

**PERFORMANCE OF VICTORIAN INTEGRITY AGENCIES 2020/21:
FOCUS ON WITNESS WELFARE**

Organisation: Independent Broad-based Anti-corruption Commission (IBAC)

Date Received: 15 July 2022

Integrity and Oversight Committee's review of the Performance of Victorian Integrity Agencies 2020/21: Focus on Witness Welfare

IBAC Supplementary Public Written Submission

This constitutes IBAC's supplementary public written submission to the Committee's Inquiry into the Performance of Integrity Agencies 2020/21: Focus on Witness Welfare.

The purpose of this submission is to:

- (a) highlight the responsibility that all oversight bodies (including IBAC) have to consider the impact of their activities on the wellbeing of those whom they interact with;
- (b) provide clarity and reassurance to the Committee and broader Victorian community on IBAC's approach to witness welfare;
- (c) address concerns raised in public submissions; and
- (d) reiterate IBAC's concerns as to the conduct of the Committee's Inquiry and particularly issues relating to procedural fairness.

Responsibility of Oversight Bodies to Ensure Witness Welfare

The Committee's inquiry has brought into sharp focus the manner in which integrity agencies manage witness welfare while fulfilling their statutory functions. This is an important issue that warrants inquiry in order to maintain public confidence in the integrity system. However, it must be noted that witness welfare management is not solely confined to integrity agencies. All bodies with powers of inquiry and oversight should take all reasonable steps to ensure the health and safety of those whom they interact with, whether they be commissions, agencies, the Ombudsman or parliamentary committees.

The inquiries and investigations undertaken by such bodies have a very real impact on the individuals involved. It is a normal human reaction to experience stress or discomfort when compelled to give evidence or answer questions, regardless of whether there is any allegation of wrongdoing. What cannot be predicted is how well an individual will be able to cope with such stressors, some of which may be compounded by matters outside the control of either the individual themselves or the relevant body. As each individual's life circumstances are unique, it is not possible to adopt a "one size fits all" approach to welfare management.

IBAC is cognisant that witnesses appearing before IBAC (whether in a public or private examination) will be under some level of stress or discomfort. These feelings may be experienced by any witness called to give evidence but may be particularly heightened for individuals whose conduct is under scrutiny for alleged corrupt conduct or misconduct. This is analogous to the discomfort experienced by suspects, accused persons and others involved in the justice system, such as those involved in coercive processes carried out by police, coroners, the judiciary, commissions and other inquisitorial bodies. However, it should be noted that feelings of stress or discomfort will not necessarily lead to welfare or health issues.

Nevertheless, all such bodies, when taking evidence, should ensure there are adequate processes in place to minimise the risk to welfare of those they interact with, including by considering the effect that any particular action (or inaction) may have before it is taken and to implement any necessary measures to mitigate the risk(s) that may arise.

As noted by the Australian Psychological Society (APS) in their submissions dated 27 April 2021:

Key factors that influence a witness's psychological distress during an investigation can include a lack of meaningful support and limited transparency in terms of the investigative process followed...To minimise the potential for distress, the APS considers it imperative that witnesses are supported, involved and educated throughout the process to help address uncertainty and to better manage stress and anxiety associated with an investigation.

IBAC's approach to witness welfare

Welfare issues have arisen in or following an IBAC investigation, in one of the three circumstances set out below. When the welfare issue has become known it is managed in the ways set out:

First, where a witness gives no sign of having a welfare issue at any stage of the investigation. In this scenario, no welfare risks are identified in IBAC's intelligence holdings or contact assessments prior to the exercise of coercive powers, and no signs or symptoms of overt distress are evidenced at the time of service of the summons, during the examination or during the natural justice process. In this scenario, IBAC will follow its standard practices to inform the witness of the welfare support services available to them and ask the witness (or their legal representative) to draw any welfare concerns to IBAC's attention. The witness will be advised that the support service remains available to them throughout the natural justice process prior to the tabling of a report. However, no risk factors or 'red flags' arise that would warrant further inquiry or require adjustment to standard practices for the conduct of the examination or natural justice process even if, unknown to IBAC, a witness's welfare has become compromised during the natural justice process.

