ibac independent broad-based anti-corruption commission
Victoria

Operation Daintree

Special report

April 2023

Acknowledgement

IBAC acknowledges the Traditional Custodians of the lands on which we work and pays respect to Elders past, present and emerging. We recognise and celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of Victoria.

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Summary of the investigation and outcomes

1.1 Introduction

Occupational violence against health workers has been a growing problem globally over the last twenty years. The World Health Organization has labelled it an epidemic and Victoria has not been immune from it. Numerous reports on how to address it in Victoria appear to have made few inroads into the problem.

Before the 2014 Victorian election, the then Labor opposition made a series of commitments to address violence in healthcare settings, including through staff training. In June 2016, the Violence in Healthcare Taskforce reported to the then Minister for Health, the Hon Jill Hennessy. The taskforce made 19 recommendations that included identifying staff training needs, developing a specific security training module, assessing all health services' security models and developing statewide guidance on security models.

In early 2018, the Health Workers Union (HWU) began lobbying the Victorian Government on this issue. The HWU proposed establishing a publicly funded training program on occupational violence and aggression for hospital security and patient transport staff, many of whom were its members. The HWU submitted an 'unsolicited proposal' to the Minister for Health's Office in June 2018 for its related and recently established entity, the Health Education Federation (HEF), to develop and deliver the program.

The 2018 State election was due to be held on 24 November. The 'caretaker period' for that election was to commence at 6pm on 30 October. By convention, governments and their departments are required not to take actions that may bind a successor government, such as entering into major contracts, during the caretaker period preceding an election.[1]

The then Department of Health and Human Services (DHHS) entered into a $1.2 million contract with HEF to provide occupational violence and aggression training to 575 health workers on 30 October 2018 prior to the commencement of the caretaker period.

A week earlier, on 23 October 2018, the Premier had announced an election commitment for a further commitment of $2.2 million to train 1,000 frontline health workers in partnership with the HWU, to recognise and respond to occupational violence. The HWU understood the announcement to mean that HEF would deliver this training.

This contract and the 2018 election commitment were the primary focus of the Independent Broad-based Anti-corruption Commission's (IBAC's) Operation Daintree investigation.

1.2 The allegations

On 30 May 2019, IBAC received a complaint from an anonymous source. It alleged that the procurement process and awarding of a contract by DHHS to HEF for the provision of training to healthcare workers in November 2018 constituted serious corrupt conduct.

The anonymous source alleged that:

(a) the contract value was more than $1 million, but no competitive process was followed

(b) the project was awarded to a single provider, HEF, which:

- was newly formed and had no relevant experience
- at the time of engagement was not a registered training organisation (RTO)
- was not financially established and thereby posed a risk of non-delivery
- did not have sound governance arrangements in place
- had directors with executive officer positions at the HWU

(c) HEF was not on the training panel and would have been unlikely to qualify for inclusion

(d) a partial upfront payment was approved prior to delivery of any training, despite the finance department of DHHS advising to the contrary

(e) the contract was awarded less than a day before the government caretaker period commenced in 2018.

1 Victorian Public Sector Commission (VPSC)(2018), Caretaker Conventions, viewed at vpsc.vic.gov.au/caretaker-conventions/

IBAC determined the matter was a 'protected disclosure complaint' (now a 'public interest disclosure')[2] and referred it to the Victorian Ombudsman for investigation under section 73 of the *Independent Broad-based Anti-Corruption Commission Act 2011* (IBAC Act) as the allegations, if proven, were capable of amounting to 'improper conduct'. This was on the basis that what was then known fell below IBAC's threshold for investigation.

On 27 November 2019, the Victorian Ombudsman notified IBAC under section 16E(4) of the *Ombudsman Act 1973* that her investigation had identified evidence of pressure exerted on DHHS staff to award the contract to HEF and in their management of the contract.

This raised a reasonable suspicion of corrupt conduct by:

- the Victorian Premier, the Hon Daniel Andrews MP
- the Hon Jill Hennessy MP (former Minister for Health)
- the Hon Jenny Mikakos MP (former Minister for Health)
- ministerial staff working in the offices of the above ministers and the Premier.

IBAC then commenced Operation Daintree. Two further related complaints were made to IBAC in late 2020.

1.3 The nature of IBAC's findings

IBAC can publish a special report relating to the performance of its duties and functions at any time. This includes a special report about an investigation into suspected 'corrupt conduct'.

Corrupt conduct is defined in section 4 of the IBAC Act. It includes conduct that involves a breach of public trust, such as the misuse of a public power or position, and can include misuse of information gained by a public officer. The misuse can be for private gain, or advantage of that person or another person. The definition requires that the conduct would constitute a relevant criminal offence.

However, IBAC is not a court. It is prohibited from including in its reports any finding or opinion that a person is guilty of or has committed a criminal or disciplinary offence, or that a person should be prosecuted for any such offence.

Unlike a court, IBAC is not bound by the rules of evidence and, in producing a special report, it is not required to apply the criminal standard of proof (proof beyond reasonable doubt).

In a special report, IBAC can make findings of fact and can express comments or opinions about a person's conduct. In doing this, IBAC applies the civil standard of proof (proof on the balance of probabilities), according to what is commonly referred to as the Briginshaw principle. Under this principle, IBAC has regard to the seriousness of the finding, the inherent likelihood or unlikelihood of the fact in question, and the gravity of the consequences that may flow from the finding.

1.4 What the IBAC investigation found

The investigation substantiated the factual allegations in the original complaint. It also substantiated the suspicion in the Ombudsman's notification that a ministerial advisor working in the Health Minister's office exerted pressure on DHHS staff to award the contract to the HEF. It also found that an advisor in the office of the subsequent Health Minister and an advisor in the office of the Premier (acting through the Health Minister's office) intruded into DHHS' management of the contract in ways favourable to the HEF and against the public interest.

The evidence gathered in the investigation fell short of establishing that any person had committed corrupt conduct within the meaning of the IBAC Act - noting that this would include a requirement to be satisfied that a relevant offence had been committed.

2 Under the Protected Disclosure Act 2012, which was retitled the Public Interest Disclosures Act 2012 on 1 January 2020.

It did however reveal a range of concerning conduct and omissions in breach of the public duties and ethical obligations of ministers and ministerial advisors. It also identified conduct by senior public servants that fell short of the required Victorian public sector standards.

The need for training for hospital security and patient transport staff to help them manage occupational violence and aggression had been identified, but a formal procurement process had not been established.

The secretary of the HWU lobbied a senior advisor in the Premier's Private Office (PPO) and a senior advisor to the Health Minister in favour of the HEF being contracted to develop and deliver the training. The senior advisor to the Health Minister helped the HWU to shape an unsolicited proposal that HEF be contracted to deliver training to 575 healthcare workers. The senior advisor then submitted that proposal to DHHS for consideration.

Unsolicited proposals from potential suppliers can play a legitimate role in government procurement of goods or services. However, because by definition they arise outside the normal planning and procurement processes of government, they can present probity risks. Those risks were compounded because of the conflict between the government's interest in procuring the most suitable supplier for the training and the governing party's interest in assisting an affiliated union. These probity risks meant that a rigorous process was especially important to safeguard the public interest.

Relevant staff in DHHS had significant concerns about the proposal, including concerns about the capacity of HEF to deliver the program, and considered that there should be a competitive procurement process. Despite those concerns, a departmental deputy secretary as the delegate of DHHS decided that the minister did not need to provide instructions on the preferable procurement process. The deputy secretary also decided that they would authorise a non-competitive process in which only the HEF would be asked to provide a detailed tender to deliver the training services. After the HEF submitted a tender, which was assessed by DHHS, the deputy secretary entered into a contract for $1.2 million with the HEF.

The contract was signed in the hours before the caretaker period commenced. There is commonly a burst of intense activity before a caretaker period as the public sector attempts to reach milestones or complete projects before activity is suspended. In this case, the timing was significant because (as detailed in section 4.5.3 below) the project timelines had been changed to bring forward the planned commencement of the contract from after the election to before the caretaker period, and (as detailed in section 4.5.5) the Assistant Director of the relevant DHHS team – the Worker Wellbeing team (WWt) – said that they felt pressured by the minister's office, particularly about timing and the approach of the caretaker period.

The investigation found that a senior advisor to the Health Minister improperly intruded into the process of DHHS awarding the contract to the HEF. It also found that the decision by DHHS to contract with HEF without undertaking a competitive procurement process was driven by a belief of senior staff in that department that that was the minister's and government's preference, and by ongoing pressure from the ministerial advisor and secretary of the union.

There were serious concerns about the standard of training provided by HEF under the contract. However, intervention in 2019 and early 2020 by another advisor in the new Minister for Health's office, on occasion at the request of a senior adviser in the PPO, dissuaded DHHS from taking steps to terminate the contract.

Ultimately, between the signing of the contract in October 2018 and the cessation of the training in March 2020 due to the COVID-19 pandemic, HEF trained only 83 of the planned 575 staff. The quality of the training was poor. In total, $335,000 of the $1.2 million contract was actually paid to HEF.

The safeguards designed to ensure the integrity and fairness of the procurement process were bypassed. This meant that the government's actual conflict of interest was not properly managed. The union was given privileged access and favourable treatment. The combined effect of these failings and unethical conduct resulted in a contract that should not have been entered into with the union and an outcome which was not in the public interest.

Misconduct that favours political, personal or organisational interests of people and entities in an office holder's network, as the IBAC and the Victorian Ombudsman reported in Operation Watts, 'corrode[s] standards of public governance, decision-making in the public interest, and trust in government.'[3] While it may fall short of 'corrupt conduct' as defined in the IBAC Act, it leaves the public sector vulnerable to significant risks of such conduct.

3 IBAC and Victorian Ombudsman, Operation Watts Report, para 813.

The Premier, the Secretary of the HWU, Ms Diana Asmar (with the HWU and HEF) and Health Advisor A queried the basis on which IBAC could report on alleged improper conduct when it had not identified any corrupt conduct. IBAC may produce a special report on any matter relating to the performance of its duties and functions. This report deals with matters arising from the exercise of IBAC's function of investigating corrupt conduct. Reporting on conduct of the sort revealed by this investigation fulfils IBAC functions, including education and prevention, that are directed at achieving the objects of the IBAC Act.[4] The objects include:

- assisting in the prevention of corrupt conduct
- facilitating the education of the public sector and the community about the detrimental effects of corrupt conduct and the ways in which corrupt conduct can be prevented, and
- assisting in improving the capacity of the public sector to prevent corrupt conduct.[5]

This report will assist in the prevention of corrupt conduct and will educate the public sector (including ministers and their advisors) on the detrimental effects conduct perceived as corruption can have on the public sector as well as instances of misconduct and lesser misconduct. In Operation Daintree, IBAC has examined systems and practices and has exposed gaps in governance frameworks that create an environment in which corrupt activity could occur and accordingly, has made recommendations to reduce the risk of it occurring in the future.

IBAC's more detailed findings and witnesses' responses to them where they contain adverse comment or opinion are contained in Chapter 4 and Appendix A.

