

**Submission  
No 3**

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

**Organisation:** Information and Privacy Commission NSW

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31 March 2022

Ms Harriet Shing, MP  
Chair, Parliament of Victoria Integrity and Oversight Committee  
Parliament House  
Spring Street  
East Melbourne VIC 3002

By email: [REDACTED]

Dear Chair

## **WITNESS WELFARE MANAGEMENT DURING INTEGRITY AGENCY INVESTIGATIONS**

The Information and Privacy Commission (IPC) is pleased to provide a submission to the Parliament of Victoria's Integrity and Oversight Committee Inquiry review into witness welfare management during integrity agency investigations.

The IPC oversees the operation of privacy and information access laws in New South Wales.

The Information Commissioner has responsibility for overseeing agency compliance with the information access rights enshrined in the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act) and exercises functions prescribed in the GIPA Act and the *Government Information (Information Commissioner) Act 2009* (NSW) (GIIC Act).

The Privacy Commissioner has responsibility for overseeing and advising NSW public sector agencies on compliance with the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) and the *Health Records and Information Privacy Act 2002* (NSW) (HRIP Act).

The IPC is a recognised integrity agency as represented in the NSW Premier's Memorandum *M2021-08 NSW Government submissions and responses to inquiries*. Recent additional oversight functions vested upon IPC Commissioners under the *Digital Restart Fund Act 2020* (NSW) and the *Public Interest Disclosure Bill 2021* (NSW) have or will extend the integrity functions exercised by the Information Commissioner and the Privacy Commissioner.

### **Provisions relating to inquiries, investigations and complaints**

In relation to information access, Part 3 of the GIIC Act covers the functions of the Information Commissioner, including the conduct of investigations into how agencies fulfill their functions under the GIPA Act. In relation to privacy, Part 4 of the PPIP Act and Part 7 of the HRIP Act include relevant sections for privacy related inquiries, investigations and complaints.

These sections have a direct bearing on members of the public, witnesses, persons of interest and others involved in agency investigations and go towards witness welfare management. Broadly, these provisions are underpinned by principles of fairness which ensure that inquiries and investigations conducted by the IPC are done so in way that is fair and impartial towards relevant individuals involved in investigations by the IPC.

This is achieved in several ways. Firstly, section 15 of the GIIC Act requires the Information Commissioner when conducting inquiries and investigations to:

- act in an informal manner, including avoiding conducting formal hearings, as far as possible
- act according to the substantial merits of the case without undue regard to technicalities
- determine the procedures to be followed in exercising the Commissioner's functions, including the procedures to be followed at an inquiry or investigation conducted by the Commissioner, and
- not be bound by the rules of evidence, with the Commissioner to inform themselves on any matter in any way that the Commissioner considers to be just.

Information access investigations under the GIIC Act are to be made in the absence of the public (s 23(1) of the GIIC Act).

Similar provisions apply to the conduct by the Privacy Commissioner of inquiries and investigations about personal information under the PPIP Act (s 39) and health information under HRIP Act (s 61). Notably the Privacy Commissioner is also required to act in an informal manner, including avoiding conducting formal hearings, as far as possible. In addition, the Privacy Commissioner must endeavour to resolve certain complaints by conciliation (s 49(1) of the PPIP Act; s 46(1) of the HRIP Act). Investigations and inquiries are by default to be done in the absence of the public unless otherwise determined by the Privacy Commissioner (s 38(3) of the PPIP Act; s 60(3) of the HRIP Act).

Secondly, when investigating complaints there are requirements to both provide notice, and the opportunity to make submissions to the relevant Commissioner. Under the GIIC Act, notice must be given to both the complainant of the decision to investigate and to an agency of the decision to investigate a complaint about the agency (s 22 of the GIIC Act). There are some similar provisions with respect to notice for privacy complaints being dealt with by way of conciliation under both the PPIP Act and HRIP Act (s 49(1) of PPIP Act; s 46(2) of the HRIP Act).

The GIIC Act also makes it clear that opportunities should be provided to make submissions on the matter the subject of the investigation, both to the agency whose conduct is the subject of investigation (if practicable), and in the case of an investigation of a complaint, to the complainant (s 23(2) of the GIIC Act). These requirements are important as they allow the relevant parties to a complaint the opportunity to understand the case to meet by providing the subject matter of the investigation, and an opportunity to reply in a way that is appropriate for the circumstances.

