representative legislature to make laws respecting its own constitution, its own powers and its own procedure. This authority does not extend to the executive power in the constitution. But it is plenary save in so far as it may be qualified by a law which falls within the description of the proviso. The power to make laws respecting its own constitution enables the legislature to deal with its own nature and composition. The power to make laws respecting its own procedure enables it to prescribe rules which have the force of law for its own conduct. Laws which relate to its own constitution and procedure must govern the legislature in the exercise of its powers, including the exercise of its power to repeal those very laws. ...

> But the proviso recognizes that the exercise of the power may to some extent be qualified or controlled by law. ... The extent is limited to which such a law may qualify or control the power to make laws respecting the constitution, powers and procedure of the Legislature. It cannot do more than prescribe the mode in which laws respecting these matters must be made. ...

The law proposed by the Bill to repeal sec 7A of the Constitution Act 1902 to 1929 answers the description "a law respecting the powers of the legislature" just as the provisions of sec 7A itself constitute a law with respect to those powers. But the proposal cannot be put into effect save by a law which "shall have been passed in such manner and form as may be required by any" prior law of the New South Wales Legislature. Unless it be void, sec 7A is undeniably a prior law of the New South Wales Legislature. It is no less a law of that Legislature because it requires the approval of the electors as a condition of its repeal. But it is not void unless this requirement is repugnant to sec 5 of the *Colonial Laws Validity Act*. No requirement is repugnant to that section if it is within the contemplation of its proviso, which concedes the efficacy of enactments requiring a manner or form in which laws shall be passed. If, therefore, a provision that a particular law respecting the powers of the Legislature may

⁴⁶ [1931] 44 CLR 394.
⁴⁸ At 429-432
not be made unless it is approved by the electors, requires a manner or form in which such a law shall be passed, then sec 7A is a valid law and cannot be repealed without the approval of the electorate.

Relevantly to the issue under consideration, *Trethowan* clearly establishes that a requirement for a referendum can be a "manner and form" requirement for the entrenchment of a law with respect to the constitution, powers or procedure of the legislature.

In 1975 the Victorian Constitution was consolidated with amendments in the Constitution Bill 1975 which was passed by both Houses and, as required by the *Australian States Constitution Act 1907* (Imp.), was reserved for Her Majesty’s assent. It received that assent and came into operation on 1 December 1975.

The 1865 Act was still in force at the time of the enactment of the Constitution Act 1975. As originally enacted section 18(1) of that Act stated the power of the Parliament to repeal, alter or vary all or any of the provisions of that Act but created an exception to that general power for a Bill dealing with a matter specified in section 18(2). Such a Bill was specified as requiring an absolute majority in both Houses on its second and third readings.

Major amendments to section 18 of the Constitution Act 1975 were made by the Constitution (Parliamentary Reform) Act 2003. That Act, passed by an absolute majority on its 2nd and 3rd readings in each House, introduced a whole new suite of entrenched provisions including, for the first time, entrenchment by referendum. For present purposes, the most relevant entrenchment introduced by the 2003 Act was the entrenchment of section 94E relating to the Ombudsman. As noted above, new section 18(1B), also inserted by the 2003 Act, purported to entrench section 94E and section 18(1B) itself, by providing that those provisions might only be repealed, altered or varied by a Bill passed by both Houses and approved at a referendum.

By the time of the 2003 Act the Australia Act 1986 (Imp. & Cth.) was in force. Section 2 of that Act provided that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of the State that have extra-territorial operation and indeed all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of the Act for the peace, order and good government of the State. Section 3(2) protected State laws made after the commencement from being void or inoperative on the ground of repugnancy to Imperial law.

Section 6 of the Australia Act then provides:

Notwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether before or after the commencement of this Act.
Section 3(1) of the Australia Act expressly disappplied the *Colonial Laws Validity Act 1865* from any law made after its commencement by a State Parliament.

The Australia Act came into operation on 3 March 1986.

Section 6 of the Australia Act is substantially to the same effect as the proviso to section 5 of the *Colonial Laws Validity Act 1865*. It renders a law with respect to the constitution, powers or procedure of the Parliament of no effect, although validly made, unless it complies with a “manner and form” requirement imposed by an earlier Act. It has no relevance to any other kind of law.

As noted above, *Trethowan* established that a requirement for a referendum was a “manner and form” requirement for the purposes of the 1865 Act. There is no reason to think that this would not also apply for the purposes of section 6 of the Australia Act.

What is meant by the “constitution, powers or procedure” of the Parliament? The dictum of Dixon J in *Trethowan* quoted above is apposite:

> The power to make laws respecting its own constitution enables the legislature to deal with its own nature and composition. The power to make laws respecting its own procedure enables it to prescribe rules which have the force of law for its own conduct. Laws which relate to its own constitution and procedure must govern the legislature in the exercise of its powers, including the exercise of its power to repeal those very laws.

In *Attorney-General for Western Australia v Marquet* Gleeson CJ, Gummow, Hayne and Heydon JJ stated in their joint judgment:

> The meaning to be given to the expression "constitution, powers or procedure of the Parliament" must be ascertained taking proper account of the history that lay behind the enactment of the *Australia Act*. In particular, it is necessary to give due weight to the learning that evolved about the operation of the *Colonial Laws Validity Act*, s 5 of which also spoke of "laws respecting the constitution, powers, and procedure" of the legislatures to which it applied.

In s 5 of the *Colonial Laws Validity Act* the expression "constitution, powers, and procedure" appeared in that part of the section which provided that a representative legislature "shall ... have, and be deemed at all times to have had, full power to make laws respecting" those subjects. The reference to manner and form requirements in the proviso to the section was treated as a condition upon which the full power referred to in s 5 was exercisable. Section 6 of the *Australia Act* takes a different form. It provides, directly for the requirement to observe manner and form. Nonetheless, the use of the expression "constitution, powers or procedure" in the *Australia Act* is evidently intended to build on the provisions of the *Colonial Laws Validity Act*. (The use of the conjunction "or" rather than "and" in the collocation is readily explained by the drafting change from grant of power to requirement to obey manner and form.)

On its face, the expression "constitution, powers or procedure" of a legislature describes a field which is larger than that identified as "the constitution" of a legislature. It is not necessary or appropriate to attempt to describe the boundaries of the areas within the field that the three separate integers of the expression "constitution, powers or procedure" cover, let alone attempt to define the boundaries of the

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entire field. In particular, it is not necessary or appropriate to explore what is encompassed by the
reference in s 6 of the Australia Act to "powers or procedure" of a legislature, whether in relation to the
ability of a legislature to entrench legislation about any subject or otherwise. It is enough to focus on
the expression the "constitution" of the Parliament.

The "constitution" of a State Parliament includes (perhaps it is confined to) its own "nature and
composition" [Attorney-General (NSW) v Trehowar (1931) 44 CLR 394 at 429]. The Attorneys-General
for New South Wales and Queensland, intervening, both submitted that s 6 of the Australia Act should
be read strictly and that, accordingly, the "constitution" of a State Parliament should be understood as
referring only to the general character of the legislature rather than the rules pursuant to which
members are returned to a chamber.

For some purposes, the nature and composition of the Western Australian Parliament might be
described sufficiently as "bicameral and representative". But the reference in s 6 of the Australia Act to
the "constitution" of a State Parliament should not be read as confined to those two descriptions ...
That is, s 6 is not to be read as confined to laws which abolish a House, or altogether take away the
"representative" character of a State Parliament or one of its Houses. At least to some extent the
"constitution" of the Parliament extends to features which go to give it, and its Houses, a representative
character. Thus s 6 may be engaged in cases in which the legislation deals with matters that are
encompassed by the general description "representative" and go to give that word its application in the
particular case. So, for example, an upper House whose members are elected in a single State-wide
electorate by proportional representation is differently constituted from an upper House whose
members are separately elected in single member provinces by first past the post voting. Each may
properly be described as a "representative" chamber, but the parliament would be differently
constituted if one form of election to the upper House were to be adopted in place of the other.

Not every matter which touches the election of members of a Parliament is a matter affecting the
Parliament's constitution. In Clydesdale v Hughes ([1934] S1 CLR S18 at S28), three members of the
Court held that a law providing that the holding of a particular office did not disable or disqualify a
person from sitting as a member of the Legislative Council of Western Australia was not a law which, for
the purposes of s 73 of the 1889 Constitution, effected an alteration or change in the constitution of
that House. Again, however, it is neither necessary nor appropriate to attempt to trace the metes and
bounds of the relevant field.

In Marquet what was under consideration was a Bill repealing the existing arrangements as
to how both Houses of the Western Australian Parliament were to be constituted and a Bill
providing a new method for constituting them. Each Bill was held to be a law respecting the
constitution of the Parliament.

As noted above, the "manner and form" exception established by section 6 of the Australia
Act only applies to laws about the constitution, powers or procedure of the Parliament. Is
there any other basis on which Parliament might after the commencement of the Australia
Act entrench a law?

A principle derived from the decision of the Privy Council in Bribery Commissioner v
Ranasinghe50 has often been put forward as a basis for entrenchment. In that case the Privy

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Council stated\textsuperscript{51} that "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law".