1.5 Summary of strategic issues and corruption vulnerabilities

Key issues emerging from the investigation include:

- the inappropriate influence of ministerial advisors on departmental advice, decisions and administrative actions
- a lack of understanding of, and/or disregard for, their ethical obligations by ministerial advisors, including those relating to the boundaries between their and public servants' roles in procurement and giving advice to the minister
- the absence of any 'safe' avenue for public servants to complain about misconduct by ministerial advisors, processes for effectively investigating such complaints, and confidence that appropriate action will be taken in response to any proven allegations
- the influence of the PPO on ministers and their offices and, through them, their departments
- the lack of oversight of advisors by ministers (and with it, the potential for plausible deniability, raising questions about the efficacy of the Westminster convention of individual ministerial responsibility as an accountability mechanism to parliament and, through it, the community)
- the pliability of DHHS in delivering what it understood the minister wanted, in breach of its ethical obligations
- a propensity by some advisors and public servants to avoid, ignore, bend or break rules to achieve sought-after outcomes that are not in the public interest
- bypassing the safeguards in the procurement system designed to ensure the integrity and fairness of the process, and successful delivery of the contract
- failure of leadership in both the administrative and political arms of government to model appropriate behaviour for their staff and to protect their staff's mental health in a sometimes challenging environment
- a failure by ministers and their advisors to ensure that systems were in place to manage actual or perceived conflicts of interest with third parties that use their relationships with the political executive to advance their own interests to the detriment of the public interest, including, in this case, the proper training of its members
- ministerial offices giving privileged access and favourable treatment to special interest groups to the detriment of the public interest, in breach of the ethical obligations of ministers, ministerial advisors and public servants.

4 IBAC Act s.15(5)
5 IBAC Act s8(b) – (d)

Individuals and bodies to whom a draft of this report or relevant extracts from it were provided in accordance with IBAC's natural justice obligations[6] have disputed some of these findings. In some instances, IBAC has accepted these submissions in full or in part, and modified the report accordingly. Where IBAC has not accepted such submissions, a summary of them is set out in Appendix A and at the relevant points in the following chapters, with an explanation as to why IBAC has not accepted them.

Around the world, commentators have observed a growing politicisation of public administration through the enlargement of political executives' roles, political appointments at senior administrative levels, partisanship in promotions and the increased use of ministerial advisors.[7] In IBAC's view, Victoria has not been immune from this trend, as reflected in some of the issues outlined above.

Accompanying this trend has been a tolerance, or, on occasion, tacit encouragement of rule avoidance, bending and breaking. Adherence to the rules and observation of conventions appear to have become increasingly viewed as optional and breaches rarely attract consequences. These rules and conventions have evolved and been applied over time to protect the public interest and promote integrity in government decision-making.

Traditional safeguards have been diminished or abandoned, leading to:

- a significant erosion in the accountability of the executive to the parliament and people
- the growth of an environment where improper conduct and corrupt conduct is more difficult to detect and address
- a partisanship in policy development and implementation that favours special interests to the detriment of the public interest.

The decline in standards and transparency, and the rise in preferential treatment of people and organisations linked to decision makers or parties in power, does not always reach the threshold of corrupt criminal conduct, which requires proof of a relevant offence, but because of its unethical nature has often been referred to as 'grey' or 'soft' corruption.

IBAC notes that despite this trend, or perhaps in response to it, some transparency and accountability measures have been implemented over the same period to provide assurance to the public that government is acting in the public interest.

Such measures in Victoria have included:

- freedom of information and information privacy legislation
- expanding the role of the Ombudsman
- establishment of the Victorian Civil and Administrative Tribunal
- performance (or effectiveness) audits (in addition to traditional financial audits)
- scrutiny by Parliamentary Committees
- public inquiries
- the introduction of the Victorian Charter of Human Rights and Responsibilities
- the establishment of integrity or anti-corruption agencies.[8]

While these measures provide some level of assistance in holding government to account, they have not arrested the decline in standards.

Unfortunately, most of the identified issues are not new and reflect the continuing decline in standards of integrity. They are a further illustration of the significant deterioration in the observance of more traditional rules and conventions, which have affected the role and independence of ministers and their departments, and furthered the increasing influence of ministerial advisors and the centralisation of power in the PPO.

6 See IBAC Act s.162.
7 For example, see Halligan, J 2020, '*Politicisation of public services in comparative perspective*' at researchgate.net/publication/344335778_Politicisation_of_public_services_in_comparative_perspective, p.1.
8 While this observation is made in relation to Victorian reforms, this 'accountability innovation' trend has been evident in Australia and other common law jurisdictions. For example, see Mulgan, R 2012, 'Assessing ministerial responsibility in Australia', *Ministerial Careers and Accountability in the Australian Commonwealth Context*, p. 179.

Operation Watts, which was a joint investigation report of IBAC and the Victorian Ombudsman released in July 2022, identified other integrity failings in relation to the maintenance of appropriate standards by ministers and parliamentarians.

Many of these issues have also been identified in Professor Coaldrake's *Review of culture and accountability in the Queensland public sector* (Coaldrake review).[9] Finding the same issues emerging in different contexts through IBAC's investigations (and reviews in other jurisdictions) points to some systemic governance, integrity and accountability failings. These need to be urgently addressed to restore community confidence that government processes are followed and decisions are made in the public interest.

The recommendations in this report are made with that aim.

1.6 Section 159 recommendations

Under section 159(1) of the IBAC Act, IBAC makes the following recommendations.

Recommendation 1

That the Victorian Government ensures that lobbying activities by employee and employer associations are included in any reforms arising from IBAC's *Special report on corruption risks associated with donations and lobbying*.

Recommendation 2

That the Victorian Parliament requests the Parliamentary Ethics Committee (to be established as a result of the Operation Watts report) to prepare guidance about the current scope of the convention on ministerial accountability and its application to Victorian Government ministers.

Recommendation 3

That the Premier ensures that:

(a) the Ministerial Code of Conduct is amended to be consistent with any guidance issued by the Parliamentary Ethics Committee in implementing Recommendation 2

(b) the Ministerial Code of Conduct is amended to require all ministers to:

- observe the relevant protocols and conventions in providing instructions to, and communicating with, departments
- ensure that their offices have effective arrangements for the supervision and accountability of staff, escalation of issues and clear lines of communication
- ensure that their staff observe the relevant protocols and conventions in communicating with departments
- complete a mandatory induction program
- undertake mandatory refresher training on the Ministerial Code of Conduct
- be fully aware of their obligations under the Ministerial Code of Conduct and their staff's obligations under the Ministerial Staff Code of Conduct
- ensure the scope of all advisors' authority is clearly defined, and the manner in which they may discharge their functions is consistent with the Ministerial Staff Code of Conduct and the protocols about interactions with public servants.

9 Coaldrake, P 2022 *Review of culture and accountability in the Queensland public sector*, Queensland Government, referred to in this report as the Coaldrake Review.

Recommendation 4:

That, in line with other Australian jurisdictions, the Victorian Government develops and introduces legislation to clarify and formalise the employment arrangements for ministerial staff, in order to strengthen transparency and accountability.

Options to consider include:

(a) clarifying employment responsibilities, such as:

- designating the minister to whom the staff are assigned to be their employer, or alternatively, vesting employer responsibilities in the minister to whom staff are assigned, once they have been employed by the Premier
- providing for the accountability and supervisory arrangements for ministerial staff

(b) articulating the values and employment principles that apply to ministerial staff

(c) providing for the making of codes of conduct by the Premier to be observed by staff in performing their functions, including:

- providing that a breach of the Ministerial Staff Code of Conduct may constitute misconduct
- requiring the Ministerial Staff Code of Conduct to be published and reviewed at regular intervals

(d) articulating the principles for ministerial staff to follow when dealing with portfolio departments and agencies, including a specific prohibition on directing public sector employees.

Recommendation 5:

That the government introduces legislation to require the Secretary to the Department of Premier and Cabinet (DPC) or the Victorian Public Sector Commission (VPSC) to include information in their annual report about the number of ministerial advisors and other staff who were employed in each ministerial office as of 30 June each year, and the total cost of employing ministerial advisors and staff during each financial year.

Recommendation 6:

That, subject to any legislation drafted pursuant to Recommendation 4, the Premier, the DPC and the VPSC collaborate to ensure that the Ministerial Code of Conduct, the Ministerial Staff Code of Conduct, and the VPSC guidance to ministerial staff, departmental secretaries, executive officers and non-executive officers are consistent, comprehensive and emphasise:

(a) role clarity and the need for ministerial staff and public servants to understand and act within the scope of their roles

(b) mutual respect in relations between ministerial offices and public servants

(c) greater awareness of potential conflicts of interest and the need for additional caution to be exercised in managing conflicts of interest,

(d) the operation of the conventions on ministerial responsibility.

Recommendation 7:

That:

(a) the Victorian Government, in consultation with the VPSC, provides a mandatory induction program for new ministerial staff that covers their obligations under the Ministerial Staff Code of Conduct and other guidance

(b) all ministerial staff members and public service employees who regularly engage with ministerial offices undertake training in the relevant guidance governing relations between ministers, their offices and public sector departments and agencies, and the principles underpinning the guidance, at least once every two years

(c) the DPC or VPSC publish annual statements that detail the number of staff and advisors who attended training sessions in the previous financial year, broken down by individual portfolios.

Recommendation 8:

That the Parliamentary Integrity Commissioner (to be established as a result of the Operation Watts report) be responsible for:

(a) receiving and investigating complaints about possible, non-criminal breaches of the Ministerial Staff Code of Conduct and other misconduct

(b) referring prima facie allegations of criminal or corrupt conduct to Victoria Police or IBAC

(c) referring minor breaches to the Premier for investigation and resolution, in the commissioner's discretion, and subject to the Premier advising the commissioner of the outcome of the investigation

(d) recommending further action to the employer of the ministerial staff member, including on potential sanctions, where the Parliamentary Integrity Commissioner is satisfied a ministerial staff member engaged in conduct that is in breach of the Ministerial Staff Code of Conduct

(e) promoting the revised Ministerial Staff Code of Conduct and providing regular education on it

(f) monitoring and reporting on compliance with the Ministerial Staff Code of Conduct and potential measures to improve it

(g) revising the Ministerial Staff Misconduct Policy and Procedure to align with this report's recommendations

(h) reporting annually on the performance of their functions with respect to ministerial staff (or on specific cases if warranted) to the parliament.

Recommendation 9:

That in developing the legislation to establish the ministerial staff complaints regime, the Victorian Government ensures that the legislation includes a requirement for ministerial staff to cooperate with an investigation of a complaint against them (or another ministerial staff member) with:

(a) safeguards against the use of such information in other criminal or civil proceedings (other than for unfair dismissal or providing false or misleading information); and

(b) a failure to cooperate with the Parliamentary Integrity Commissioner constituting misconduct enabling the commissioner to recommend appropriate action to the employer of the ministerial staff member for that misconduct.

Recommendation 10:

That in developing the proposed complaints regime in relation to ministerial staff, the Victorian Government:

(a) requires the Premier (or minister to whom a ministerial staff member is assigned if they have employment responsibilities) to:

- accept the recommendations of the proposed Parliamentary Integrity Commissioner from an investigation into the conduct of a ministerial staff member; or
- report to the commissioner on their reasons for not accepting the recommendations and any alternative action they have taken or have determined should be taken

(b) requires the commissioner to publish a report each year on the nature and number of recommendations made, accepted and not accepted.

