

## APPENDIX D

# IBAC and Victorian Ombudsman joint letter to the Premier

On 15 August 2019, the IBAC and Victorian Ombudsman issued a joint letter to the Premier on the outcome of their inquiries into the OFS campaign. We include the letter here.

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15 August 2019

VO ref: C/19/4462  
IBAC ref: CD/19/48763

The Honourable Daniel Andrews MP  
Premier of Victoria  
Level 1, 1 Treasury Place  
EAST MELBOURNE VIC 3002

Dear Premier

**Fight for Victoria's Fair Share Campaign**

As you will probably be aware, our offices have received complaints [REDACTED]

[REDACTED] about the above campaign.

You will be aware that the complaints are, in effect, that the campaign breached the *Public Administration Act 2004* (Vic) (PAA). [REDACTED] complaint to the Ombudsman was specifically about an advertisement endorsed by the Department of Education and Training as part of the campaign.

The complaint to IBAC was made by [REDACTED] in relation to the authorisation, approval or endorsement by four Departments<sup>1</sup> of the advertisements which were part of the above campaign. The complainants allege in substance that there was a breach of section 97C of the PAA by the Departments in the authorisation, approval or endorsement of the campaign. A similar complaint was also made to the Victorian Public Sector Commission in relation to the Department of Transport.

In support of their allegation, [REDACTED] state that the content, tone and the timing of the release of these advertisements during the caretaker period prior to the May federal election, indicate the campaign's design or intent was to influence public sentiment against the current Government of the Commonwealth, contrary to the PAA.

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<sup>1</sup> Department of Health and Human Services, Department of Education and Training, Department of Treasury and Finance, Department of Premier and Cabinet.

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### Enquiries by the Ombudsman

In response to the Ombudsman's enquiries with the Department of Education and Training, the Department confirmed the advertisement was endorsed by a number of senior departmental staff, as well as the Department of Premier and Cabinet. It provided a copy of the Department's *Campaign Strategy Approval* documents, which justified the campaign among other things on the grounds that the Victorian Government is seeking funding parity across all school sectors in its negotiation with the Commonwealth. The Department later said that its public interest purpose is:

to advocate on behalf of Victoria to advance Victoria's position or interests (regulation 4(c) of the PAA)

### Enquiries by IBAC

IBAC requested the Victorian Public Sector Commission, consistent with its power to monitor compliance with public sector values and codes of conduct, to seek information from each of the Departments to ascertain whether there had been a breach of the PAA, and to advise IBAC of the outcome of the Commission's consideration. Commissioner [REDACTED] wrote to the relevant heads of Department. Two of the Departments placed particular reliance upon the public interest purpose contained in regulation 4(c) of the *Public Administration (Public Sector Communication) Regulations 2018* (Vic) in support of their approval of the advertising campaign.<sup>2</sup> The Department of Premier and Cabinet role was to support governance structures that are in place to ensure that the advertising complied with applicable laws and policies including obtaining internal legal advice on compliance with the PAA.

The detailed responses of each Department Secretary refute the allegation that the campaign was 'intended or designed' to influence Victorians against the then Federal Government. The Department of Treasury and Finance played no part in the approval process for the campaign.

### Conclusion and concerns

Both our agencies have considered the complaints in light of our respective functions, powers and jurisdictions, the resource commitment that would be required to investigate the allegations and the detailed responses provided by the Department Secretaries. Ultimately, we have both determined that investigation of the complaints cannot be justified. It would be highly unlikely that the detailed explanations made by each Department Secretary could be contradicted that in facilitating the campaign, they were motivated solely by the public interest in advancing Victoria's position or interest.

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<sup>2</sup> Except for the Department of Treasury and Finance, which had no endorsement function with regard to the campaign.

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In this regard, it is relevant that all Department Secretaries relied upon regulation 4 of the *Public Administration (Public Sector Communication) Regulations 2018* (Vic) which prescribes a number of public interests, including 'to advocate on behalf of Victoria to advance Victoria's position or interests'.

Accordingly the complaint to IBAC will be dismissed and the complaint to the Ombudsman will be finalised.

However, we consider that the timing and content of the campaign advertisements would have had the effect of influencing public sentiment against the Government of the Commonwealth. This would have been the likely perception of a reasonable member of the Victorian public, whatever their political allegiance.

For the avoidance of doubt, we should state that while we hold the above concerns, we make no criticism of any Department Secretary nor should it be implied that we have formed any adverse view.

**Public Administration Act 2004**

The maintenance of an apolitical public sector is a core public sector value and is set out in the Public Sector Code of Conduct. It is recited in the objects of the Public Administration Act. We refer to various provisions of Part 5, which came into effect in September 2018:

- Section 97B:
  - (1) A public sector body that publishes or causes to be published a public sector communication must ensure that publication is in the public interest.
  - (2) Without limiting subsection (1), the regulations may prescribe public interest purposes for the purposes of this section.
  
- Section 97C(a)(v):

A public sector body that publishes or causes to be published a public sector communication must ensure that the public sector communication is not designed or intended to directly or indirectly influence public sentiment for or against... the current Government of the Commonwealth.

In the second reading speech for the amendments, the [REDACTED] said:

... it is critical that, when public funds are spent on advertising and communication, this activity is undertaken for a purpose that serves the public interest. This expenditure must be effective, efficient and accountable and should never seek to provide political advantage to the government of the day. This Parliament and the Victorian community have a right to expect that there are clear and rigorous standards in place for publicly funded advertising, to provide assurance that it will occur for the benefit of the public and deliver value for money.

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... The second section in the new part requires that public sector communication is not designed or intended to directly or indirectly influence public sentiment for or against a political party, a candidate for election or a member of Parliament.

... These amendments to the Public Administration Act 2004 recognise the importance of undertaking government advertising and communication but also the need for rigorous controls and oversight to safeguard the integrity of the public sector, the appropriate use of public resources and, ultimately, the robustness of our democratic process.

... Enshrining these new standards in legislation will ensure that they are applied consistently and transparently and that they will provide ongoing protection against the wasting of public funds in an attempt to achieve political benefit.

The intent of these amendments, that publicly funded advertising not be used for political advantage, is laudable and necessary. But in our view the likely public perception of the recent advertising campaign would be at odds with this intent. The effect of the advertising, despite its public interest component, was inconsistent with apolitical public sector conduct as espoused under the PAA.

Any 'public interest' purpose of a communication is, under the legislative scheme, intended to be subject to the discrete and overriding obligation that the communication does not have the effect prohibited by s 97C(a)(v). To ensure that the expectation is met that the public sector be apolitical, the provision requires amendment. The requirement that the communication be 'designed or intended' to have the prohibited effect should be removed from s 97C(a)(v). The legality of the campaign should not depend upon proof that this element exists. Removal of this element will place obligations on the public sector body authorising, approving or endorsing the communication and also on those advising it as to the campaign's compliance with the communication standard. They must ensure that the communication is apolitical and does not have the prohibited effect even if the communication can be viewed as serving a specified public interest.

We draw this to your attention as this issue is likely to remain; in our view prompt amendment of the Act and Regulations is desirable to underline the apparent purpose of the recent amendments, to reinforce the importance of an apolitical public sector and to advance the wider public interest.

Each of the complainants is being advised as to the outcome of their complaints and we will provide them with a copy of this letter.

Yours sincerely



Deborah Glass  
**Ombudsman**



Robert Redlich  
**Commissioner**

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