That case related to a requirement in the Constitution of Ceylon, contained in an Imperial Order in Council, that an amendment had to be passed by a two-thirds majority and a certificate of the Speaker to that effect given. Taylor in \textit{The Constitution of Victoria} \textsuperscript{52} distinguishes that case on a number of grounds. First on the ground that the conditions of law-making by the Parliament of Ceylon were imposed at the Imperial level and not, as in the case of the Constitution Act 1975, by the relevant Parliament itself. Secondly on the ground that under the Australia Act the Parliament of Victoria has all the powers that the Imperial Parliament once had in relation to Victoria, including the power to override any restrictive procedure. Thirdly, on the ground that if "the instrument which itself regulates its power to make law", in the case of the Parliament of Victoria is the Australia Act, as the Victorian Parliament cannot amend that Act then it could not rely on the \textit{Ranasinghe} principle to create entrenchments. And, if that instrument were the Constitution Act 1975, the Victorian Parliament could entrench any law on any topic by the simple device of including it within the Constitution Act, disregarding the limited field of entrenchment provided by section 6 of the Australia Act.

In \textit{McGinty v Western Australia} \textsuperscript{53} Gummow J. stated with reference to the \textit{Ranasinghe} principle:

\begin{quote}
The case may stand for the propositions that a manner and form provision which appears in the written constitution of a unitary State where no paramount law, such as s 5 of the 1865 Act, remains in force, continues to place a restraint upon law making, and that the question of the observance of the restraint is justiciable ... It is unnecessary to resolve the matter in the present case. This is because, as I have indicated, whilst s 2(2) of the Australia Acts declares and enacts that the State Parliaments have plenary legislative power, it is further provided in s 6 that, notwithstanding this provision, manner and form requirements must be satisfied. This express treatment of the subject must leave no room for any greater operation which a principle derived from \textit{Ranasinghe} might otherwise have had for any Parliament of an Australian State.
\end{quote}

In \textit{Marquet}, Gummow J. returned to this theme and, in a joint judgment with Gleeson CJ, Hayne and Heydon JP\textsuperscript{54} stated that "the express provision of s 6 can leave no room for the operation of some other principle, at the very least in the field in which s 6 operates, if such a principle can be derived from considerations of the kind which informed the Privy Council's decision in \textit{Bribery Commissioner v Ranasinghe} and can then be applied in a federation".

While that statement from the joint judgment does not clearly exclude the \textit{Ranasinghe} principle in areas beyond the constitution, powers or procedure of the Legislature, it would

\textsuperscript{51} At 197.
\textsuperscript{52} Published by the Federation Press (2006). See 479-480.
\textsuperscript{53} (1996) 186 CLR 140 at 297.
\textsuperscript{54} At 574.
seem most unlikely, in the face of the limited exception allowed in matters of constitutional importance, that a court would breathe any life into that principle.

*Harris & Others v Minister of the Interior*[^55], a case in the Appeal Court of South Africa, is sometimes cited as supporting an argument that only a Parliament constituted as specified in an entrenching Act has power to amend a provision entrenched by that Act. The South Africa Act 1909 required amendments to that Act to be passed by a two-thirds majority in a joint sitting of both Houses of the Parliament. This was upheld on the basis that only Parliament, as so constituted, had authority to make the amendments. While obiter approval of this decision was given by Gibbs J. in *Victoria v The Commonwealth and Connor*[^56], it is worth noting that section 5 of the Colonial Laws Validity Act 1865 did not then apply to South Africa so no argument based on section 5, or nowadays section 6 of the Australia Act, covering the field of entrenchment could have been made. Further, it has been argued that the reference in section 2 of the Australia Act to the Parliament of the State, in stating the legislative powers of the State, must refer to that Parliament as constituted in accordance with the Constitution of the State so any reconstitution of that Parliament for any purpose would have to comply with any applicable “manner and form” requirement prescribed in compliance with section 6 of the Australia Act. In Victoria section 15 of the Constitution Act 1975 provides that the “legislative power of the State of Victoria shall be vested in a Parliament, which shall consist of Her Majesty, the Council, and the Assembly”. That section is entrenched by section 18(2)(b) of the Constitution Act 1975 which requires a special majority on the third reading of a Bill purporting to repeal, alter or vary it. That entrenchment would appear to be covered by section 6 of the Australia Act.

Finally, the theory is sometimes advanced that section 106 of the Commonwealth Constitution empowers the entrenchment of State laws. That section provides that the Constitution of a State continues as at the establishment of the Commonwealth “until altered in accordance with the constitution of the State”. The argument runs that so long as the entrenched provision is located in, and entrenched by a provision of, the Constitution it can only be altered by complying with the “manner and form” set out in the Constitution.

Prior to the passing of the Australia Act the Supreme Court of Western Australia held in *Western Australia v Wilsmore*[^57] that section 106 effectively mandated compliance with a restrictive procedure set out in the Constitution Act 1889 (WA). Burt CJ, with whom Lavan and Jones JJ agreed, stated[^58]:

> ... s 106 of the Commonwealth Constitution by its own force and for its own purposes is a law which requires that such manner and form provisions as are to be found in the State Constitution conditioning the power to amend the Constitution be observed.

[^56]: [1975] 134 CLR 81 at 163.
[^58]: At 18.
However, in *McGinty v Western Australia*\(^9\) Gummow J. stated:

the phrase in s 106 "altered in accordance with the Constitution of the State" recognises or accepts requirements ... which otherwise apply to State constitutional changes. Accordingly, the sense of the phrase "altered in accordance with" would be "so altered as not to contravene any otherwise binding requirement". It would be a distinct question whether s 106 goes further so as to create any additional and binding category of restraint upon State constitutional alteration.

There is a conceptual difficulty, to my mind, with the legitimacy of a manner and form requirement which is inserted in a written constitution otherwise than by a law made with observance of that manner and form which is thereafter to apply, or by a law having paramount force.

In *Marquet* the majority judgment referred to *Macdonnell Professional Fishermen's Association Inc. v South Australia*\(^6\) where all seven High Court Judges stated that "the continuance of the Constitution of a State pursuant to s 106 is subject to any Commonwealth law enacted pursuant to the grant of legislative power in par (xxxviii) of s 51" and added that "Section 6 of the Australia Act, therefore, is not to be seen as some attempt to alter s 106 or s 107 otherwise than in accordance with the procedures required by s 128. Section 6 was enacted in the valid exercise of power given to the federal Parliament by s 51(38viii)". Accordingly, it can be argued that the effect of section 6 was to narrow the protection given by section 106 to those "manner and form" provisions that are covered by section 6.

While the matter is not free from doubt, in my opinion the better view is that the express provision about "manner and form" made by section 6 of the Australia Act has displaced any room for entrenchments effected on any other basis.

On the likely outcome that section 6 of the Australia Act is the sole basis on which laws might be entrenched it is therefore necessary to consider whether section 94E of the Constitution Act 1975 and the IALAA are laws respecting the constitution, powers or procedure of the Parliament.

Section 94E(1) of the Constitution declares the Ombudsman to be "an independent officer of the Parliament. Taylor in *The Constitution of Victoria*\(^6\) declares this to be "a somewhat empty phrase as it is not a technical legal term and confers no real power, merely moral authority". He further states\(^6\):

Does the incantation of this phrase suffice to render the entrenchments effective? I suggest not. They could be effective, if at all, only as provisions about the "constitution" of Parliament. However, we have seen that this enables the protection only of the more important provisions about its make-up. But if, as authority establishes, this does not even cover the qualifications of members of Parliament nor the number of them who may hold the high office of Minister of the Crown, it certainly does not cover the existence of any functionary of the Parliament, however independent.

\(^{9}\) (1996) 186 CLR 140 at 297.
\(^{6}\) (1989) 168 CLR 340 at 381.
\(^{6}\) (1996) 186 CLR 140 at 297.
\(^{6}\) At 59.
\(^{6}\) At 491.
Clydesdale v Hughes is the authority for the proposition about the qualifications of members of Parliament and Attorney-General (WA) (ex rel Burke) v Western Australia is the authority for the proposition about the number of Ministers.

In Chenard and Co v Arissolo it was held that matters affecting the privileges or immunities of individual members of Parliament were not covered by the phrase "constitution, powers or procedure" of the Parliament.

I would submit that the view taken by Taylor is unduly narrow in focussing only on the "constitution" element. This is certainly the aspect of the phrase "constitution, powers or procedure" that has tended to be the focus of litigation to date. As noted above, the majority judgment in Marquet stepped away from any attempt to describe the boundaries of the whole phrase and focussed only on the "constitution" part, suggesting that it may only cover the nature and composition of the legislature.

In my opinion, section 94E of the Constitution Act does not relate to the constitution or procedure of the Parliament. But does it relate to the "powers" of the Parliament? Arguably, it does. Section 94E(4) states that the powers of the Parliament to act in relation to the Ombudsman are as specified in the Ombudsman Act 1973 and section 94E(5) states that there are no implied powers of the Parliament arising from the Ombudsman being an independent officer of the Parliament. The powers of the Parliament to act in relation to its independent officer are as stated expressly in the Ombudsman Act 1973.