Recommendation 11:

That:

(a) the Victorian Government develops and introduces amendments to the *Parliamentary Committees Act 2003* to empower relevant committees to compel ministerial staff members to appear before them and answer questions in limited and defined circumstances, such as where a minister claims to be unaware of the staff member's conduct in a matter relevant to the minister's portfolio into which the committee is inquiring; and

(b) the Standing Orders Committee of each House (or any other committee as may be appropriate) develops guidance material for parliamentary committees and ministerial advisors called before such committees on, among other things:

- what does or does not constitute permissible questions to put to an advisor
- what an advisor's obligations are to answer questions
- the consequences of an advisor failing to answer a legitimate question.

Recommendation 12:

That the Victorian Government and parliament develop and introduce amendments to all relevant codes of conduct to provide that a breach of the relevant code includes conduct that directly or indirectly either:

(a) intimidates or victimises a person who has reported conduct (or proposes to report conduct) of a ministerial staff member or made a complaint (or proposes to complain) about a ministerial staff member

(b) interferes with any investigation or inquiry into the conduct of a ministerial staff member that is the subject of a complaint or a report, for the purpose of influencing the outcome or findings.

Recommendation 13:

That the Victorian Government ensures persons making legitimate or reasonable allegations of misconduct about a ministerial staff member are protected from detrimental action by:

(a) consulting with IBAC on the expansion of the Parliamentary Integrity Commissioner's remit to ensure that the office holder is able to engage effectively with the provisions of the *Public Interest Disclosures Act 2012*

(b) establishing procedures to provide protection for persons who are not otherwise eligible for protection under the *Public Interest Disclosures Act 2012*, such as by developing and introducing amendments to the *Public Administration Act 2004*.

Recommendation 14:

That the VPSC amends the Code of Conduct for Victorian Public Sector Employees and the Victorian Government amends the Ministerial Staff Code of Conduct to provide that the making of a frivolous, vexatious or malicious allegation to the independent complaints process may constitute a breach of the relevant code, with appropriate sanctions available to respond to such conduct.

Recommendation 15:

That the VPSC and Victorian Secretaries' Board review their current programs and initiatives, with a view to strengthening and supplementing them with specific training and materials directed to the challenges of ensuring a greater commitment in the VPS to preventing and responding effectively to improper political interference.

Recommendation 16:

That the Department of Health reviews and, where necessary, strengthens its procurement policies, systems and practices to address the corruption vulnerabilities identified by IBAC in this report, including:

(a) the assessment and management of unsolicited proposals to supply goods or services, regardless of how a proposal is conveyed to it

(b) its conflicts of interest framework so employees and contractors understand their obligations to identify, declare and manage such conflicts and avoid them where possible

(c) that suppliers are sourced in a way that complies with competition requirements in legislation and/or procurement policy and procedures.

Recommendation 17:

That the Victorian government:

(a) consults with IBAC on the preparation of legislative changes arising from the implementation of recommendations in this report

(b) provides to parliament:

- a progress report on the actions taken in response to the recommendations in this report by 31 October 2023
- a further report on those actions (with a focus on the recommended complaints regime) by 30 June 2024.

IBAC may publicly report on the adequacy or otherwise of those responses.

Background and context

2

2.1 Roles and standards

2.1.1 Government, parliament and ministers

This report examines the conduct of ministers, ministerial advisors and public servants in dealing with a trade union and its related training entity. Their actions occurred within the framework of the Westminster system of government. The Westminster model is used by all Australian jurisdictions, including the Commonwealth, and is characterised by the separation of the courts, the legislature (parliament) and the executive government.[10]

The link between the executive government (ministers, their advisors and the public service supporting them) and the legislature is stronger than in other systems such as the USA model, because the members of the government (ministers) are drawn from the ranks of members of parliament and are accountable to the parliament for their actions. The concept of ministerial responsibility to parliament is a key element of our democracy. Its effectiveness as an accountability mechanism for the conduct of ministerial advisors is a major issue that has emerged from Operation Daintree.

Victoria's *Constitution Act 1975* provides for the appointment of responsible Ministers of the Crown. They are appointed by the Governor on the recommendation of the Premier, who may also remove them from office.[11] They are assigned their portfolios under a General Order made by the Premier, which allocates the responsibility for the administration of various Acts (or parts of Acts) to them.[12]

These arrangements create a systemic tension between a minister's dependence on the Premier for their position and the minister's direct accountability to parliament for the management of their portfolio responsibilities. A minister's responsibility to parliament is implied by the use of the term 'responsible Ministers' in the Victorian Constitution, but as a convention under the Westminster system, it is not legally enforceable.

Ministers have a wide discretion about how to perform their role, although they must obviously obey all relevant laws and are accountable for their performance to the Premier, their Cabinet and party colleagues, the parliament and the wider community. They are also required to comply with the Ministerial Code of Conduct,[13] which is a public document issued by the Premier.

It sets out principles and duties in relation to the performance of ministerial duties, including to:

> … accept accountability for the exercise of the powers and functions of their office – that is to ensure that their conduct, representations and decisions as Ministers … *and the conduct, representations and decisions of those who act as their delegates or on their behalf* – are consistent with the particular responsibilities of their office …
>
> (and) are expected to provide a proper account of their exercise of public office, and of the agencies within their portfolios.[14] *(emphasis added)*

The Ministerial Code of Conduct reflects the Westminster convention of ministerial responsibility for advisors, staff, and the departments that support a minister's portfolio obligations.

This code also requires ministers to, among other things, 'be familiar with the requirements of the Ministerial Staff Code of Conduct and ensure that their staff comply with it'.[15]

The Ministerial Code of Conduct affirms the Premier's power to ask a minister to stand aside if they become the subject of an official investigation for alleged illegal or improper conduct, and to resign if convicted, or if the Premier is satisfied that they have breached or failed to comply with the code in a substantive and material manner.[16]

10 A system inherited or derived from the United Kingdom's Parliament. See www.parliament.vic.gov.au/about.
11 *Constitution Act 1975*, s. 50. The Premier's advice or recommendation to the Governor is a matter of constitutional convention.
12 The current order and supplement can be found at https://www.vic.gov.au/general-order-dated-5-december-2022 and https://www.vic.gov.au/supplement-general-order-effective-13-december-2022.
13 Victorian Premier, 2018 Code of Conduct for Ministers and Parliamentary Secretaries (Vic).
14 Ministerial Code of Conduct, ss.2.2 III and 2.3.
15 Ibid., s.7.1.
16 Ibid., s.9.

2.1.2 Chiefs of staff and ministerial advisors

Ministers are supported by ministerial advisors, who are employed by the Premier[17] and are not part of the public service. They perform a critical role in modern Australian governments.

The most recent review of the Australian Public Service observed that:

> Ministerial advisors now have an enduring and important role in Australia's system of government.[18] … [They] provide often-indispensable political, policy and administrative support to ministers … [and] fulfill a critically important role in public administration in Australia.[19]

The Canadian handbook, *Open and Accountable Government*, makes a similar point, noting that ministerial advisors 'assist Ministers in their official responsibilities by providing political analysis, advice and support that the public service cannot provide'[20] due to its required impartiality.

The number of ministerial advisors and other support staff is determined by the Premier, and generally depends on the size and importance of the minister's portfolio or portfolios. A Chief of Staff is usually appointed to manage a minister's office, including the advisors, and acts as a critical liaison point with the relevant public service department and related statutory entities, other ministers' offices and external stakeholders.

Although the structure and workflow arrangements for ministerial offices vary, a Chief of Staff will usually be the primary decision maker under the minister, and will be responsible for prioritising the briefs or other communications that are brought to the minister's attention.

In formal terms, a minister's office is almost invisible. It has a minimal presence in legislation and the actions of advisors are considered to be the actions of their minister. Advisors are not public sector decision makers who are subject to public accountability regimes for their actions (except through their minister), and they cannot be called before parliamentary committees, even if their minister is unaware of their actions.

The expansion of ministers' offices and their influence in the past 40 years has raised many questions about their transparency and accountability.

As Associate Professor Yee-Fui Ng has commented:

> … the constitutional theory is that the minister and their advisors are one and the same—the advisor is the alter ego of the minister and therefore everything the advisor says reflects what the minister actually asked the advisor to do. In reality what you find is that advisors, because they have been very influential and their numbers have grown, often act independently of the minister. One of the roles they take is to filter advice that comes to the minister. So sometimes they are acting without the minister's consent or knowledge but it is hard for a public servant to recognise when this is the case, when certain advice has been authorised by the minister and when it hasn't. I think that has caused a lot of problems—that interface between the public service and advisors.[21]

Some commentators have suggested that ministerial advisors are relatively unaccountable. Their operating environment has been described variously as:

- a shadowy zone where politics meets power and the Parliament meets the executive'[22]
- a largely fluid unregulated universe', which can be contrasted with the 'elaborate administrative law accountability frameworks' to which ministers and public servants are subject[23]
- a 'black hole of accountability' through which advisors can provide plausible deniability to ministers, while by convention they cannot be called to appear before parliamentary committees'.[24]

These issues are explored further in Chapter 5: Adequacy of systems, policies and controls, in response to the evidence uncovered by this investigation.

17 Public Administration Act 2004 s.98.
18 Commonwealth of Australia, 2019 *Our Public Service, Our Future – Independent Review of the Australian Public Service*, p. 135 (referred to in this report as the Thodey review).
19 Ibid., p. 135.
20 Canadian Privy Council Office, 2015 *Open and Accountable Government*, p. 4, at https://pm.gc.ca/en/news/backgrounders/2015/11/27/open-and-accountable-government
21 Ng, Yee-Fui, 2017 'Between Law and Convention: Ministerial Advisors in the Australian System of Responsible Government', *Papers on Parliament No.68*, Commonwealth of Australia, p. 14.
22 Dobell, G, 2016 'Mind the rise – and ever rise – of ministerial advisors', *The Mandarin,* 24 February 2016, at www.themandarin.com.au/https://www.themandarin.com.au/60854-mind-rise-ever-rise-ministerial-advisers/
23 Ng, op cit n.21), p. 14.
24 Daley, J 2021 *Gridlock: Removing barriers to policy reform*, Grattan Institute, p. 48. See also Coaldrake, P 2022 Review of culture and accountability in the Queensland public sector: Interim Report, Queensland Government, p.7 (referred to as Coaldrake Interim Report).

2.1.3 Ministerial Staff Code of Conduct

Ministerial staff are subject to the Ministerial Staff Code of Conduct, issued by the Premier. A number of versions have been released, most recently in July 2022. The relevant code at the time of these events was prepared in 2016 and was not available to the public. It was updated in 2019 and again in July 2022, when it was made public for the first time.

This represented a significant improvement in transparency, giving the community and public servants an insight into the standards of conduct expected of ministerial staff.