Further, if an investigation finds that there are grounds for adverse comment in respect of any person, before making any such comment in any report, the Information Commissioner must, in so far as it is practicable to do so, inform that person of the substance of the grounds of the adverse comment and give the person an opportunity to make submissions (s 23(3) of the GIIC Act). In addition, before the publication of a report containing adverse comment in respect of any agency, the Commissioner must inform the Minister responsible for the relevant agency that a report will be proposed to be published and must at the request of that Minister, consult the Minister (s 23(4) of the GIIC Act).

Lastly, while the relevant legislative frameworks for both information access and privacy make it clear that the approach to inquiries, investigations and complaints should be informal as far as possible, the GIIC Act makes provision for the ability to make or hold formal inquiries for the purposes of an investigation (s 29(1) of the GIIC Act). When making or holding formal inquiries for the purposes of an investigation the Commissioner has the powers, authorities, protections and immunities conferred on a Commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923* (NSW). That Act provides for some procedural matters as they relate to witnesses, for example, summoning, oaths and affirmations. Similar provisions apply under the PPIP Act and HRIP Act (s 38(1) of the PPIP Act; s 60(1) of the HRIP Act).

### **Policies, procedures and information**

Consistent with open access requirements in NSW under the GIPA Act, information about inquiries, investigations and complaints to support those involved with the IPC is publicly available on the IPC's website. Broadly, the available resources provide information on the powers, policies, procedures and investigative processes taken by the IPC for both information access and privacy.

The IPC Regulatory Framework is published on the IPC website and sets out the IPC's approach to the exercise of statutory functions by the Commissioners.<sup>1</sup> That Framework also details operational factors such as reporting and the making of public comments.

In relation to information access<sup>2</sup>, there is information relevant to investigations under the GIIC Act which provide further detail on:

- powers of the Information Commissioner during an investigation
- the approach taken by the IPC in information access investigations, including that it is informal, with the aim of conducting a thorough, expeditious and fair investigation
- the obligations of witnesses to participate in an investigation
- the ability of witnesses to request copies of discussions or interviews taken as part of an investigation
- whether witnesses can bring support persons to an interview, and
- what individuals can expect as outcomes from an IPC information access investigative process.

Similarly, there is also information available for those involved in privacy related inquiries, complaints and investigations<sup>3</sup> under the PPIP Act and HRIP Act which cover the:

- powers of the Privacy Commissioner during an investigation and complaint handling process
- approach to be taken by the IPC in privacy complaints, including that it is informal with a focus on conciliation of parties to act to seek resolution in good faith
- that the respondent, consistent with principles of fairness, is to be advised of the complainant's identity, the nature of and circumstances giving rise to the complaint and any alleged breaches of privacy

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<sup>1</sup>[https://www.ipc.nsw.gov.au/sites/default/files/file\\_manager/IPC%20Regulatory%20Framework%202016\\_.pdf#:~:text=Regulatory%20Framework%202016-.About%20the%20IPC%20Regulatory%20Framework,support%20compliance%20with%20the%20laws.](https://www.ipc.nsw.gov.au/sites/default/files/file_manager/IPC%20Regulatory%20Framework%202016_.pdf#:~:text=Regulatory%20Framework%202016-.About%20the%20IPC%20Regulatory%20Framework,support%20compliance%20with%20the%20laws.)

<sup>2</sup> See, for example, Fact Sheet – Being investigated by the IPC, updated March 2020 available at <https://www.ipc.nsw.gov.au/fact-sheet-being-investigated-ipc>

<sup>3</sup> See for example, Protocol for handling privacy complaints, updated March 2022 available at [Protocol for handling privacy complaints \(nsw.gov.au\)](https://www.ipc.nsw.gov.au/protocol-for-handling-privacy-complaints)

- whether parties can be represented in conciliation proceedings, and
- what individuals can expect as outcomes from an IPC privacy process.

I hope this information assists the review of witness welfare management, however, please do not hesitate to contact us if you require any further information. You can contact [REDACTED], Senior Policy Officer, Legal Counsel and Regulatory Advice on [REDACTED], or by email at [REDACTED], if you have any questions.

Yours sincerely

[REDACTED]

Elizabeth Tydd  
**CEO, Information and Privacy Commission NSW**  
**Information Commissioner**  
**NSW Open Data Advocate**

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Samantha Gavel  
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