If it is accepted that section 94E is a law respecting the powers of the Parliament, and accordingly validly entrenched, then it is necessary to consider whether the IALAA itself is a law "respecting the constitution, powers or procedure" of the Parliament.

As mentioned above, the IALAA sets up an Accountability and Oversight Committee of the Parliament and confers on it various functions in relation to the Ombudsman and in relation to the Victorian Inspectorate (in respect of Ombudsman officers). It, however, is expressly limited in its powers to act in relation to the Ombudsman.

Parliament establishes parliamentary committees to enable it to effectively and efficiently discharge its functions and exercise its powers relating to the scrutiny of the Executive. In enquiring into and investigating the administrative actions of authorities, the Ombudsman plays a key role in assisting the Parliament in that regard. It may be strongly argued that the powers of the Parliament (whether exercised directly or through a committee of the Parliament) to act in relation to the Ombudsman are of sufficient importance to be encompassed within the expression "constitution, powers or procedure" in section 6 of the

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63 [1934] S1 CLR 518.
65 [1949] AC 127 at 133.
66 See section 6A(2) of the Parliamentary Committees Act 2003 and section 26H(2) of the Ombudsman Act 1973.
Australia Act. If so, the IALAA affects those powers and is, accordingly, a law respecting the powers of the Parliament and, if not passed as set out in section 18(18) of the Constitution Act 1975, is of no force or effect.

The matter is not free from doubt. However, having regard to the nature of the Ombudsman’s role in relation to a core function of the Parliament, the reporting and accountability relationship of the Ombudsman to the Parliament and the clear need for Parliament to protect the independence of the Ombudsman, I am of the opinion that the better view is that section 94E of the Constitution Act 1975 is validly entrenched as a provision that relates to the powers of the Parliament and that establishes a proper “manner and form” requirement and that the Integrity and Accountability Legislation Amendment Act 2012 which also relates to those powers is accordingly of no force or effect.

While, as noted above, Trethowan is authority for the proposition that a requirement for a referendum can be a “manner and form” requirement for the entrenchment of a law, I do have the dicta of Gummow J67 ringing in my ears that there is a conceptual difficulty “with the legitimacy of a manner and form requirement which is inserted in a written constitution otherwise than by a law made with observance of that manner and form which is thereafter to apply”. The imbalance in arms brought about by a law, enacted without a referendum, requiring a referendum for it to be amended or repealed may cause some judges to reject such an entrenchment as being a proper “manner and form” requirement.

What course of action should the Ombudsman take?

It is open to the Ombudsman, as a person affected by the terms or purported terms of the IALAA, to seek a declaration as to its status from the Supreme Court. There can be no doubt that the Ombudsman would have standing to seek such a declaration. The language of section 6 of the Australia Act is clear. If the IALAA, and section 94E of the Constitution Act 1975, are laws respecting the constitution, powers and procedure of the Parliament, and entrenchment by referendum is appropriate, the IALAA is “of no force or effect” as it was not made in accordance with the “manner and form” requirement imposed by section 18 of the Constitution Act.

In that event, the effect of section 6 of the Australia Act is that the entire Integrity Accountability Legislation Amendment Act 2012 is of no force or effect. This has implications not only for the Ombudsman but for the Victorian Inspectorate, IBAC, the Auditor-General, the Freedom of Information Commissioner and other entities. The Auditor-General is affected particularly as Part 6 of the IALAA made extensive amendments to the Audit Act 1994 together with related amendments to the VIA. The obligations and reporting requirements of the Auditor-General, and the powers of the Victorian Inspectorate in relation to the Auditor-General, purportedly imposed by the IALAA would have no force or effect.

67 In McGinty v Western Australia (1996) 186 CLR 140 at 297.
In determining what course of action to take the Ombudsman needs to balance his clear interest and duty in protecting the independence of the office which he holds with the broader concept of public interest. If the challenge were to result in the entrenchment of section 94E not being effective, a number of other entrenched provisions would be called into question. The consequence would be the stripping away of an apparent barrier to any future government wanting to affect adversely the independence of the office of the Ombudsman or any of the other purportedly entrenched independent officers of the Parliament.

There is no doubt that the argument will be made that as the Victorian Inspector is also an independent officer of the Parliament the accountability of the Ombudsman remains in-house. For the reasons given above, particularly having regard to the nature of the powers given to the Victorian Inspectorate, I think the argument is not a strong one.

I would be pleased to advise further on this matter should my instructing solicitor so wish.

Eamonn Moran PSM QC
8 March 2013
Attachment B – Joint Memorandum of Advice – Stephen McLeish SC and Graeme Hill of Counsel (22 March 2013)

IN THE MATTER OF THE INTEGRITY AND ACCOUNTABILITY 
LEGISLATION AMENDMENT ACT 2012 (VIC) AND SECTION 94E OF THE 
CONSTITUTION ACT 1975 (VIC)

JOINT MEMORANDUM OF ADVICE

1. We are briefed to provide advice on the Integrity and Accountability Legislation Amendment Act 2012 (Vic) (the 2012 Act) and the status of the Ombudsman as an independent officer of the Parliament under s 94E of the Constitution Act 1975 (Vic) (the Constitution Act).

2. We are asked whether the provisions in the 2012 Act affecting the Ombudsman are consistent with s 94E of the Constitution Act; in particular, provisions for oversight of the Ombudsman by the Victorian Inspectorate including new ss 82 and 83 of the Victorian Inspectorate Act 2011 (Vic) (VI Act), and new ss 13AB and 25A of the Ombudsman Act 1973 (Vic) (the Ombudsman Act).

3. For the reasons that follow, we answer that question “yes”. We therefore disagree with advice from Mr Eamonn Moran PSM QC dated 13 March 2013 (the Moran advice), which takes the view that the various provisions in the 2012 Act are inconsistent with s 94E of the Constitution Act, particularly s 94E(1) and (6).

A. BACKGROUND

A-1 CONSTITUTION ACT, S 94E

4. Section 94E of the Constitution Act provides for the independence of the Ombudsmen. It provides:
94E Independence of the Ombudsman

(1) The Ombudsman appointed in accordance with the Ombudsman Act 1973 is an independent officer of the Parliament.

(2) The functions, powers, rights, immunities and obligations of the Ombudsman are as specified in this section, the Ombudsman Act 1973 and other laws of the State.

(3) There are no implied functions, powers, rights, immunities or obligations arising from the Ombudsman being an independent officer of the Parliament.

(4) The powers of the Parliament to act in relation to the Ombudsman are as specified in the Ombudsman Act 1973.

(5) There are no implied powers of the Parliament arising from the Ombudsman being an independent officer of the Parliament.

(6) Subject to this section, the Ombudsman Act 1973 and other laws of the State, the Ombudsman has complete discretion in the performance or exercise of his or her functions or powers.

(7) The Ombudsman is not to be removed or suspended from office except in accordance with the provisions of sections 3 and 4 of the Ombudsman Act 1973 as in force immediately before the commencement of section 19 of the Constitution (Parliamentary Reform) Act 2003 or provisions substituted for those sections which have the same effect.

5. Section 18(1B)(o) of the Constitution Act provides that it shall not be lawful to present to the Governor for assent any Bill by which Pt VA (which contains s 94E) “may be repealed, altered or varied unless the Bill has been passed by the Assembly and the Council and approved by the majority of the electors voting at a referendum.” A bill to which s 18(1B) applies must be submitted to a referendum on a day not sooner than 59 days after the Bill has been passed by the Assembly and the Council (s 18(1C)). Section 18(3) states that any Bill “dealing with any of the matters specified in subsection (1B) which has not been approved in accordance with that subsection is void”. We have been asked to assume that these provisions operate in accordance with their terms to limit the Parliament’s legislative powers.


6. Part 7 of the 2012 Act made various amendments to the Ombudsman Act 1973 (Vic) (the Ombudsman Act) and related amendments. The 2012 Act was not submitted to a referendum (cf Constitution Act, s 18(1C)). The main provisions are as follows.
7. Section 245 of the 2012 Act inserts a new Pt VB into the Ombudsman Act entitled “Oversight of the Ombudsman”. Relevantly for present purposes, new s 26G provides that the functions of the Victorian Inspectorate in respect of “Ombudsman officers” are set out in the VI Act. The expression “Ombudsman officer” means the Ombudsman, the Acting Ombudsman or a member of Ombudsman staff (as further defined): s 2 of the Ombudsman Act.

8. The Victorian Inspectorate is given the following functions in respect of Ombudsman officers, under s 11(4) of the VI Act (see s 264 of the 2012 Act):

   (1) to monitor the exercise of coercive powers by Ombudsman officers: s 11(4)(a)(i);

   (2) to monitor compliance by Ombudsman officers with procedural fairness requirements in performing functions under the Ombudsman Act and other laws: s 11(4)(a)(ii);

   (3) to receive complaints about, and investigate and assess, the conduct of Ombudsman officers: s 11(4)(b) and (c); and

   (4) to report to Parliament on (VI Act, s 87), and make recommendations to the Independent Broad-based Anti-corruption Commission (IBAC) (VI Act, s 78), the Auditor-General (s 80), the Ombudsman (ss 82-83) or the Chief Examiner (s 84) as a result of, the performance of these functions: s 11(4)(d) (see ss 54, 216 and 278 of the 2012 Act).