Provisions from the 2016 Ministerial Staff Code of Conduct that are particularly relevant to Operation Daintree are set out below:

> **1.1.** Ministerial staff play an important role in providing advice and assistance to Ministers in the performance of their functions. Their closeness to the most significant decisions of government is a privilege that carries with it an obligation to act with care and diligence in the performance of their duties.
>
> **1.2.** This Ministerial Staff Code of Conduct (the Code) sets out the standards that Ministerial staff are expected to meet in the performance of their duties.
>
> **1.3.** This Code applies to Ministerial officers employed under section 98 of the Public Administration Act 2004. This Code is incorporated into the contracts of Ministerial staff, such that compliance with the Code, as amended from time to time at the discretion of the Premier, is a term of employment of Ministerial staff.
>
> …
>
> **4.6**. Ministerial staff must abide by probity requirements at all times and in particular follow any guidelines or protocols issued in relation to contact with firms currently involved in major government tenders.
>
> …
>
> **5.1.** Ministerial staff are employed by the Premier and in line with Westminster principles, are accountable to their Minister.
>
> …
>
> **5.3**. Ministerial staff must ensure that they treat everyone with respect and without harassment or discrimination.
>
> …
>
> **5.6**. Ministerial staff have a key role in facilitating direct and effective communication between their Minister's department and their Minister. They must respect protocols established to guide these relationships and ensure the prompt handling of paperwork and advice.
>
> **5.7.** Ministerial staff do not have the authority to direct Victorian Public Sector employees in the performance of their duties.
>
> …
>
> **6.1.** This Code is not a comprehensive statement of Ministerial staff ethics. It is not a definitive compilation of obligations expected by the Premier and the relevant Minister, and at no time does it replace the good judgement Ministerial staff are expected to exercise in carrying out their duties.
>
> **6.2.** If a Ministerial staff member is in doubt about the appropriate course of action, they should raise the matter with their Chief of Staff or the Premier's Chief of Staff.
>
> **6.3.** Ministerial staff must comply with all applicable laws, codes of conduct (including the Lobbyist Code) and abide by any guidelines issued by the Premier.
>
> **6.4.** In addition, Ministerial staff must make themselves aware of the Code of Conduct for Victorian Public Sector Employees, available on the Victorian Public Service Commission website, and note the public sector values it contains.
>
> **6.5.** A breach of the Code may result in disciplinary action which may include termination of employment.

A related convention to s.5.7 in the 2016 Ministerial Staff Code of Conduct is that advisors should not talk directly to non-executive public servants on work-related matters. Part of the rationale for that convention is that executives generally have a broader perspective from which to respond and are more capable of resisting improper requests.

Similarly, the VPSC publishes guidance for ministerial advisors and their interactions with the public service.[25] The guidance includes information about the role of ministers, their offices and the public sector, and includes advice that advisors are not authorised to give directions to public servants. The guide is discussed further in Chapter 5: Adequacy of systems, policies and controls.

The guide also provides that:

> A ministerial officer may, at the discretion of the secretary, have direct working relationships with specific senior departmental staff to allow day-to-day activities to take place effectively and efficiently.

More recently, and after the events described in this investigation, the convention on contact with public servants was formalised in the VPSC's *Officer and executive guide for informing and advising ministers* released in October 2022, which advises non-executive officers that:

> You shouldn't engage with your minister's office without a clear understanding and authorisation from your executive. And you should never take direction from a ministerial adviser.[26]

Advisors were also required to be familiar with the VPS Code of Conduct. Relevant obligations are identified in the following section on public servants.

The 2009, 2016 and 2019 Ministerial Staff Codes of Conduct did not provide for a formal complaint-handling or dispute-resolution process, although the practice seems to have been that complaints were managed by either the relevant minister's Chief of Staff or the Premier's Chief of Staff. By contrast, separate policies on complaint resolution and misconduct procedures were introduced with the new Ministerial Staff Code of Conduct in July 2022.

2.1.4 Public servants

Public servants are meant to be apolitical and required to serve the government of the day, regardless of the political party in power. The Public Administration Act provides for the structure and operation of the VPS.[27] All public servants should demonstrate in their work the public sector values articulated in the Public Administration Act,[28] which include:

(a) responsiveness, defined to include providing 'frank, impartial and timely advice'

(b) integrity, defined to include being 'honest, open and transparent in their dealings'

(c) impartiality, defined to include 'making decisions and providing advice on merit'

(d) accountability, defined to include 'seeking to achieve best use of resources'.

Public servants are also bound by the VPS Code of Conduct, which is issued by the VPSC. The VPS Code of Conduct provides more detailed guidance about each of the public sector values. The guidance on the integrity value requires the 'highest standards of integrity in financial matters' and compliance with the relevant financial management legislation, policies and procedures.[29] Reference to the financial management regime includes the obligation to comply with supply policies issued by the Victorian Government Purchasing Board.[30]

25 VPSC 2022, *Guide for Ministerial Officers in the Victorian Public Service*, at vpsc.vic.gov.au.
26 Section headed 'Officers: what to consider when briefing' at https://vpsc.vic.gov.au/ethics-behaviours-culture/inform-and-advise-ministers/officer-and-executive-guide-for-informing-and-advising-ministers/ viewed on 11 November 2022.
27 Part 3, Public Administration Act 2004.
28 Public Administration Act 2004 s.7.
29 VPS Code of Conduct s3.3.
30 All secretaries and other departmental staff must comply with these supply policies: *Financial Management Act 1994*, s.54L(4).

The VPSC developed its *Informing and advising Ministers* guidance for departmental secretaries[31] (issued on 29 October 2021), in response to a recommendation from the COVID-19 Hotel Quarantine Inquiry.[32] It articulates the challenges public servants may face in responding to ministerial requests and direction:

> A Secretary will from time to time need to provide the Minister with advice and clarification that may not be received favourably by the Minister, including actions by their department that need to be changed or corrected. A Secretary may also need to provide advice that they know or anticipate the Minister may not welcome.

This should be managed openly and transparently and by:

(a) acknowledging the issue

(b) being responsive by presenting options and possible solutions.

> Shielding the Minister from information and advice that they may not be comfortable hearing is not consistent with the principle of frank and fearless advice. It is only by providing the Minister with full information and advice that Ministers can consider the matter, take into account relevant information and make decisions about necessary actions.[33]

In addition, *Informing and advising Ministers* notes that a minister does not need to be briefed on 'every matter dealt with by [their] department' and that over-briefing risks 'overwhelming decision-making and hindering the effective and efficient functioning of departments and government.' It then provides guidance on how to determine the matters on which a minister should be briefed.

The VPSC has also more recently released a complementary guide for executive officers and non-executive officers on informing and advising ministers, which is further discussed in Chapter 5: Adequacy of systems, policies and controls.[34]

2.2 Procurement and unsolicited proposals

Procurement of goods and services by government agencies is an area of high potential for corrupt activity and has featured in many IBAC investigations into public sector misconduct. Fair and effective procurement policies reduce the risk of corruption, while promoting value-for-money outcomes through competitive, merit-based processes.

The Victorian Government Purchasing Board (VGPB) has the responsibility for setting overarching procurement standards that must be followed by public sector departments and agencies. It has produced an extensive suite of policies, guidance and toolkits for departments to use in establishing their own procurement systems.[35] DHHS also produced its own procurement governance system to apply the VGPB policies to its own procurement activities.

This investigation relates to an unsolicited proposal made by HEF to develop and deliver training.

An unsolicited proposal is an approach to government from a proponent with a proposal to build and/or finance infrastructure, or to provide goods and/or services, where the government has not requested the proposal. These approaches are, by definition, outside of the normal planning and procurement processes of government.

For this reason, as noted by the Audit Office of NSW:[36]

> The risks associated in directly dealing and negotiating with unsolicited proposal proponents are inherently higher than applying a more transparent and open competitive process, such as tendering or calling for expressions of interest.

The Victorian Government's *Managing an unsolicited proposal – goods and services procurement guide*[37] notes that:

> … an unsolicited proposal can give rise to significant probity and process issues. If you proceed with a proposal that pre-empts wider market testing or you pilot the proposal, the broader supplier market could claim unfair advantage.

31 https://vpsc.vic.gov.au/ethics-behaviours-culture/inform-and-advise-ministers/
32 COVID-19 Hotel Quarantine Inquiry, *Final Report and Recommendations*, Volume I. Parl paper no. 191 (2018–2020), pp. 309–311 and Recommendation 76.
33 n.31
34 n.31
35 https://www.buyingfor.vic.gov.au/victorian-government-purchasing-board-vgpb
36 New South Wales Auditor-General's Report, 2016 *Performance Audit: Managing unsolicited proposals in New South Wales*, p.5 see https://www.audit.nsw.gov.au/media-release/managing-unsolicited-proposals-in-new-south-wales
37 https://www.buyingfor.vic.gov.au/managing-unsolicited-proposal-goods-and-services-procurement-guide

> If you do opt for a pilot and you want to test knowledge gained during the pilot, you need to create a 'level playing field' for other potential suppliers. The Minister's office should be fully conversant with your organisation's process for managing unsolicited bids to prevent any commitment by government before an appropriate testing and validation process.

The DHHS policy would usually have required an open, competitive tender process to be adopted for a procurement that was of the value and complexity of the HEF contract. However, the policy also allowed for exceptions to the usual process if they could be justified.

The DHHS Funding Allocation Policy specified six probity principles that should be followed in allocating funding that were:

- fairness and impartiality
- use of open, competitive processes (where relevant)
- consistency and transparency of the process
- security and confidentiality
- identification and resolution of conflicts of interest
- compliance with legislation and government policies.

The evidence uncovered in this investigation showed that most of these principles were breached in the processes used to award and manage the HEF training contract.

2.3 Occupational health and safety – violence in healthcare

Occupational violence against health workers has been a global phenomenon of increasing concern for more than two decades, with the World Health Organization noting in 2011 that it was epidemic in all societies.[38]

In Victoria, concern about increasing levels of occupational violence against health workers led the Victorian Department of Human Services to fund research into the incidence of violence in four public hospitals in 2002, and to establish a Victorian Taskforce on Violence in Nursing in 2004.

Since that time, numerous reports have made recommendations on how to reduce occupational violence in Victorian health services. These include the final report of the Victorian Taskforce on Violence in Nursing (2005), the Inquiry into violence and security arrangements in Victorian hospitals (2011), and the Australian Nursing and Midwifery Federation 10-point plan to end violence and aggression (2014). However, occupational violence against healthcare workers remains an ongoing problem in Victoria.

2.3.1 Labor Party 2014 election commitments

During the 2014 Victorian state election campaign, the then Labor opposition made election commitments to:

- address violence in healthcare settings by focusing on reporting, Code Grey and Black security responses, auditing security staff and considering other responses, including training
- establish a $20 million fund to prevent violence and improve safety in health services
- deliver an Ice Action Plan, which included $1 million for the development of a standard ice (methamphetamine) training course for frontline health workers who are at risk of violence at work
- support the implementation of the 10-point plan developed by the Australian Nursing and Midwifery Federation (Victorian Branch) (ANMF) to end violence and aggression
- appoint an expert to ensure the recommendations of the Victorian Taskforce on Violence in Nursing would be fully implemented and complied with.

The Labor Party was elected to government in November 2014.