Second, where no welfare concerns are identified prior to an examination, but during an examination (whether public or private) a welfare issue emerges, or the witness exhibits signs of distress. In this scenario, the examiner will respond as appropriate to the circumstances. This may include to regulate the examination by adjourning the proceeding for an appropriate period as required, ensuring the witness has access to appropriate support services and (for public examinations) ceasing any broadcast of hearings. The examination will be ceased entirely if it is determined, following consultation with the witness and/or their legal representative, that its continuation would seriously jeopardise the person's wellbeing. The welfare concerns identified in this scenario would be incorporated into the operational risk assessment, and considered at all subsequent stages of the investigation, including in any decision to name the person in the draft report, and if so, the manner in which the individual would be engaged throughout the natural justice process.

Third, where specific welfare issues or risks are identified prior to an examination either by IBAC through its risk assessment or in circumstances where the witness or their legal representative has raised a welfare issue. The nature of these issues will be carefully considered, including where appropriate by consulting with the witness, and/or their legal representative (and possibly their medical practitioner), and a determination made as to whether the examination can proceed or whether the welfare issues can be reasonably managed through the application of available risk treatment measures. Where an examination is held, the examination may be regulated to mitigate any specific welfare risks as far as possible. Depending on the individual's circumstances, this might

entail various strategies such as holding the examination in a less formal setting, holding part or the whole of the examination in private, limiting the scope of questions asked, having an appropriate support person present and/or not engaging in confrontational or challenging questioning. In certain situations, where a high welfare risk has been identified, the examination may be adjourned to an appropriate time or may not proceed at all.

In all these scenarios, welfare considerations take primacy over investigation objectives.

IBAC reiterates that the extent to which IBAC can respond to, and address, welfare concerns is limited by the information available to IBAC at the time of undertaking any particular activity. Ultimately, IBAC has to rely on witnesses, their legal representative, or other agencies where relevant, informing IBAC about their welfare concerns, as it has no power or authority to require a witness to submit to an assessment of their welfare prior to an examination or to indicate whether they have availed themselves of welfare support services.

Concerns raised in public submissions

IBAC has carefully reviewed and considered the submissions received by the Committee (as published on the Committee's website) for the purposes of its own learnings and as part of its continual improvement processes. In those submissions, specific concerns have been raised as to:

- (a) the support provided by IBAC;
- (b) the provision of information to witnesses about their rights, legal responsibilities and the availability of support services;
- (c) the factors taken into account in the issuing of confidentiality notices and holding of public or private examinations;
- (d) the complaints process; and
- (e) the timeliness of investigations and conclusion of hearings and publication of final reports and recommendations.

We consider that these concerns have been addressed in IBAC's previous submissions and responses to questions on notice.¹ However, if the Committee has any specific matters about which it requires clarification, we would be pleased to assist.

We further acknowledge that the anxiety and stress experienced by witnesses can be exacerbated by the time taken to complete investigations and public reports. While some of this delay can be attributed to appeal processes outside IBAC's control, we support the submission of the City of Casey that *"there is a clear need for IBAC to be appropriately resourced to bring investigations and public hearings to conclusion in a shorter and more reasonable timeframe."* Ensuring integrity agencies are appropriately funded to complete their investigations in a timely manner and have a legislative framework that ensures that litigation that delays the completion of the investigation is expedited to the extent possible² will likely reduce the ongoing anxiety experienced by witnesses awaiting finalisation of an investigation.

IBAC then turns to its concerns about the procedure followed by the Committee.

¹ As set out in our response to the Committee's questions dated 3 May 2022, our appearance before the Committee at the public hearings on 9 May 2022 and our response to the Committee's questions on notice dated 8 July 2022.

² If the Committee requires further information on legislative provisions in other jurisdictions which ensure litigation arising from integrity agency investigations is expedited, it can be provided.

Conduct of Inquiry and Procedural Fairness

As raised in the Commissioner's correspondence to the Committee of 13 May 2022, 2 June 2022 and 10 June 2022, IBAC has grave concerns about the procedure that the Committee has followed in undertaking its Inquiry, which in IBAC's view has involved a significant departure from established principles of procedural fairness.

We are aware that a number of confidential communications that were invited and received by the Committee have been leaked to the media. Some of these leaks plainly relate to confidential submissions that contain adverse allegations and comments about IBAC's conduct in respect of ongoing investigations and specific witnesses. Despite IBAC's repeated requests to have the opportunity to be heard on the matters raised in those submissions, the Committee has refused to allow IBAC that opportunity, either in a public or private forum.