9. To facilitate the monitoring functions above, provision is made for certain matters to be notified by the Ombudsman.

   (1) Section 18A of the Ombudsman Act (inserted by s 234 of the 2012 Act) requires the Ombudsman to give the Victorian Inspectorate written notice after issuing a witness summons, specifying the name of the person summoned and the reasons why the summons was issued.

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1 The 2012 Act renumbered the provisions in the VI Act: s 301. References in this advice are to the provisions as renumbered.
(2) Section 42 of the VI Act (s 266) empowers the Victorian Inspectorate to require the Ombudsman to specify, among other things, the relevance of a person's appearance before the Ombudsman to the purpose of an investigation and the name of any other person present in an official capacity during the appearance.

10. The complaints referred to in paragraph 8(3) above are complaints about the conduct of an Ombudsman officer in respect of the exercise of coercive powers or compliance with procedural fairness requirements: s 43(5) of the VI Act (s 267 of the 2012 Act). The Victorian Inspectorate may decide to investigate such a complaint: s 44(5) (s 268) and has a power to investigate the same kind of conduct of its own motion: s 46(3) (s 269).

11. In performing its functions, the Victorian Inspectorate may exercise powers under the VI Act, such as:

(1) summoning the Ombudsman and his staff to attend an examination, or to produce documents or other things: s 53;

(2) examining the Ombudsman or his staff on oath or affirmation: s 62;

(3) entering and inspecting Ombudsman premises, and seizing and copying documents and things on those premises: s 63(5) (s 275 of the 2012 Act);

(4) overriding confidentiality and secrecy obligations: s 68(7)-(8) (s 276); and

(5) requiring the Ombudsman and his staff to provide evidence over which privilege would ordinarily attach (such as the privilege against self-incrimination): s 70.

12. Section 47(3) of the VI Act (s 270(1) of the 2012 Act) relevantly provides:

(3) For the purposes of conducting an investigation in relation to an Ombudsman officer, the Victorian Inspectorate—

(a) may investigate any aspect of the operations of the Ombudsman or any conduct of an Ombudsman officer;

(b) has full and free access to all the records of the Ombudsman and may copy any record or part of any record of the Ombudsman;
may require an Ombudsman officer to give the Victorian Inspectorate any information in the Ombudsman officer’s possession which the Victorian Inspectorate considers is relevant to the investigation;

(d) may require an Ombudsman officer to attend before the Victorian Inspectorate to answer questions or to produce documents or other things relating to operations of the Ombudsman or any conduct of an Ombudsman officer.

13. The Ombudsman is required to give any assistance to the Victorian Inspectorate which it reasonably requires to conduct any investigation in relation to an Ombudsman officer; s 48(3) (s 271 of the 2012 Act).

14. In relation to parliamentary committees:

(1) the Accountability and Oversight Committee of Parliament has been given functions to monitor, review and report on the Victorian Inspectorate’s performance of its oversight functions in respect of the Ombudsman: s 6A(1)(f)-(i) of the Parliamentary Committees Act 2003 (Vic) (s 260(1)(c) of the 2012 Act); and

(2) the IBAC Committee’s functions in relation to the Victorian Inspectorate have been amended to clarify that these functions do not relate to the Victorian Inspectorate’s role in overseeing the Ombudsman: s 12A of the Parliamentary Committees Act 2003 (as amended by s 222 of the 2012 Act).

15. As well as the reporting functions, the oversight regime outlined above empowers the Victorian Inspectorate to deal directly with the Ombudsman.

16. Section 278 of the 2012 Act inserts new ss 82 and 83 of the Victorian Inspectorate Act 2011 (Vic) (the VI Act), which provide:

82. Recommendation to the Ombudsman

(1) The Victorian Inspectorate may at any time make recommendations to the Ombudsman in relation to any action that the Victorian Inspectorate considers should be taken.

(2) Without limiting subsection (1), the Victorian Inspectorate may recommend taking action—

(a) to prevent specified conduct from continuing or occurring in the future;
(b) to remedy any harm or loss arising from the conduct of any Ombudsman officer.
A recommendation to the Ombudsman which is not contained in a report must be made in private.

Subsection (3) does not limit the power of the Victorian Inspectorate to make a public recommendation if the Victorian Inspectorate considers that the Ombudsman has failed to take appropriate action in relation to the recommendation.

The Victorian Inspectorate may require the Ombudsman to give a report to the Victorian Inspectorate, within a reasonable specified time, stating—

(a) whether or not the Ombudsman has taken, or intends to take, action recommended by the Victorian Inspectorate; and

(b) if the Ombudsman has not taken the recommended action, or does not intend to take the recommended action, the reason for not taking or intending to take the action.

The Ombudsman must comply with a requirement of the Victorian Inspectorate under subsection (5).

Recommendation for further action in respect of Ombudsman officers

The Victorian Inspectorate may at any time recommend in private to the Ombudsman the undertaking of a disciplinary process or action against any Ombudsman officer other than the Ombudsman.

Subsection (1) does not limit the power of the Victorian Inspectorate to make a public recommendation if the Victorian Inspectorate considers that the Ombudsman has failed to take appropriate action in relation to the recommendation.

If the Victorian Inspectorate is satisfied that any conduct of any Ombudsman officer which has been the subject of a complaint, investigation or other finding should be the subject of any further investigatory or enforcement action, the Victorian Inspectorate may make a recommendation to that effect to any or all of the following—

(a) the Chief Commissioner of Police;
(b) the Director of Public Prosecutions;
(c) the Australian Federal Police;
(d) the IBAC;
(e) the Victorian WorkCover Authority;
(f) any other person or body prescribed for the purposes of this subsection.

Section 227 of the 2012 Act inserts (relevantly) new s 13AB of the Ombudsman Act, which provides:

Ombudsman not to prejudice legal proceedings or investigations

The Ombudsman must not perform his or her functions or duties or exercise his or her powers in a manner that would prejudice any—

(a) criminal proceedings or criminal investigations; or
(b) investigations by the IBAC or the Victorian Inspectorate.
(2) For the purposes of ensuring compliance with subsection (1), the Ombudsman may consult any of the following—

(a) the Director of Public Prosecutions;
(b) the Chief Commissioner of Police;
(c) the IBAC;
(d) the Victorian Inspectorate.

18. Section 243 of the 2012 Act inserts (relevantly) new s 25A of the Ombudsman Act, which provides:

25A Content of reports
(1) The Ombudsman must not include in a report under this Act—

(a) any information that the Ombudsman considers would prejudice any criminal proceedings or criminal investigations, or investigations by the Ombudsman, the IBAC or the Victorian Inspectorate; or
(b) any information, or information in any document, referred to in section 19; or
(c) a finding or an opinion that a specified person is guilty of or has committed, is committing or is about to commit an offence; or
(d) a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for an offence.

(2) If the Ombudsman intends to include in a report under this Act a comment or opinion that is adverse to any person, the Ombudsman must first give the person a reasonable opportunity to respond to the adverse material and fairly set out the response in the report.

B. ANALYSIS

B-1 OPERATION OF CONSTITUTION ACT, s 94E(1) AND (6)

19. The principal constitutional requirements that are relevant for present purposes are that the Ombudsman is an “independent officer of the Parliament” (s 94E(1)) and that the Ombudsman “has complete discretion in the performance or exercise of his or her functions or powers”, subject to s 94E of the Constitution Act, the Ombudsman Act and other laws of the State (s 94E(6)).
i) INDEPENDENT OFFICER OF PARLIAMENT

20. In our opinion, the purpose of the word "independent" in s 94E(1), and the primary purpose of s 94E as a whole, is to ensure the independence of the Ombudsman from the executive government.

1 In the Second Reading Speech to the Audit (Amendment) Bill 1999 (Vic) (which added Pt V, Div 3 including s 94B to the Constitution Act which is in similar terms to s 94E but relates to the Auditor-General), the then Premier stated that the provision applied two basic principles:

   ensuring the independence of the Auditor-General from executive direction, and establishing a transparent accountability framework for the Auditor-General.2

2 To similar effect, in the Second Reading Speech to the Constitution (Parliamentary Reform) Bill 2003 (Vic), the then Premier stated that each of the provisions making the Ombudsman and the Electoral Commissioner "independent officers of the Parliament" (ss 94E and 94F):

   means these important office-holders will be responsible to the Parliament, not the government, and can only be dismissed by the Parliament.3

21. The heading to s 94E is "Independence of the Ombudsman". Other subsections of s 94E address more particularly the relationship between the Ombudsman and the Parliament, including the powers of the Parliament to act in relation to the Ombudsman (sub-s (4)), the absence of implied powers of the Parliament arising from the Ombudsman being an independent officer of the Parliament (sub-s (5)) and the manner in which the Ombudsman may be removed from office by Parliament (sub-s (7)). Nothing in these provisions suggests that the Ombudsman, as an "independent officer of the Parliament", may not be made accountable to the Parliament or its committees or officers. To the contrary, in our opinion such accountability is consistent both with the Ombudsman's status as an "officer of the Parliament" and with the Parliament's exclusive power to

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2 Victoria, Parliamentary Debates, Legislative Assembly, 11 November 1999 at 365 (Mr Bracks) (emphasis added).