A deputy secretary of DHHS at the time of the events investigated in Operation Daintree, Executive Officer A, gave evidence under examination that 'there was a reasonably long history of the [health] sector being concerned' about occupational violence and 'of government going in and out of paying attention to the issue'. Executive Officer A specifically directed their team at DHHS that the ANMF's 10-point plan on occupational violence (listed above), which included a commitment around training for security staff, should be considered an election commitment.

38 Parliament of Victoria Drugs and Crime Prevention Committee 2011 Inquiry into violence and security arrangements in Victorian hospitals and, in particular, emergency departments, Final Report, p. 2.

2.3.2 Victorian Auditor-General's Office audits of occupational violence in the healthcare sector

The Victorian Auditor-General's Office (VAGO) conducted audits of occupational violence in the healthcare sector in 2013 and 2015.

VAGO's 2013 audit of occupational health and safety risk in public hospitals identified a concerning level of occupational violence and aggression against nurses and other healthcare workers, and insufficient training in managing this violence in public hospitals.

The 2013 audit findings led VAGO to conduct a further audit of occupational violence against healthcare workers, released in May 2015.[39] The 2015 audit examined DHHS, WorkSafe, Ambulance Victoria and selected health services to see whether local and statewide systems were protecting healthcare workers from the risks and incidence of occupational violence.

VAGO found systemic failures across all audited agencies in collecting and analysing occupational violence data. In relation to DHHS, the audit found that it had:

- an incomplete view of the prevalence and severity of occupational violence against healthcare workers in Victoria, because it collected data about occupational violence incidents only against nurses, rather than all healthcare workers
- not evaluated whether its occupational violence policy and limited guidance material were being used, or if its initiatives had been effective.

The audit recommended, among other things, that DHHS:

- review its guidance material on occupational violence and evaluate its uptake and usefulness, including gaps in information
- in collaboration with health services and Ambulance Victoria, develop a set of core occupational violence training tools that could be adapted by health services to their local context as required.

DHHS accepted VAGO's audit recommendations, and Ambulance Victoria supported those recommendations relevant to it.[40]

2.3.3 Violence in Healthcare Taskforce report – Taking action to reduce violence in Victorian hospitals

Following the release of the VAGO audit in August 2015, the Minister for Health, the Hon Jill Hennessy MP, established the Violence in Healthcare Taskforce. Its broad membership included representatives from the Australian Medical Association Victoria, ANMF, Peninsula Health and the HWU.

The role of the taskforce was to 'identify issues and make recommendations to the Minister for Health on opportunities to reduce violence in Victorian hospitals as well as support the implementation of the government's election commitments to address violence in healthcare'.

In its June 2016 report to the minister, Violence in Healthcare Taskforce report – Taking action to reduce violence in Victorian hospitals, the taskforce made 19 recommendations.

Relevant to IBAC's investigation in Operation Daintree, these included to:

- develop tools to identify staff training needs and priorities, and provide minimum standards
- develop a specific security training module
- review Code Grey guidance and standards, and make recommendations
- develop statewide guidance and direction regarding security models
- survey all health services' security models.

The taskforce also supported establishing a reference group to help implement the recommendations.

39 Victorian Auditor-General's Office, 2015 *Occupational Violence Against Healthcare Workers*, VAGO, Melbourne.
40 Ibid, Appendix A.

2.3.4 Public Health Services Security Model Review

In line with the taskforce's recommendations, DHHS surveyed security arrangements in 85 Victorian health services in December 2016.

An independent organisation then reviewed existing security arrangements using these survey results, industry research, site visits to 15 health services, and stakeholder consultations with the Australian Medical Association, HWU, ANMF and the Health and Community Services Union.

The review outcome was published in August 2018. The review recommended that health services ensure security staff have equivalent skills, capabilities and competencies to those licensed under the *Private Security Act 2004*, and receive specific health service training in accordance with the DHHS *Guide for violence and aggression training in Victorian health services*, published in February 2017.[41]

This demonstrates that by early 2018, the Victorian Government had a policy that called for occupational violence training for frontline health workers.

2.3.5 Commitments around security training

On 23 October 2018, the Premier, Daniel Andrews, announced an election commitment for $2.2 million towards targeted and tailored training for 1,000 frontline workers, in partnership with the HWU, to recognise and respond to occupational violence.

Separately, on 30 October 2018, a contract between DHHS and HEF was executed, procuring HEF to provide training on occupational violence and aggression to health workers.

These two actions form a signficiant part of the subject of IBAC's investigation in Operation Daintree and are dealt with in Chapter 4: What IBAC's investigation found.

2.4 Summary of how the investigation was conducted

2.4.1 Information obtained

IBAC was provided with the materials obtained during the Ombudsman's investigation, including DHHS procurement documents, emails and transcripts of interviews with key DHHS personnel.

IBAC's investigation extended the evidentiary holdings to add emails and other internal documents relating to the security training contract, including documents concerning the considerations and actions of the Office of the Minister(s) for Health and the PPO. IBAC also obtained and analysed telecommunications data for communications between some of the parties who are subjects of this investigation.

IBAC conducted interviews or private examinations with a range of people detailed in the next two sections.

41 DHHS, 2018 *Public Health Services Security Model Review Report – Executive Summary* p. 9 at https://www.health.vic.gov.au/publications/public-health-services-security-model-review-report-executive-summary.

2.4.2 Private examinations

IBAC conducted private examinations with the following individuals during the months indicated. The roles that the individuals held at the time of the conduct investigated in Operation Daintree were:

- Health Advisor B (Office of Minister for Health, Jenny Mikakos) (June 2021)
- Minister for Health Jenny Mikakos (June 2021)
- Health Advisor A (Office of Minister for Health, Jill Hennessy) (August 2021 and November 2021)
- PPO Advisor A (PPO) (August 2021 and November 2021)
- Chief of Staff A (Office of Minister for Health, Jill Hennessy) (August 2021)
- Chief of Staff B (Office of Minister for Health, Jenny Mikakos) (August 2021)
- HWU Secretary (and HEF Director) Diana Asmar (October and December 2021)
- HEF Director A (October 2021)
- DHHS Executive Officer A (November 2021)
- DHHS Executive Officer B (December 2021)
- DHHS Executive Officer C (November 2021)
- Minister for Health Jill Hennessy (December 2021)
- Premier Daniel Andrews (December 2021).

IBAC did not conduct any public examinations for Operation Daintree. It decided that the criteria for such examinations set out in s.117 of the IBAC Act were not satisfied. The criteria are that IBAC must consider on reasonable grounds that:

(a) there are exceptional circumstances; and

(b) it is in the public interest to hold a public examination; and

(c) a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing; and

(d) the conduct that is the subject of the investigation may constitute—

  (i) serious corrupt conduct; or

  (ii) systemic corrupt conduct; or

  (iii) serious police personnel misconduct; or

  (iv) systemic police personnel misconduct.

2.4.3 Interviews

The Victorian Ombudsman interviewed a number of DHHS staff as part of its investigation including Executive Officers A and B. Information obtained by the VO in those interviews was provided to IBAC.

IBAC also conducted interviews with staff from DHHS, the Department of Education and Training (DET), the Offices of the Ministers for Health, the Office of the Minister for Training and Skills, the PPO and the HWU (and HEF) together with a sub-contractor to the HWU.

The key people and entities involved

3

This chapter lists the roles that key people held at the time of the conduct that IBAC investigated in Operation Daintree (2018–2021).

IBAC has decided not to name most of the people who provided evidence to the investigation, including all the people who were not subject to adverse comment. IBAC has decided to name some people who are subject to some degree of adverse comment, primarily because of their senior positions in the government or, in Ms Asmar's case, the organisation which she led. They had the ability to put in place systems and influence behavioural norms that could have prevented the improper behaviour that occurred.

IBAC has also named some public sector and union entities because of the adverse comments directed against them and their employees and their similar ability to have put in place systems and norms that could have prevented the improper behaviour that occurred.

The witnesses and entities who have been named have been named because of their responsibilities, not because of any findings of corrupt conduct.

IBAC decided that the other witnesses subject to adverse comment (and for whom also no findings of corrupt conduct were made) should not be named because of a variety of concerns about health and welfare, reputational harm and/or the level of the witness' involvement in the events under investigation.

IBAC has used or adapted position titles for those persons not named in the report to assist the reader's understanding of the report.

3.1 Members of the Victorian Government

The Hon Daniel Andrews MP, Premier of Victoria

The Hon Daniel Andrews MP has been the member for Mulgrave since 2002, parliamentary leader of the Australian Labor Party (ALP) (Victorian Branch) since December 2010 and the Premier of Victoria since 4 December 2014. He previously served as Minister for Gaming, Minister for Consumer Affairs and Minister Assisting the Premier on Multicultural Affairs in 2006–07, then as Minister for Health in 2007–10.

The Hon Jill Hennessy MP, Minister for Health

The Hon Jill Hennessy MP was the member for Altona from 2010 to 2022 and was the Minister for Health and Minister for Ambulance Services in 2014 -18.

Ms Hennessy subsequently served as the Attorney-General and Minister for Workplace Safety in 2018-20.

The Hon Jenny Mikakos, Minister for Health

The Hon Jenny Mikakos became a member of the Victorian Legislative Council in 1999, originally representing the Jika Jika Province until it was abolished in 2006, when she became a representative for the Northern Metropolitan Region. Ms Mikakos was the Parliamentary Secretary for Justice in 2002–07, Parliamentary Secretary for Planning in 2007–10, Minister for Families and Children, and Minister for Youth Affairs in 2014–18, and Minister for Early Childhood Education in 2017–18.

Ms Mikakos became the Minister for Health and the Minister for Ambulance Services on 29 November 2018, following the 2018 state election.

Ms Mikakos held those ministries and was also Minister for the Coordination of Health and Human Services: COVID-19 from 6 April 2020, until she resigned from parliament on 26 September 2020.

3.2 Premier's Private Office staff and ministerial staff

PPO Advisor A

PPO Advisor A began in the PPO in October 2017 as Senior Advisor, Parliament and Strategic Relations Unit, and became Senior Advisor, Union Partnership, at the end of 2019, a position they held until June 2021. In both roles, PPO Advisor A reported to the Director of Policy within the PPO, who in turn reported to the Premier's Chief of Staff.

PPO Advisor A gave evidence that their role in the PPO involved managing stakeholders, including unions and employer associations. They saw this role as both proactive (requiring them to establish relationships with stakeholders before any significant problems arose) and reactive (responding to issues stakeholders raised with them).

In their response to the draft report, PPO Advisor A reiterated that they were the key contact point in the PPO for unions, and that they regularly discussed the detail of what they were doing with their director and the Chief of Staff.

PPO Advisor A's other duties included guiding ministerial offices in their dealings with unions (including resolving issues), briefing the Premier for meetings with unions and policy development. They saw their policy role as providing a whole-of-government view for specific proposals in a minister's portfolio.

Chief of Staff A to the Hon Jill Hennessy MP

Chief of Staff A to the Hon Jill Hennessy held this position from December 2014 until December 2020, which encompassed her roles as Minister for Health and Minister for Ambulance Services, and then Attorney-General and Minister for Workplace Safety.