This marks a fundamental departure from notions of fairness, as:

- (a) the Committee has expressly confirmed it will be analysing the evidence accepted, including written submissions, which will form the basis of the report on the review to be tabled later this year³ notwithstanding IBAC's concerns about the accuracy of those submissions to which IBAC has not had the opportunity to respond;
- (b) the Committee's views have been improperly affected and informed by the confidential submissions without having provided IBAC the opportunity to review or respond to the material contained in those submissions; and
- (c) there has been widespread (and inaccurate) adverse media reporting about IBAC's welfare management practices on the basis of the leaked submissions, to which IBAC has no ability to respond.

Despite raising these issues on multiple occasions, the correspondence received to date from the previous Chair of the Committee has been unresponsive and/or has reinforced the concerns highlighted above. IBAC refers in particular to Ms Shing's most recent letter to the Commissioner dated 24 June 2022, in response to his letter dated 10 June 2022. In the Commissioner's letter dated 10 June, he raised the following issues:

- (a) the apparent leaks of confidential submissions and correspondence to the Committee and what was being done to detect the source and prevent future leaks;
- (b) concern that the Committee decision to hold the inquiry was the direct and immediate result of the events concerning a witness in Operation Sandon, a current IBAC investigation
- (c) that the form of the invitation that the Committee extended to persons to provide the Committee with submissions concerning their experiences of IBAC investigations was calculated to include submissions concerning the matter referred to in (b) above and other current IBAC investigations and not surprisingly it appears that the Committee received numerous such submissions;
- (d) that the Committee members had all been provided with all the submissions received by the Committee, which raised issues of the ability of members to remain fair and impartial in reaching any findings or formulating recommendations; and

³ Letter from Chair Harriet Shing MP dated 24 June 2022.

- (e) a proposal to overcome the profound procedural unfairness by resolution of either a private hearing (a suggestion the Commissioner had previously made to the Chair) or deferral of the Committee's report until the IBAC investigations that were the subject of submissions had been completed and any relevant reports tabled was ignored.

The Chair did not respond to these individual concerns but expressed the view that in conducting its Inquiry, the Committee had complied with section 7(2) of the *Parliamentary Committees Act 2003*. That section relevantly provides that the Committee cannot prejudice an investigation being conducted by the IBAC. Each of the matters set out in (b) to (d) above demonstrates conclusively that the claim that the Committee sought to, and has complied with, section 7(2) is simply wrong. The response makes no attempt to explain how the profound procedural unfairness would be addressed arising from the fact that the Committee's reason for announcing an inquiry was to explore matters relating to an ongoing investigation – paragraph (b) above - and that the submissions they invited were likely to relate to ongoing investigations – paragraph (c) above. Many of the submissions then received by the committee inevitably related to ongoing investigations – paragraph (d) above.

The response ignores the repeated concerns that IBAC and other integrity bodies have raised with her and her predecessor about the fact that the Committee is unable to keep communications with it (both by way of correspondence and confidential submissions) confidential. IBAC hopes that the Committee can understand IBAC's concern about repeated breaches of confidence by the Committee which impedes IBAC's ability to communicate about important matters that may be of interest and importance to the Committee.

These disappointing shortcomings in the Chair's response and the Committee's management of this Inquiry have ultimately adversely affected all entities involved in the Inquiry - the members of the public who have been invited to make submissions, the integrity agencies who have not had the opportunity to respond to allegations or concerns raised, the Committee members whose views have been tainted by improperly received information, and the broader community in reducing trust in the integrity system.

To avoid any irreversible damage as a result of the leaked submissions, a private hearing to canvas the issues raised in those submissions should be undertaken which would not in any way prejudice any ongoing investigation. Alternatively, the inquiry could be adjourned until the investigations the subject of the submissions has been completed. By one of these two means the Committee could become apprised of all relevant matters that relate to any issues on which the committee has obtained some degree of knowledge. Failing to follow either course would mean that the procedural unfairness will not have been addressed, and the strong perception will remain that any conclusions of fact reached by the committee will be tainted.

Finally, throughout the course of the Committee's Inquiry, IBAC has provided extensive detail about the policies, procedures and practices IBAC has adopted to ensure witness welfare, and the ongoing work it is undertaking in this area.⁴ However, there has been little or no engagement by the committee with IBAC that would provide IBAC with an opportunity to respond to any preliminary thoughts the Committee has as to any additional steps that might be taken by integrity agencies in managing witness welfare. IBAC would appreciate the opportunity to consider and respond to any tentative views of the Committee before it finalises its position.

⁴ As set out in our response to the Committee's questions dated 3 May 2022, our appearance before the Committee at the public hearings on 9 May 2022, our response to questions on notice dated 8 July 2022, and these supplementary submissions.