3 Victoria, Parliamentary Debates, Legislative Assembly, 27 February 2003 at 162 (Mr Bracks).
remove the Ombudsman as recognised in s 94E(7). To facilitate parliamentary accountability, Parliament may, consistently with s 94E, provide for oversight of the performance of the Ombudsman’s functions.

22. Accordingly, the independence protected by s 94E (in common with that of the Auditor-General under s 94B and the Electoral Commissioner under 94F) is primarily independence from the executive government, and co-exists with appropriate accountability to the Parliament. As the then Premier stated in the Second Reading Speech to the Audit (Amendment) Bill 1999:

It is important that the Auditor-General be accountable for the performance or exercise of the functions, duties and powers attached to the office, and for the public resources applied in the process. A balance must be kept so that the accountability framework does not compromise the independence of the office.¹

23. We note that the discussion of “independent officer of the Parliament” by the Public Accounts and Estimates Committee in its Report on a Legislative Framework for Independent Officers of Parliament (February 2006) is consistent with the views expressed above. The Committee stated:

(1) The primary function of an officer of the Parliament is to act as a check on the executive government, as part of the Parliament’s constitutional role of ensuring the executive’s accountability (para 2.1.4).

(2) Five structural features determine the independence and accountability relationships of independent officers of Parliament and their agencies:

(a) the nature of the mandate of the office/agency, including how it is defined initially and how it is updated periodically;

(b) the provisions in respect of the appointment, tenure and removal of the leadership of the agency;

(c) the processes for deciding budgets and staffing for the agency;

(d) whether the agency is free to identify issues for investigation and whether it can compel the production of information; and

¹ Victoria, Parliamentary Debates, Legislative Assembly, 11 November 1999 at 365 (Mr Bracks).
(e) the reporting requirements for the agency and whether its performance is monitored

(para 4.1).

(3) On this last point, it is important that independent officers report to Parliament, to enable Parliament to follow up their work (para 4.1.5). At the same time, however, an independent officer should not be subject to direction from Parliament or its committees on operational matters (para 4.1.6).

24. These recommendations are consistent with the view we have expressed above that the status of the Ombudsman as an “independent officer of the Parliament” does not prevent the Ombudsman and his staff being subject to oversight by or on behalf of the Parliament. The Committee recommended legislative amendment to state explicitly that officers cannot be directed by Parliament or by parliamentary committees on operational matters. No such amendment was made. It is therefore a question of degree in every case whether a power of parliamentary direction would impermissibly detract from the Ombudsman’s status as an independent officer of the Parliament.

ii) COMPLETE DISCRETION IN THE PERFORMANCE OF FUNCTIONS

25. The other relevant provision is s 94E(6) of the Constitution Act.

26. The Ombudsman’s “complete discretion” in the performance of his or her functions is expressed to be subject to s 94E of the Constitution Act, the Ombudsman Act and other laws of the State. The reference to the Ombudsman Act is a reference to that Act as amended from time to time.

(1) The general reference in s 94E(6) to the Ombudsman Act contrasts with s 94E(7), which refers to the Ombudsman Act as in force at a particular time, and also with s 94G (which was inserted by the same Act).

(2) A reference in an Act (including the Constitution Act) to an Act is to be construed as a reference to that Act as amended and in force for the time being, unless the contrary intention appears (Interpretation of Legislation).
Act 1984 (Vic), s 17(1)). In our opinion, in contrast to ss 94E(7) and 94G, no such contrary intention appears in s 94E(6).

27. Accordingly, in our opinion, s 94E(6) of the Constitution Act does not entrench a complete discretion of the Ombudsman in the performance of his or her functions. Rather, s 94E(6) provides that the Ombudsman's discretion can only be confined by legislation, as in force from time to time. This conclusion is consistent with our view that s 94E as a whole is concerned with the independence of the Ombudsman from the executive, rather than the Parliament.5

28. For these reasons, we consider that the greater degree of oversight of the Ombudsman by the Parliament and independent officers of the Parliament introduced by the 2012 Act does not mean that the Ombudsman's discretion has been interfered with contrary to s 94E(6). We elaborate on the application of s 94E(6) in this matter further at paragraphs 36 to 42 below.

B-2 CONSIDERATION OF THE 2012 ACT

29. For the following reasons, we do not consider that the oversight of the Ombudsman by the Victorian Inspectorate (including under new ss 82 and 83 of the VI Act), or new ss 13AB and 25A of the Ombudsman Act, are inconsistent with s 94E of the Constitution Act.

i) VI ACT, SS 82 AND 83 AND OVERSIGHT GENERALLY

30. The Moran advice concludes that new ss 82 and 83 of the VI Act are contrary to the Ombudsman's status as an independent officer of the Parliament. That advice states more generally that "[i]t may be argued" that the overall scheme of oversight by the Victorian Inspectorate is inconsistent with s 94E of the Constitution Act.6

5 Of course, any amending legislation must itself be consistent with the remainder of s 94E, particularly s 94E(1).
6 Moran advice, p 17.
It is convenient to begin with the more general argument about oversight by the Victorian Inspectorate. As the Moran advice notes, the Inspector who constitutes the Victorian Inspectorate is himself an independent officer of the Parliament (VI Act, ss 10, 17(1)).\(^7\) The Inspectorate is not subject to direction from or control by the executive government (VI Act, s 16). Its work is subject to review by the Accountability and Oversight Committee of Parliament (see Parliamentary Committees Act 2003, s 6A(1)).

In our opinion, an independent officer of the Parliament may be made accountable and responsible to Parliament, not only directly or via parliamentary committees, but also via another independent officer of the Parliament who is themselves so accountable and responsible.

(1) For example, we consider that an independent officer of the Parliament may, consistently with that status, be subject to oversight and review in the nature of independently conducted financial and performance audits.\(^8\) We see no distinction in principle between such oversight and that directed at substantive matters such as that able to be undertaken by the Victorian Inspectorate.

(2) In our view, given the independence of the overseeing officer, the oversight of itself is not necessarily contrary to the preservation of the required independence. This appears to be consistent with one of the four elements supporting “the accountability of accountability officers” identified by the Western Australian Commissioner for Public Sector Standards, namely “checks and balances on each other’s operations”.\(^9\)

(3) The existence of coercive powers to facilitate oversight on behalf of the Parliament of one of its officers is likewise not in our view of itself inconsistent with the status of the officer as an independent officer of the Parliament. Such powers exist, and may be used, only for the purpose of

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\(^{7}\) Moran advice, p 6.

\(^{8}\) See, similarly: Victorian Ombudsman, A section 25(2) report to Parliament on the proposed integrity system and its impact on the functions of the Ombudsman (Ombudsman report), pp 11, 13.

\(^{9}\) This West Australian report is cited in Ombudsman report, p 24.
that oversight, not to direct the manner in which the officer performs his or her functions. We do not understand Mr Moran QC to disagree with this view.10

33. We therefore disagree with the view that s 94E(1) of the Constitution Act requires that the Ombudsman can only be accountable “directly” to the Parliament.11 The question then becomes whether, despite the independence of the Victorian Inspectorate, the nature of the oversight is such as to amount to a power to direct the Ombudsman in the performance of his functions or the exercise of his powers. If so, a further question as to the consistency of such a power with s 94E(1) would arise.

34. The VI Act confers functions on the Victorian Inspectorate to monitor the Ombudsman (particularly the Ombudsman’s use of coercive powers: see s 42 and s 43(5) (which applies to Ombudsman officers)). The Victorian Inspectorate is empowered to make recommendations to the Ombudsman in relation to any action that the Victorian Inspectorate considers should be taken (s 82(1)), and may require the Ombudsman to give a report to the Victorian Inspectorate as to whether the Ombudsman has or intends to take the recommended action (s 82(5)). The Victorian Inspectorate may recommend to the Ombudsman undertaking disciplinary process or action against any Ombudsman officer (s 83(1)). In each case, the recommendation is first made in private, but can be made public if the Victorian Inspectorate considers that the Ombudsman has failed to take appropriate action (s 82(4); s 83(2)).

35. The Moran advice concludes that these oversight measures are inconsistent with the independence of the Ombudsman, because they “have the capacity to, in effect, direct the Ombudsman as to the conduct of operational matters and monitor aspects of those matters on an on-going basis”.12 We disagree with that conclusion.

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10 We understand Mr Moran QC to base his conclusion regarding s 94E(1) on as 82 and 83 of the VI Act: Moran advice, pp 9-11.
11 Contra Moran advice, p 17.
12 Moran advice, p 13.
(1) We do not consider that new ss 82 and 83 of the VI Act permit the Victorian Inspectorate to direct the Ombudsman in relation to operational matters. The Victorian Inspectorate merely makes recommendations. The Ombudsman is not required to follow those recommendations, but is at most required to explain to the Victorian Inspectorate why a recommendation has not been followed.