Chief of Staff A's duties included advising the minister, managing the other advisors in the ministerial office, working with relevant departmental secretaries and senior executives, liaising with the Commonwealth and other state and territory governments, liaising with the leadership in the PPO and across government, and taking the lead on budget preparation.

Health Advisor A

Health Advisor A was a senior advisor to the Hon Jill Hennessy MP, then Minister for Health and Minister for Ambulance Services, from January 2015 until the state election in November 2018.

They reported to Chief of Staff A and had 'policy responsibility for workforce and ambulance services'. This made them responsible for 'all workforce stakeholders', including a broad range of unions, such as the HWU and other health sector unions and associations.

They had previously worked as an electorate officer for Ms Hennessy and became her Deputy Chief of Staff when Ms Hennessy was appointed Attorney-General.

Chief of Staff B

Chief of Staff B held this role when the Hon Jenny Mikakos MP was Minister for Health and Minister for Ambulance Services, from December 2018 until September 2020. They had also been the Chief of Staff to Ms Mikakos from 2016 to December 2018 in her previous roles, when she was the Minister for Families and Children, Minister for Youth Affairs and Minister for Early Childhood Education.

Health Advisor B

Health Advisor B was a senior advisor to the Hon Jenny Mikakos MP when she was Minister for Health and Minister for Ambulance Services, from November 2018 until September 2020. In that role, they reported to Ms Mikakos's Chief of Staff. They had been an advisor to Ms Mikakos since 2014 and had previously worked in her electorate office.

Relevant to Operation Daintree, Health Advisor B was responsible for worker health and wellbeing, and occupational violence and aggression. They also held the role of HWU Lead. Health Advisor B gave evidence that being the 'HWU Lead' required them to meet with the HWU, hear them out on any issues they were having and act as a conduit between the HWU and DHHS.

3.3 Department of Health and Human Services

DHHS was established on 1 January 2015, merging the staff and functions of the former Department of Human Services, Department of Health, and Sport and Recreation Victoria around the mission of improving the health and wellbeing of Victorians. Through its Health and Wellbeing division, DHHS supported the Minister for Health and helped to implement Victorian Government health policy. On 1 February 2021, DHHS was separated into two new departments: the Department of Health and the Department of Families, Fairness and Housing.

Executive Officer A

Executive Officer A became the Deputy Secretary of the Health and Wellbeing division in 2017. In this role, they were responsible for most of the health service delivery operations in the health portfolio. The Health and Wellbeing division consisted of several branches overseen by executive directors who reported to Executive Officer A.

Executive Officer A resigned from their position in late January 2021.

Executive Officer B

Executive Officer B became the Executive Director, Health Services Performance and Commissioning branch within the Health and Wellbeing division in 2017.

In this role, they reported to Executive Officer A. They were responsible for the performance of all Victorian health services and key policy areas, including mental health, elective surgery, medical research and emergency departments.

Executive Officer B left DHHS in August 2019.

Executive Officer C

In 2018 and 2019, Executive Officer C was the Director, Policy and Planning in the Health and Wellbeing division. They reported to Executive Officer B.

In this role, Executive Officer C was responsible for health service delivery, policy development and the WWt. This team was set up in response to incidents of occupational violence in health settings.

In February 2020, Executive Officer C moved to the role of Executive Director of Planning, Funding and Monitoring, which also sat within the Health and Wellbeing division.

3.4 Health Workers Union and Health Education Federation

Established in 1991, the Health Services Union is a federated national union with branches in every state and territory. It represents a wide range of workers, including security officers, in public and private hospitals, aged care, ambulance services, community health, disability, mental health, pathology and private practice. The Victorian branch is the No.1 Branch (trading as the HWU).

The HWU is formally affiliated with the Victorian branch of the ALP, which means it gives financial support to the ALP and has voting rights at the Victorian Labor State Conference where the party's policies are determined.

HEF was created as a public company limited by guarantee (not-for-profit) on 24 February 2017. The company's three directors at the time of incorporation, and during 2018, were Diana Asmar and HEF Directors A and B. Both HEF Directors A and B have since resigned from these roles. The HWU set up HEF to deliver industry-led and accredited training. It sought to focus on patient/client care and training to minimise workplace injuries and human error incidents.

On 7 September 2018, HEF acquired all the shares in Seven Seas Education Services Pty Ltd, which was then a RTO. Diana Asmar and HEF Directors A and B became Directors of Seven Seas Education Services Pty Ltd the same day. HEF Directors A and B have both since resigned from these roles.

A RTO is a provider registered by the Australian Skills Quality Authority (or a state regulator) to deliver nationally recognised vocational education and training. Having RTO status confirms that a provider is capable of meeting rigorous government standards and is permitted to issue nationally recognised qualifications.[42]

HEF was required to be a RTO under the security training contract with DHHS.

Diana Asmar, Secretary of the HWU and Director of HEF

Diana Asmar has been a member of the HWU since 1998. In 2004, she became a Health Services Union Industrial Organiser and has been the Secretary of the HWU since December 2012.

Diana Asmar has been a Director of HEF since its creation on 24 February 2017.

HEF Director A

HEF Director A is the Assistant Secretary of the HWU and a former Director of HEF.

HEF Director A first joined the HWU as a member in 1988. They were elected President of the HWU in 2012 and became the Assistant Secretary in 2014. They were also a Director of HEF from its incorporation on 24 February 2017 until 27 February 2020.

HEF Director B

HEF Director B was a Director of HEF from its incorporation on 24 February 2017 until their resignation on 19 April 2021.

HEF Director B is an Audit and Assurance Partner at Stannards Accountants and Advisors Pty Ltd (Stannards).

42 What is a RTO? | Australian Skills Quality Authority (ASQA) at https://www.asqa.gov.au/rtos/what-is-an-rto

What IBAC's investigation found

4

4.1 Overview

IBAC's investigation in Operation Daintree commenced after the Ombudsman notified it that her investigation of certain complaints gave rise to reasonable grounds for suspicions of corrupt conduct that enlivened IBAC's jurisdiction.

In February 2018, following the recommendation that there be occupational violence and aggression training for frontline health workers, the HWU approached the Victorian Government, requesting funding for its new training organisation, HEF. The HWU said HEF would deliver accredited courses to patient transport officers and security officers, including in relation to occupational violence and aggression.

The HWU believed that it had a commitment from the Government to deliver on occupational health and safety issues including occupational violence and aggression training. It formed the view that DHHS was not acting quickly enough to deliver appropriate training and was not supportive of the training sponsored by the HWU. Ms Asmar, on behalf of the HWU, then lobbied the Government to seek a policy change that would support training provided under the sponsorship of the HWU.

The HWU first raised the proposal with PPO Advisor A. In the following months, the advisor worked with the Office of the Minister for Training and Skills and DET to develop an alternate model to the HWU proposal under which the HWU would deliver training in partnership with the technical and further education (TAFE) sector, in accordance with government policy at that time. However, Ms Asmar, the Secretary of the HWU, was unwilling to engage with that model.

In May 2018, the HWU turned to Health Advisor A, a senior advisor in the Minister for Health's Office with whom they had a pre-existing professional relationship. As a result, a proposal was developed for HEF. On 13 June, the advisor submitted the proposal that HEF be funded to deliver training to the DHHS on behalf of the HWU (the HEF proposal).

They did so having first contacted the deputy secretary responsible for finance in DHHS and confirmed that there was funding available for the proposal. The ministerial advisor conveyed the HEF proposal to DHHS staff in terms that were taken by the relevant staff members as a direction to engage HEF to deliver training.

By the end of June 2018, DHHS had decided to allocate budget for the training to HEF, despite the serious reservations about HEF's capacity and expertise held by some of the key staff tasked with assessing its suitability. By September, despite known continuing concerns about HEF's suitability held by the relevant teams within DHHS, the responsible executive officer, Executive Officer A, had decided DHHS would approach HEF alone to tender for the contract, rather than proceed to brief the minister to consider either a competitive tender or a ministerial grant to HEF.

At the same time, in September 2018, the HWU proactively sought a formal election commitment from the Premier for funding for a more extensive training program. During this period, advisors from the PPO and Health Advisor A formulated an election commitment, including costings to train a further 1,000 healthcare workers in relation to occupational violence and aggression, in a partnership with the HWU. That proposed election commitment to partner with the HWU in delivering training was related to but separate from the anticipated success of the HEF proposal under consideration by DHHS.

On 30 October 2018, Executive Officer A approved and executed the contract for HEF to develop and deliver training to 575 staff over two years, for which HEF was to be paid a total of $1.2 million. An amendment to the terms of the proposed contract, to allow an advance payment of $121,500 to HEF, was approved immediately before the contract was signed. In the week before the formal contract to engage HEF to deliver the training was signed, the Premier had announced the separate election commitment, in partnership with the HWU.

From the outset, it was apparent to DHHS officers that HEF was not equipped to deliver the training. During 2019, DHHS found HEF's performance under the contract to be so poor that it was subsequently said by numerous witnesses, including former Minister Mikakos and Executive Officer A, to be a contract that should never have been awarded to HEF. Many of the risks that DHHS staff had identified during the procurement process came to fruition, resulting in delays and disputes. Before the training program was suspended in March 2020 due to COVID-19, the training had been delivered to only 83 participants. Minister Mikakos, the new Minister for Health, decided that the further training promised in the election commitment should be the subject of a competitive tender.

In their responses to the draft report, Ms Asmar, the HWU, HEF and HEF Director B contested any proposed negative findings on the quality of the training materials HEF developed, the trainers it engaged and the courses it delivered. IBAC rejects this submission on the basis that the evidence before it justifies such a finding. IBAC accepts some of the supporting points for the HWU/HEF submission, including that the development of the training program was a staged process and that the contract enabled HEF to engage contractors to undertake the development and delivery of the course. However, on the evidence of the interactions of HEF with DHHS staff and the materials that the staff prepared during the administration of the contract, it is not persuaded that HEF had improved the quality of the training materials and course delivery to such a level that, were it not for the COVID-19 pandemic, it would have successfully delivered the balance of the program.

In its investigation, IBAC found that DHHS staff held the view from the outset that the minister's office had a preferred outcome and that this accorded with the HWU's expectations. Senior executives of the department felt obliged to give effect to the preferred course and this view affected DHHS's processes at all levels. The opinions of the WWt and the procurement team who had prime responsibility for consideration of HEF's submission were that a competitive tender was necessary. They held enduring concerns about HEF's suitability. Their views were never given effect and they were ultimately asked to prepare a critical document reflecting a view they did not hold.

The relevant DHHS teams went through a form of procurement process, but at a senior executive level, the view was taken that DHHS would have to find a way to manage the known risks associated with contracting with HEF, despite the views of the relevant teams who considered a competitive tender was necessary. The conduct at the most senior executive levels to support a contract with HEF was coloured by their knowledge of the attitude of the minister's office and the belief that this outcome was delivering on a government commitment.

Executive Officer A in their response to the draft report said that whatever the views of the other senior executives, if they had been advised that the risks could not be managed and that it was thought that HEF would not be able to deliver the training, Executive Officer A would not have determined to approach HEF as a sole supplier. Executive Officer A's knowledge and management of the WWt's views is discussed in detail at Section 4.5.1.