(2) In our opinion, it is incorrect to say that the Victorian Inspectorate’s power to make public recommendations means that “in effect” the Ombudsman is being directed. If the making of such recommendations has any effect on the performance of the Ombudsman’s functions beyond that of any other public comment that might be made in that respect, it derives from the status of the Inspectorate as an independent officer of the Parliament. It is implicit in review by or on behalf of the Parliament that the results of that review might affect the manner in which the Ombudsman performs his duties or functions. That is, presumably, the very purpose of such review. It is not, in our opinion, inconsistent with the independence of the Ombudsman to be subject to that review. In particular, again, it cannot be said that the Inspectorate’s oversight constitutes any form of direction to, or control of, the Ombudsman in the performance of his functions or duties.

(3) As noted in paragraphs 32-33 above, we consider that it does not compromise the independence of the Ombudsman under s 94E(1) to be subject to oversight by another independent officer of the Parliament, falling short of a power of direction in the performance of his functions or the exercise of his powers. Thus we consider that monitoring by the Victorian Inspectorate as provided for by the 2012 Act does not infringe s 94E(1).13

13 We leave open the further question (see paragraph 33 above) whether it would be contrary to s 94E if the Victorian Inspectorate (an independent officer of the Parliament) were to be given power by legislation to direct the Ombudsman in relation to operational matters.
ii) **OMBUDSMAN ACT, SS 13AB AND 25A**

36. The Moran advice also concludes that ss 13AB and 25A of the Ombudsman Act are inconsistent with s 94E(6) of the Constitution Act, by limiting the discretion of the Ombudsman in the performance of his functions.

37. These provisions are contained in the Ombudsman Act. The Ombudsman’s freedom of discretion in s 94E(6) is expressed to be subject to the Ombudsman Act, which means that Act as amended from time to time; see paragraphs 26-27 above. Given the ambulatory operation of s 94E(6), the mere fact that there are now greater constraints on the Ombudsman’s discretion than before, in itself, does not establish an inconsistency with that provision: see paragraph 28 above. Any alteration to the manner in which the Ombudsman’s discretions are to be exercised is effected only by specific legislation, as contemplated by s 94E(6). It follows that new ss 13AB and 25A are not inconsistent with s 94E(6).

38. In any event, we do not consider that ss 13AB or s 25A of the Ombudsman Act impose any constraint on the Ombudsman’s discretion that compromises his independence (especially not his independence from the executive government).

39. In our opinion, s 13AB is properly seen as defining the scope of the Ombudsman’s functions; in particular, the relationship between the Ombudsman’s functions and other investigations and processes. No body is given the power to direct the Ombudsman not to continue an investigation. It is not contrary to s 94E of the Ombudsman Act to define the functions of the Ombudsman, including by confining those functions.

40. Section 25A does regulate what material can be included in an Ombudsman’s report to Parliament. However, much of this regulation merely reflects limits that derive from elsewhere.

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14 Contra Moran advice, p 17.
15 As accepted in the Moran advice, p 16.
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(1) The restriction on including information that would prejudice specified proceedings or investigations (s 25A(1)(a)) is the counterpart of the limit in s 13AB on the scope of the Ombudsman's functions.

(2) The Ombudsman may not include Cabinet information (s 25A(1)(b)). This reflects that ss 19, 19A and 19B provide that information of this sort may not be provided to the Ombudsman. Section 19, in particular, has always been in the Ombudsman Act (albeit now in amended form).

(3) The Ombudsman must not include in a report a finding that a person is guilty of an offence, or a recommendation that a person be prosecuted (s 25A(1)(c) and (d)). This reflects that these matters do not come within the Ombudsman's functions. The Ombudsman is not precluded from recommending that a prosecution be considered by those with the appropriate powers required to make such decisions.

(4) The Ombudsman must not include any information that would lead to the identification of a person who has made an "assessable disclosure" for the purposes of the Protected Disclosure Act 2012 (Vic) (s 25A(1A)). This reflects the prohibition on disclosure in s 53 of the Protected Disclosure Act and predecessor legislation.

In short, s 94E does not prevent the Parliament from defining and limiting the functions of the Ombudsman, and giving effect to those limits in what is included in the Ombudsman's reports.

41. In addition, the Ombudsman must not make an adverse finding without giving the person affected a reasonable opportunity to respond and set out that response fairly (s 25A(2)). This does no more than reflect the general obligation to provide procedural fairness, discussed in cases such as Ainsworth v Criminal Justice Commission (Qld).16

42. Finally, the Ombudsman must not include any information that would enable the identification of a person who is not the subject of adverse comment or opinion, unless the Ombudsman: is satisfied that it is necessary to do so in the

16 (1992) 175 CLR 564.
public interest; is satisfied that it will not cause unreasonable damage to the person's reputation, safety or wellbeing; and states in the report that the person is not the subject of any adverse comment or opinion (s 25A(3)). These limits protect the privacy and reputation of persons who are not the subject of adverse comment or opinion, and therefore does not interfere with the Ombudsman's ability to publicise maladministration.

C. **ENTRENCHMENT OF CONSTITUTION ACT, S 94E**

43. We have assumed for the purposes of this advice that s 18 of the Constitution Act is effective to entrench s 94E.

44. We note, however, that the Moran advice states that s 18 is effective to entrench s 94E because any law that purported to amend s 94E would be a law “respecting the constitution, powers or procedure of the Parliament of the State” within s 6 of the Australia Act 1986 (Cth). This conclusion is said to follow from the fact that s 94E(4) and (5) deal with the powers of the Parliament. However, the inconsistency here is said to arise between the 2012 Act and s 94E(1) and (6) of the Constitution Act. We note that the fact that s 94E(4) and (5) deal with the powers of the Parliament does not necessarily mean that s 94E as a whole, or s 94E(1) and (6) in particular, is to be characterized as a law respecting the powers of the Parliament.

Dated: 22 March 2013

[Signature]

STEPHEN McLEISH
Solicitor-General for Victoria
Owen Dixon Chambers West

[Signature]

GRAEME HILL
Melbourne Chambers

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17 Moran advice, p 26.
report concerning the constitutional validity of aspects of Victoria’s new integrity legislation
Attachment C – Memorandum of Advice – Eamonn Moran PSM QC (3 June 2013)

IN THE MATTER OF THE INTEGRITY AND ACCOUNTABILITY
LEGISLATION AMENDMENT ACT 2012
AND
IN THE MATTER OF THE CONSTITUTION ACT 1975

MEMORANDUM OF ADVICE

I provided a Memorandum of Advice dated 8 March 2013 (my earlier advice) on the constitutional ramifications of the enactment of the IBAC suite of Acts and in particular the enactment of the Integrity Accountability Legislation Amendment Bill 2012 (IALAA). I am now asked to advise on a Joint Memorandum of Advice on the same issue dated 22 March 2013 prepared by Mr Stephen McLeish SC, Solicitor-General for Victoria, and Mr Graeme Hill (the Joint Advice).

The Joint Advice

The Joint Advice (paragraph 2) adopts the view that provisions of the IALAA that affect the Ombudsman are “consistent with s94E of the Constitution Act”. I take that to mean that they do not purport to amend or vary that section.

The Joint Advice focusses on the requirement of section 94E(1) of the Constitution Act (Ombudsman is an independent officer of the Parliament) and of section 94E(6) of that Act (Ombudsman has complete discretion in the performance or exercise of his or her functions or powers).

Paragraph 20 of the Joint Advice offers the opinion that the primary purpose of section 94E of the Constitution Act as a whole “is to ensure the independence of the Ombudsman from the executive government”.

Paragraph 21 asserts the view that nothing in section 94E(4), (5) or (7) suggests that the Ombudsman as an “Independent officer of the Parliament” may not be made accountable to “the Parliament or its committees or officers” (emphasis added). Such accountability is said to be consistent with the Ombudsman’s status as an officer of the Parliament and with the Parliament’s exclusive power to remove him or her from office. It is then asserted that to facilitate parliamentary accountability Parliament may, consistently with section 94E of the Constitution Act, provide for oversight of the performance of the Ombudsman’s functions.

Paragraph 22 repeats the opinion that the independence protected by section 94E is “primarily independence from the executive government” (emphasis added) and states that, by analogy to the provisions relating to the Auditor-General, that independence co-exists with appropriate accountability to the Parliament.
Paragraph 23 sets out recommendations from the Public Accounts and Estimates Committee’s Report on a Legislative Framework for Independent Officers of Parliament (February 2006) including that “an independent officer should not be subject to direction from Parliament or its committees on operational matters”. Paragraph 24 notes that no express amendment to this effect has been made and that therefore it is “a question of degree in every case whether a power of Parliamentary direction would impermissibly detract from the Ombudsman’s status as an independent officer of the Parliament”.

Paragraph 26 notes that section 94E(6) of the Constitution Act makes the “complete discretion” of the Ombudsman in performing functions or exercising powers subject to section 94E itself and to the Ombudsman Act 1973 and other laws of the State. It is opined that the reference to the Ombudsman Act is a reference to that Act as amended from time to time. This is said to flow from section 17(1) of the Interpretation of Legislation Act 1984 and from the express references in sections 94E(7) and 94G of the Constitution Act to Acts as in force at a particular time. Paragraph 27 then states that the Ombudsman’s discretion can be confined by legislation as in force from time to time. However, an important qualification to that is contained in a footnote to that paragraph which states that the “amending legislation must itself be consistent with the remainder of s94E, particularly s94E(1)”. Paragraph 28 then states that the greater degree of oversight of the Ombudsman by the Parliament and independent officers of the Parliament introduced by the IALAA does not mean that “the Ombudsman’s discretion has been interfered with contrary to s94E(6)”.

Paragraphs 30 to 42 review provisions of the IALAA and conclude that they are not “inconsistent with s94E of the Constitution Act” (paragraph 29). In summary those paragraphs argue that

- an independent officer of the Parliament “may be made accountable and responsible to the Parliament, not only directly or via parliamentary committees, but also via another independent officer of the Parliament who is themselves so accountable and responsible” (paragraph 32)
- the Victorian Inspectorate cannot direct the Ombudsman in relation to operational matters but can merely make recommendations, albeit public ones (paragraph 35(2))
- the independence of the Ombudsman is not compromised by being subject to oversight by “another independent officer of the Parliament, falling short of a power of direction in the performance of his functions or the exercise of his powers” (paragraph 35(3))
- given the ambulatory operation of section 94E(6) of the Constitution Act “the mere fact that there are now greater restraints on the Ombudsman’s discretion than before, in itself, does not establish an inconsistency with that provision” (paragraph 37 (it is to be noted that the qualification contained in the footnote to paragraph 27 is not repeated in this paragraph) but that in any event any new restraints do not
compromise “his independence (especially not his independence from the executive government)” (paragraph 38)

- Section 94E of the Constitution Act does not prevent the Parliament from defining and limiting the functions of the Ombudsman (paragraphs 39 and 40).

Finally, paragraph 44 of the Joint Opinion touches on the issue of the entrenchment of section 94E of the Constitution Act. That paragraph notes that “the fact that s94E(4) and (5) deal with the powers of the Parliament does not necessarily mean that s94E as a whole, or s94E(1) and (6) in particular, is to be characterized as a law respecting the powers of the Parliament”. The intent of that note is not clear to me. What is most relevant to the issue of entrenchment in this matter is whether the IALAA is a law respecting the powers of the Parliament, not whether section 94E is such a law. I will return to this matter later in this advice.

Before leaving this review of the Joint Advice it is worth noting that at paragraph 35(2), when commenting on the power of the Victorian Inspectorate to make public recommendations it is said that if “the making of such recommendations has any effect on the performance of the Ombudsman’s functions beyond that of any other public comment that might be made in that respect, it derives from the status of the Inspectorate as an Independent officer of the Parliament. It is implicit in review by or on behalf of the Parliament that the results of that review might affect the manner in which the Ombudsman performs his duties or functions”. It is difficult to see how that recognition of reality can be substantively distinguished from the Ombudsman being “in effect” directed in relation to the performance of his or her duties or functions.

**Independent Officer of Parliament**

A central issue in this matter is what is intended by section 94E(1) in declaring the Ombudsman to be an independent officer of the Parliament? I agree with the Joint Advice that it certainly intends independence from the executive government. I also agree with the Joint Advice that it does not mean that the Ombudsman is not accountable to the Parliament. As noted in my earlier advice at pages 2-3, the then Premier said in the second reading speech on the Constitution (Parliamentary Reform) Bill 2003 that making the Ombudsman an independent officer of the Parliament meant that the Ombudsman would be responsible to the Parliament, not the Government, and could only be dismissed by the Parliament.

The issue of contention is whether it is consistent with independent status for an officer of the Parliament to have to account to another officer of the Parliament in operational matters and for that other officer to be able to use the status of his or her office as an independent officer of the Parliament to make recommendations, including public recommendations, as to action that he or she considers that the accountable officer should take.
The February 2006 Public Accounts and Estimates Committee report referred to earlier, recommended legislation stating that that the Independent officers of the Parliament "cannot be directed by Parliament or its parliamentary committees on operational matters". Clearly that Committee didn't contemplate the possibility of direction by another Parliamentary officer.

As noted in my earlier advice at page 4, pre-IBAC not even a Parliamentary committee had oversight responsibility with respect to operational matters of the Ombudsman. All that the Ombudsman was required to do was to report to the Parliament on the performance of his or her functions.

Section 5(e) of the Victorian Inspectorate Act 2011 (VIA) states that an object of the Act is to "provide for the independent oversight of Ombudsman officers". If that oversight is truly independent in what sense is it compatible with the Ombudsman being accountable to the Parliament as such? While the Victorian Inspectorate is required to report annually details arising from that oversight (section 91 of the VIA), the Accountability and Oversight Committee is prevented from reviewing any decision of the Victorian Inspectorate to investigate, not to investigate or discontinue an investigation of a complaint in respect of an Ombudsman officer and from reviewing any findings, recommendations, determinations or other decisions of the Victorian Inspectorate in relation to a particular complaint (section 6A(2) of the Parliamentary Committees Act 2003).

The Victorian Inspectorate may make recommendations to the Ombudsman as to action to be taken. If the Ombudsman ignores the recommendations the Victorian inspectorate may make them public. The Accountability and Oversight Committee of the Parliament has no power to review the making of those recommendations. As noted at paragraph 35(2) of the Joint Advice "the status of the Inspectorate as an independent officer of the Parliament" sets the recommendations apart from any other public comment. At paragraph 24 of the Joint Advice it is stated that it is "a question of degree in every case whether a power of Parliamentary direction would impermissibly detract from the Ombudsman's status as an independent officer of the Parliament". The "direction" at issue here is not one given by Parliament but by an independent officer of the Parliament with the Parliament having no power to review it. In my opinion the better view is that this new state of affairs is not compatible with the Ombudsman being an independent officer of the Parliament.

If the intention was for the Ombudsman to be free to decide whether or not to take any action in response to a recommendation of the Victorian Inspectorate, why was the Victorian Inspectorate given the power to make the recommendation public? It could only be that the intention was to bring such pressure to bear on the Ombudsman that he or she would be unlikely not to take the recommended action.

Given the acknowledged accountability of the Ombudsman, and of the Victorian Inspectorate, to the Parliament and recognising the Ombudsman's independent status, this
aspect might be rectified by removing the power of the Victorian Inspectorate to make a recommendation public and giving the Ombudsman the power to ask the Accountability and Oversight Committee to review a particular recommendation.

Complete discretion in the performance of functions

Section 94E(6) of the Constitution Act makes the complete discretion of the Ombudsman subject to the Ombudsman Act 1973 and other laws of the State. However, that does not mean, of course, that it would be compatible with that section for the Ombudsman Act to be amended or another law enacted that had the effect that in no sense did the Ombudsman have complete discretion. It is mentioned above that it is acknowledged in a footnote to paragraph 27 of the Joint Advice that any amending legislation must be consistent with the remainder of section 94E of the Constitution. I agree with that but would also submit that it must not be totally incompatible with section 94E(6) itself.

If the amendments are such as to change the way in which section 94E(6) operates, then effectively section 94E(6) would have been amended and if those amendments are purportedly effected by a law “respecting the constitution, powers or procedure of the Parliament” that law must comply with the “manner and form” requirement of section 18(1B) of the Constitution Act.

In my earlier advice I put forward the opinion that new sections 13A8 and 25A of the Ombudsman Act impose restrictions on the Ombudsman’s discretion in the performance or exercise of his or her functions. However, it is sections 82 and 83 of the VIA, which confer on the Victorian Inspectorate the power to make recommendations including public recommendations, that in context impact most on the discretion of the Ombudsman and bring about the situation that it can no longer be said that the Ombudsman has “complete” discretion in the performance or exercise of his or her functions or powers. The making of a public recommendation by the Victorian inspectorate may bring about the situation that in reality the Ombudsman has no discretion in the performance or exercise of his or her functions.

Entrenchment of Constitution Act, s 94E

The critical question on the issue of entrenchment is whether the IALAA is a law “respecting the constitution, powers or procedure of the Parliament” within the meaning of section 6 of the Australia Act. If it is and if it has the effect of repealing, altering or varying section 94E of the Constitution Act 1975, then it has no force or effect unless it was made in the manner and form prescribed by section 18(1B) of that Act, that is with the approval of a majority of the electors voting at a referendum.

I am of the view that paragraph 44 of the Joint Advice does not correctly summarise my position with respect to entrenchment. It is not my position that any law that purported to amend section 94E would be a law “respecting the constitution, powers or procedure of the
Parliament”. The nature of the law itself must be examined. A law that amended section 94E to include, for example, a new subsection (8) to the effect that the next section was section 94F could not possibly be described as a law “respecting the constitution, powers or procedure of the Parliament”. Only a law that properly meets that description and that also purports to alter or vary section 94E is effectively caught by the “manner and form” requirement of section 18(1B) of the Constitution Act 1975, despite the broader language used in the latter section.