During the life of the contract, DHHS was concerned about HEF's continued underperformance. Management of the contract by DHHS staff was compromised because of the intervention of ministerial advisors, largely as a result of Ms Asmar's direct access to the PPO and the minister's office to whom she directed her complaints about DHHS oversight of HEF's performance. The conduct of the minister and her ministerial advisor during this period was driven by the belief that the contract and the election commitment were interrelated, and that supporting HEF in its performance of the contract was necessary if the election commitment was to be delivered on in a timely way.

The conduct of the ministerial advisors improperly influenced and undermined the DHHS processes of procurement and management of the contract. During the procurement process, senior executive officers took no steps to prevent the advisor inserting themself into or influencing the process followed by DHHS staff. As a consequence, DHHS staff involved in the management of the procurement and subsequent contract were unfairly pressured, and the procurement and contract management processes were suboptimal.

The ministerial advisors involved in the establishment and management of the contract have argued that they were only doing their job in delivering a government election commitment and assisting a third-party stakeholder to navigate the bureaucracy. They maintain that they respected the independence and role of the public service in managing the procurement process and the implementation of the contract for the training services, and reject findings of improper influence and interference.

Health Advisor A submitted in response to the draft report that they understood and had regard to their ethical obligations, and they did not display any propensity to avoid, ignore, bend or break rules. They also submitted that the DHHS officers' perceptions of interference were unreasonable in light of the actual content of the communications between the advisor and the officers. For the reasons given in the report, IBAC prefers the evidence of the public servants involved in the procurement and contract management processes and their perception that the activities of the advisors went further than guiding the delivery of an election commitment and were directed to ensuring a particular outcome was reached for the benefit of the HWU.

However, IBAC has also concluded that some DHHS officers at a senior level allowed the understanding that there was a government commitment that the HWU should deliver the training to unduly influence the discharge of their and their teams' responsibilities.

Within the PPO and at a ministerial level, IBAC has found that the evidence is consistent that there was a broad authorising environment in which the advisors worked. The extent to which the respective ministers were made aware of the specific conduct of their advisors or DHHS seems to have varied. The Premier disputed that such an environment existed but agreed that there were "a number of settings", once a government had made known its preference, within which an advisor could take further decisions about the direction to be taken. If, as the former Health Ministers testified, their advisors and DHHS were given no specific authority to engage in such conduct and did not keep them informed of these matters, the ministers remained accountable under existing conventions for the conduct of their advisors and DHHS.

The access given to the secretary of the union to advance the HWU objective that they be funded to train healthcare workers went uncontrolled. Her ready access to advisors in the PPO and other ministers' offices and with it, the belief that she had ready access to the Premier and other ministers, generated a powerful expectation that the union should be favoured with the granting of this contract and a partnership role in the larger election commitment. This expectation informed the decisions made in granting and managing the contract and in making the election commitment.

The established processes of procurement and management of a contract provide important checks and balances. Among the purposes they serve, two are particularly relevant in this case. First, that where the party contracting with a Labor government is a union, any perception of a conflict of interest is seen to have been managed through the independent role of the relevant department, thereby minimising the risk of a perception that the contract has unduly favoured the union. The first purpose derives its strength from the second – that when the prescriptive departmental process is followed, it enhances the prospect that the contractual outcomes will serve the public interest.

There was a failure to give effect to these procurement and management processes by the ministerial offices and DHHS. The advisors' conduct undermined these processes and jeopardised their purposes. The actions of the advisors, as their minister's alter ego, inevitably carried with it the apparent approval of their minister and their office. Senior DHHS officers raised no objection to the advisors' conduct. They allowed the understanding that it was the minister's preference to have the union deliver the training to improperly affect their conduct and the course followed by their staff. The ministers failed to maintain a knowledge and oversight of their advisors and their department's actions.

4.2 Timeline of key events

Date	Event
8 February 2018	PPO Advisor A meets with HWU on its training proposal
9 February 2018	HWU sends its proposal to PPO Advisor A for review
13 February 2018	HWU emails Health Advisor A (senior advisor to the Minister for Health) its training proposal for comment
15 February 2018	The HWU submits a funding request for the delivery of training by its RTO, HEF, to PPO Advisor A
16 April 2018	Meeting between representatives of the HWU and advisors to the Premier, the Minister for Health and the Minister for Training and Skills, in relation to a union–TAFE partnership model
18 May 2018	Meeting between representatives of the HWU and DET, along with advisors to the Premier, the Minister for Health and the Minister for Training and Skills, in relation to the union –TAFE partnership model
13 June 2018	Health Advisor A submits the HWU's training proposal to DHHS, saying that they had confirmed that funds were available
26 June 2018	HEF submits a revised professional development proposal to DHHS
29 June 2018	Executive Officer B (DHHS) approves a brief to allocate funds for HEF to deliver training in accordance with its proposal
27 August 2018	The WWt in DHHS receives procurement advice that the training should be procured by a competitive tender or funded by a ministerial direction to provide a grant to HEF
5 September 2018	Executive Officer A (DHHS) decides that HEF should be directly engaged to develop and deliver the training, rather than a competitive tender being undertaken, and that a brief should not proceed to the Minister for Health
10 September 2018	Executive Officer A approves a brief to approach a single provider – HEF – to develop and deliver the training
21 September 2018	DHHS Chief Procurement Officer approves a Procurement Plan to request a quote from a single provider – HEF – for the training

Date	Event
3 October 2018	HEF responds to the Request for Quote
4 October 2018	The Premier meets with representatives of the HWU
23 October 2018	The Premier announces an election commitment for occupational violence and aggression training for 1,000 frontline health services staff, to be delivered in partnership with the HWU
26 October 2018	Executive Officer A approves the Procurement Evaluation Report, which recommends that HEF be awarded the contract
29 October 2018	HWU contacts Health Advisor A regarding DHHS contract terms. DHHS agreed to amend the contract to allow for an upfront payment of $121,500
30 October 2018	Contract is executed and commences. Caretaker period begins at 6.00pm.
25 March 2019	DHHS sends a letter to HEF outlining its concerns with HEF's performance under the contract and delaying the pilot program from March to June 2019
16 April 2019	The Minister for Health meets with representatives of the HWU
August-September 2019	HEF delivers the pilot program; feedback is poor
30 October 2019	The minister's office directs DHHS that the training program will be delivered in December 2019, contrary to DHHS advice that it should be delayed
November-December 2019	HEF delivers initial block of training to 38 participants
December 2019	DHHS becomes aware that HEF's status as a RTO has been suspended
20 January 2020	DHHS receives correspondence from a subcontractor of HEF saying that their invoices have not been paid and describing concerns with the training HEF informs DHHS that training has been deferred indefinitely
March 2020	HEF delivers further training to 11 participants Further training suspended due to COVID-19

4.3 The HWU's initial funding request (February to May 2018)

The policy and political context that existed at this time helps to explain the events that followed. There had been a commitment made by the Minister for Health and government to adopt the recommendation of the Violence in Healthcare Taskforce, that there be relevant training of health workers and that the industrial partners, namely the HWU, would be a key lead in developing the training.

The HWU first approached the Victorian Government about its proposal to deliver training in February 2018. Its initial request, made to the PPO, was that the government directly fund HEF, a new body that it had established to deliver accredited courses to patient transport officers and security officers, including in relation to occupational violence and aggression.

After receiving the initial proposal, PPO Advisor A instead proposed that the HWU partner with the TAFE sector to deliver the training, in accordance with government policy at that time. Between February and May 2018, the advisor, with the apparent authority to do so, coordinated with the Office of the Minister for Training and Skills and DET to develop such a partnership for the HWU's consideration. However, HWU Secretary, Ms Asmar, was unwilling to engage with that model.

4.3.1 The HWU makes a funding request to the PPO

On 8 February 2018, representatives of the HWU, including Ms Asmar, met PPO Advisor A at the HWU office in South Melbourne. The next day, a representative of the HWU who had attended the meeting emailed PPO Advisor A a document containing a draft of the HWU's proposal.

PPO Advisor A told IBAC that, at that time, they had just commenced in their role in the PPO and were conducting a round of introductory meetings with stakeholders. PPO Advisor A's role was to be the key point of contact in the PPO for trade unions. PPO Advisor A said that this would have been the HWU's first opportunity to make the proposal to them.

Ms Asmar told IBAC that at that time, the HWU was 'lobbying very hard' for the proposal and had circulated the document to a number of people inside and outside government.

One of the people to whom the HWU provided the proposal was Health Advisor A, a senior advisor to the Minister for Health. On 13 February 2018, a HWU officer emailed the proposal to Health Advisor A, requesting their feedback before the proposal was officially provided to the PPO.

Health Advisor A explained that the HWU would have sought their feedback on the proposal because they had been in regular contact with them in their capacity as a ministerial advisor, and they would have wanted their opinion because they were pitching a proposal to the PPO. They also explained that they had a good working relationship with Ms Asmar, which began in 2015. They said that Ms Asmar viewed them as friendly and supportive of her objectives. Health Advisor A said that it was their job as advisor to the minister to understand and respond to the HWU's concerns.

However, Health Advisor A told IBAC that they had little if any involvement in the training proposal before receiving the email on 13 February 2018, and that they were on extended leave at the time. They did not recall what particular feedback they gave the HWU, but said they would broadly have encouraged them to put the proposal forward. Although they had no recall of doing so, they thought they would have mentioned the proposal to the minister.

The HWU formally submitted a written proposal by email to PPO Advisor A on 15 February 2018. It proposed that the HWU, trading under the name of HEF, would provide a variety of training modules for patient transport officers and security officers, relating to patient care and training to reduce workplace incidents. The proposed training modules were broad and included training that addressed occupational violence and aggression. The funding requested to commence the training was $7 million, which included the acquisition and fit-out of a bespoke training facility.

In her evidence to IBAC, Ms Asmar agreed that the proposal involved training for two cohorts of workers. The intention was to develop a broad range of skills, including occupational violence and aggression training. One effect would be to enable the workers to reach new classifications under the applicable enterprise bargaining agreement.

4.3.2 The PPO proposes a HWU–TAFE partnership to deliver training

After PPO Advisor A received the HWU proposal, they conferred with the policy team within the PPO, including their director, who expressed a preference that the union deliver training in partnership with the TAFE sector, rather than by a private RTO. In their evidence, PPO Advisor A explained that delivering training through TAFE was a government priority at the time. The Premier in his evidence said that the government had a policy to prefer TAFE over private training.

Over the following months, PPO Advisor A coordinated the development of a model of that kind with advisors to the Minister for Training and Skills and DET.