In my earlier advice at pages 26 to 27 I argued that the IALAA was indeed a law respecting the powers of the Parliament as it touched on the powers of the Parliament (whether exercised directly or through a committee of the Parliament) to act in relation to the Ombudsman and given the key role that the Ombudsman plays in assisting the Parliament in its scrutiny of the Executive, the powers of the Parliament to act in relation to the Ombudsman are of sufficient importance to be covered by the reference to “powers” in section 6 of the Australia Act.

Conclusion

I have carefully reviewed the Joint Advice but remain of the opinion that the better view is

- that the Integrity Accountability Legislation Amendment Act 2012 is a law “respecting the constitution, powers or procedure of the Parliament” within the meaning of section 6 of the Australia Act
- that it brought about a change in the status of the Ombudsman as an independent officer of the Parliament and in his or her status as having complete discretion in the performance or exercise of his or her functions or powers (primarily because of its insertion of new sections 82 and 83 in the Victorian Inspectorate Act 2011)
- that as such it altered or varied section 94E of the Constitution Act
- that in purporting to do so without complying with the “manner and form” requirement provided by section 18(1B) of the Constitution Act it is of no force or effect.

My instructing solicitor in his covering note on this brief advises me of the suggestion made by the Attorney-General that I should speak with the Solicitor-General regarding this matter. I think that is a very sensible suggestion given the importance of the issue at stake here and, for my part, I would be very happy to do so.

Eamonn Moran
3 June 2013
Mr George Brouwer  
Ombudsman  
Level 9 North Tower  
459 Collins Street  
MELBOURNE VIC 3000

Dear Mr Brouwer

I refer to your letter dated 5 August 2013, which attached a draft report on the constitutional validity of certain provisions in the Ombudsman Act 1973 and other elements in the State’s integrity legislation.

In accordance with longstanding convention, the Government will be relying on the advice of the Solicitor-General, who has given clear advice that the State’s integrity legislation is constitutionally valid.

As to the inclusion of the Solicitor-General’s advice in a report to Parliament, as you are aware, the Solicitor-General’s advice was provided to you for the purpose of seeking to resolve the concerns you had raised, and facilitating discussion between the Solicitor-General and Mr Eamonn Moran QC. Provision of the advice on this basis was consistent with longstanding practice that the State retains legal privilege over advice provided by the Solicitor-General. Nonetheless, if you conclude that the terms of legal advices should be published in any report you may decide to make to Parliament, the Government would wish all such advices to be published in full in your report, including the advice of the Solicitor-General and the advice referred to in your report to Parliament of December last year.

Yours sincerely,

The Hon Dr Denis Napthine MP  
Premier  
29/08/2013
Ombudsman’s Reports 2004-13

2013

- Ombudsman Act 1973 Own motion investigation into unenforced warrants
  August 2013
- Whistleblowers Protection Act 2001 Investigation into allegations of improper conduct by a Magistrates’ Court registrar
  May 2013

2012

- Own motion investigation into the governance and administration of the Victorian Building Commission
  December 2012
- A section 25(2) report to Parliament on the proposed integrity system and its impact on the functions of the Ombudsman
  December 2012
- Whistleblowers Protection Act 2001 Investigation into allegations concerning rail safety in the Melbourne Underground Rail Loop
  October 2012
- Whistleblowers Protection Act 2001 Investigation into allegations of improper conduct by CenITex officers
  October 2012
- Whistleblowers Protection Act 2001 Investigation into allegations involving Victoria Police
  October 2012
- Whistleblowers Protection Act 2001 Investigation into allegations against Mr Geoff Shaw MP
  October 2012
- Investigation into the temporary closure of Alfred Health adult lung transplant program
  October 2012
- Investigation into an alleged corrupt association
  October 2012
- Whistleblowers Protection Act 2001 Investigation into allegations of detrimental action involving Victoria Police
  June 2012
- Own motion investigation into Greyhound Racing Victoria
  June 2012
- The death of Mr Carl Williams at HM Barwon Prison – investigation into Corrections Victoria
  April 2012
- Whistleblowers Protection Act 2001 Conflict of interest, poor governance and bullying at the City of Glen Eira Council
  March 2012
- Investigation into the storage and management of ward records by the Department of Human Services
  March 2012

2011

- Investigation into the Foodbowl Modernisation Project and related matters
  November 2011
- Investigation into ICT-enabled projects
  November 2011
- Investigation into how universities deal with international students
  October 2011
- Investigation regarding the Department of Human Services Child Protection program (Loddon Mallee Region)
  October 2011
- Investigation into the Office of Police Integrity’s handling of a complaint
  October 2011
- SafeStreets Documents – Investigations into Victoria Police’s Handling of Freedom of Information request
  September 2011
- Investigation into prisoner access to health care
  August 2011
- Investigation into an allegation about Victoria Police crime statistics
  June 2011
- Corrupt conduct by public officers in procurement
  June 2011
- Investigation into record keeping failures by WorkSafe agents
  May 2011
- Whistleblowers Protection Act 2001 Investigation into the improper release of autopsy information by a Victorian Institute of Forensic Medicine employee
  May 2011
Ombudsman investigation – Assault of a Disability Services client by Department of Human Services staff
March 2011

The Brotherhood – Risks associated with secretive organisations
March 2011

Ombudsman investigation into the probity of The Hotel Windsor redevelopment
February 2011

Whistleblowers Protection Act 2001
Investigation into the failure of agencies to manage registered sex offenders
February 2011

Whistleblowers Protection Act 2001
Investigation into allegations of improper conduct by a councillor at the Hume City Council
February 2011

2010
Investigation into the issuing of infringement notices to public transport users and related matters
December 2010

Ombudsman’s recommendations second report on their implementation
October 2010

Whistleblowers Protection Act 2001
Investigation into conditions at the Melbourne Youth Justice Precinct
October 2010

Whistleblowers Protection Act 2001
Investigation into an allegation of improper conduct within RMIT’s School of Engineering (TAFE) – Aerospace
July 2010

Ombudsman investigation into the probity of the Kew Residential Services and St Kilda Triangle developments
June 2010

Own motion investigation into Child Protection – out of home care
May 2010

Report of an investigation into Local Government Victoria’s response to the Inspectors of Municipal Administration’s report on the City of Ballarat
April 2010

Whistleblowers Protection Act 2001
Investigation into the disclosure of information by a councillor of the City of Casey
March 2010

Ombudsman’s recommendations – Report on their implementation
February 2010

2009
Investigation into the handling of drug exhibits at the Victoria Police Forensic Services Centre
December 2009

Own motion investigation into the Department of Human Services – Child Protection Program
November 2009

Own motion investigation into the tendering and contracting of information and technology services within Victoria Police
November 2009

Brookland Greens Estate – Investigation into methane gas leaks
October 2009

A report of investigations into the City of Port Phillip
August 2009

An investigation into the Transport Accident Commission’s and the Victorian WorkCover Authority’s administrative processes for medical practitioner billing
July 2009

Whistleblowers Protection Act 2001 Conflict of interest and abuse of power by a building inspector at Brimbank City Council
June 2009

Whistleblowers Protection Act 2001
Investigation into the alleged improper conduct of councillors at Brimbank City Council
May 2009

Investigation into corporate governance at Moorabool Shire Council
April 2009

Crime statistics and police numbers
March 2009
2008

Whistleblowers Protection Act 2001 Report of an investigation into issues at Bayside Health
October 2008

Probity controls in public hospitals for the procurement of non-clinical goods and services
August 2008

Investigation into contraband entering a prison and related issues
June 2008

Conflict of interest in local government
March 2008

Conflict of interest in the public sector
March 2008

2007

Investigation into VicRoads’ driver licensing arrangements
December 2007

Investigation into the disclosure of electronic communications addressed to the Member for Evelyn and related matters
November 2007

Investigation into the use of excessive force at the Melbourne Custody Centre
November 2007

Investigation into the Office of Housing’s tender process for the cleaning and gardening maintenance contract – CNG 2007
October 2007

Investigation into a disclosure about WorkSafe’s and Victoria Police’s handling of a bullying and harassment complaint
April 2007

Own motion investigation into the policies and procedures of the planning department at the City of Greater Geelong
February 2007

2006

Conditions for persons in custody
July 2006

Review of the Freedom of Information Act 1982
June 2006

Investigation into parking infringement notices issued by Melbourne City Council
April 2006

Improving responses to allegations involving sexual assault
March 2006

2005

Investigation into the handling, storage and transfer of prisoner property in Victorian prisons
December 2005

Whistleblowers Protection Act 2001 Ombudsman’s guidelines
October 2005

Own motion investigation into VicRoads registration practices
June 2005

Complaint handling guide for the Victorian Public Sector 2005
May 2005

Review of the Freedom of Information Act 1982 Discussion paper
May 2005

Review of complaint handling in Victorian universities
May 2005

Investigation into the conduct of council officers in the administration of the Shire of Melton
March 2005

Discussion paper on improving responses to sexual abuse allegations
February 2005

2004

Essendon Rental Housing Co-operative (ERHC) December 2004

Complaint about the Medical Practitioners Board of Victoria
December 2004

Ceja task force drug related corruption – second interim report of Ombudsman Victoria
June 2004