PPO Advisor A's view of the HWU's proposal during this period is recorded in a memorandum on 9 April 2018 that they prepared for the Premier's Chief of Staff. It said in part:

> The HWU is in the process of establishing a RTO called the 'Health Education Federation'. In a budget bid they have provided they are seeking approximately $3.5M for the acquisition of a training centre, $3.2M for its refurbishment and equipment and $300k to develop a suitable curriculum. This proposal is in response to the inadequate training available for security guards and patient transport officers employed at hospitals. The development of training and qualifications for these occupations will underpin the unions claims for new classifications and higher wages. It will also result in a more professional and skilled workforce. A number of unions currently operate RTOs that receive government funding both directly and indirectly. Different models of cooperation/partnership between TAFEs and unions also exist. In the context of the 18/19 budget the preferred model is for the union to partner with TAFE to deliver training.
>
> …
>
> The Premier could determine to:
>
> 1) Support the HWU request and commit to provide capital and seed funding to establish the Health Education Federation training facility. This would be viewed by the union as a significant win. The training of security guards in hospitals could be linked to UV's [United Voice] request to review the licencing of security guards as no licencing requirement currently exists for these employees. The Opposition would seek to link the provision of this funding to the HWU predecessor union, the HSU, alleging that government is supporting a union known for the illegal activities of its former leadership. Electorally this could play either way, it could be accepted by the community that this funding will result in safer hospitals for patients and worker, or it could be seen as Labor funding its union mates.
> 2) Support a partnership between TAFE and union. Fund the TAFE to develop dedicated facilities and fund the union to develop trainers with industry experience. They could jointly develop the curriculum. The union has indicated it is not interested in partnering with TAFE and therefore we risk alienating the HWU in the lead up to the election. This model would ensure that the asset remains a public one and that the TAFE can provide guidance in the development of materials and ensure teaching quality. Requiring the union to partner with a TAFE will make it harder for the Opposition to claim that Labor is simply supporting its mates. …

The first option reflected the HWU's request that the government directly fund HEF. The memorandum explains that PPO Advisor A thought this involved a political risk, because it could be seen as 'Labor funding its union mates'. Several witnesses gave evidence to a similar effect. For example, Health Advisor A told IBAC this was a political consideration that any advisor would raise regarding every dealing with a union. Significantly, they commented that the protection against that risk was to make sure that any contract went through a proper process, and acknowledged that the essential safeguard was that the decision-making must be left with the department. For the reasons detailed in this chapter, IBAC has concluded that their subsequent actions did not reflect this principled position.[43]

43 Health Advisor A has disputed these conclusions. IBAC's reasons for not accepting Health Advisor's version are detailed further in this chapter.

The second option – the TAFE–HWU partnership – reflected the preferred option within the PPO. It is clear from the memorandum that PPO Advisor A perceived that taking that course might alienate the HWU, which also presented a political risk. In their evidence before IBAC, PPO Advisor A said the risk was that failing to reach a solution to the need for training might cause the union to be critical of the government. Health Advisor A observed that the HWU was a 'volatile' stakeholder.

Between February and April 2018, PPO Advisor A provided the proposal to advisors to the Minister for Health and the Minister for Training and Skills.

On 16 April 2018, a senior advisor to the Minister for Health acting in Health Advisor A's role while they were on extended leave, a senior advisor to the Minister for Training and Skills, and Senior PPO Advisor A met with representatives of the HWU, including Ms Asmar.

It is evident that the relationship between PPO Advisor A and Ms Asmar quickly deteriorated during this period. In an internal email on 30 April 2018, PPO Advisor A said that Ms Asmar had not returned their calls during March about the proposed TAFE partnership model.

Nonetheless, PPO Advisor A, together with advisors to the Minister for Training and Skills and DET, continued to work on the TAFE partnership model. DET developed a plan for a 'Health Services Industry Training Partnership' between the HWU and the TAFE sector, based on an existing partnership between the Electrical Trades Union and Holmesglen Institute. The Premier considered it within the scope of his advisors' authority to be exploring such a policy option and to work with the stakeholder without the need to obtain his approval.

PPO Advisor A, along with senior advisors from the Ministers for Health and Training and Skill's offices, arranged a meeting between the HWU and DET on 18 May 2018. Following the meeting, the HWU withdrew from discussions with PPO Advisor A about the TAFE model.

The evidence before IBAC was that this meeting was heated, and it culminated in Ms Asmar walking out. Ms Asmar told IBAC that she did so because she was frustrated that PPO Advisor A was pursuing the TAFE partnership, and she had no interest in the ideas being developed by them. Ms Asmar gave evidence that she was not interested in a TAFE partnership because she had formed the view that no TAFE had the necessary facilities, expertise or knowledge of the industry to deliver the training.

As stated above, Health Advisor A had been shown the HWU's draft proposal before it was formally submitted to the PPO. PPO Advisor A was unaware of Health Advisor A's involvement during this period.

4.3.3 The roles of the ministerial advisors in responding to the HWU's proposal

A feature of Ms Asmar's interaction with the executive branch of government during the period that she pursued the training contract was that she communicated directly with ministerial advisors, rather than approaching and working with the government department that had responsibility for providing advice on procurement policy, its implementation and process. Ms Asmar preferred to engage with the advisors to secure the interests of the HWU, rather than deal with the department. Her leading position within the HWU provided her with access to those advisors within the PPO and the Office of the Minister for Health, who were able to exert the greatest influence to achieve her desired outcome.

In their submissions on the draft report, Ms Asmar, the HWU and HEF indicate that they were not familiar with DHHS's procurement procedures, did not seek to avoid those procedures and were not advised by ministers or ministerial staff to deal solely with DHHS. IBAC accepts this submission in part. However, it finds it more difficult to accept this claimed lack of knowledge once they had received or completed the response to DHHS's Request for Quotation and, as part of that process, signed a letter of commitment to the Supplier Code of Conduct.[44]

44 See further ch 4.5.4 below.

Taken together, these two documents contained prohibitions on trying to influence by lobbying, pressuring public servants or gaining improper advantage. IBAC does, however, acknowledge that the ministerial advisors with whom Ms Asmar engaged over the procurement did not advise her that her communications were inappropriate.

An example of the centralisation of power in the PPO, and the waning influence of the relevant department and the portfolio ministers, is provided by PPO Advisor A's evidence that it was normal practice for a ministerial advisor in the PPO to evaluate a proposal from a stakeholder, rather than passing responsibility to a minister's office or a department. PPO Advisor A submitted in their response to the draft report that part of their role included liaising with ministers' offices on union-related proposals. That submission served only to emphasise that they were authorised to exert the influence that they did. It is still significant that the proposal was initiated through the PPO and that PPO Advisor A took a leading role in developing it, until the union became unhappy with the direction of the PPO-led work.

Reference will be made later in this chapter to the evidence of two former Ministers for Health who described the centralisation of power and the growth of influence of advisors in the current executive branch of government landscape in similar terms. The employment of all ministerial advisors by the Premier (and administratively through the PPO), rather than through each minister's office, may also contribute to the centralisation of influence in delivering government policy. While the Ministerial Staff Code of Conduct provides that '[m]inisterial staff … in line with Westminster principles, are accountable to their Minister', the code says nothing that would constrain the highly influential role of advisors in the PPO.

Between February and May 2018, PPO Advisor A continued to work on the HWU–TAFE model, notwithstanding the HWU's lack of interest in that approach.

PPO Advisor A accepted that, if this proposal had come from a commercial entity rather than the HWU, they would probably not have been so involved in attempting to implement the proposal, though they said that they engaged in the conduct because the HWU was a 'stakeholder', not because it was a union. But the course followed by the PPO and ultimately by the relevant minister's advisor was undoubtedly influenced by PPO Advisor A's strong view that unions are the best institution to deliver such forms of workforce training. PPO Advisor A told IBAC:

> I've always been of the view that, you know, unions are often best placed to be able to deliver training to workers … the only intention that that union has is to make sure that those workers are as best protected as possible in the workplace … the employer organisation would be very much about how to view occupational health and safety from a lens of … for it not to be a problem for the employer. Whereas if the union delivers the occupational health and safety training, they're not necessarily about whether it's a problem for the employer or not. They're concerned solely with is it appropriate for their members. And so, in unions providing training from that perspective has always been … a critical part of workplace education.

The Premier told IBAC that he was not aware of the February 2018 proposal and did not recall discussing it with his staff, but said it was part of the role of a ministerial advisor to work with a stakeholder in the way that was undertaken by PPO Advisor A. The Premier thought that his office may have pursued the TAFE model because the government's position on the primacy of TAFE was understood.

After Ms Asmar withdrew from discussions with PPO Advisor A, she sought to pursue the HEF proposal for direct funding through Health Advisor A in the Minister for Health's Office. Ms Asmar told IBAC that, when she realised that she would be unable to reach an agreement with PPO Advisor A, she turned to Health Advisor A. Similarly, Health Advisor A said that they were brought back into the issue because they had a communication channel with Ms Asmar, unlike PPO Advisor A.

Explaining their role, Health Advisor A gave evidence that their responsibility as an advisor in the minister's office was to manage the relationships with stakeholders such as the HWU. They said that they would regularly check in with the Chief of Staff or the minister, but they did not expect them to consult on everything. They testified that they were never explicitly told what their authority was to make specific decisions, but the practice was to check in before any commitments would be made by the minister. They said they would not make a commitment on the minister's behalf. They also said they would not 'lean in' to a proposal without first checking with the department to see if it was viable and with the Chief of Staff or the minister.

Former Minister Hennessy said in her evidence that although the government was very interested in protecting frontline workers from occupational violence, she did not recall seeing the February 2018 HEF proposal from the HWU. She recalled an informal conversation in the office about the union establishing a RTO, and she knew the HWU was talking to PPO Advisor A. She said she was not aware of Health Advisor A's role in receiving the HEF proposal or that Health Advisor A conveyed it to DHHS. After viewing the draft report, Ms Hennessy stated it was the first time that she had seen most of the evidence that had been summarised by IBAC. She said that the evidence "demonstrates overwhelming(ly) that in relation to (their) conduct concerning the HEF contract, (Health Advisor A) was not acting in (their) capacity and within (their) authorisation as Ms Hennessy's advisor."

Despite some differences in recollection, it is evident from the accounts of Ms Hennessy, PPO Advisor A and Health Advisor A, that all understood that Health Advisor A would be expected to work closely with the PPO in managing the relationship with the HWU and the way in which the training program with the union was developed.

4.4 The HWU's proposal to DHHS (June 2018)

After Ms Asmar rejected the TAFE partnership model proposed by the PPO, Ms Asmar turned to Health Advisor A to progress the HEF proposal with DHHS.

This section describes how a senior advisor to the minister, Health Advisor A, came to put the HWU's proposal to DHHS on the HWU's behalf. It culminated in DHHS making a formal decision at the end of June 2018 to allocate funds to HEF to deliver the training, despite no procurement process having commenced, nor a formal decision having been made by the minister that the training should proceed.

At the most senior level of DHHS, there was a belief that it was expected that the department would work with the union in developing training.

At a lower level, the advisor's communications with DHHS gave rise to a perception by the Worker Wellbeing and Procurement Services teams that the minister and government were intent on funding the HWU to deliver the training, which unduly influenced some staff who felt obliged to give effect to that intent.[45]

4.4.1 The Office of the Minister for Health takes carriage of the HWU proposal

After the meeting between the HWU and DET on 18 May 2018, responsibility for progressing the HWU's proposal was transferred to the Minister for Health's Office. Between May and June 2018, Health Advisor A engaged with the HWU, apparently in preparation for the proposal's submission to DHHS.

On 21 May 2018, a senior advisor for health in the PPO sent an email to Chief of Staff A to the Minister for Health, and Health Advisor A, attaching two documents. The first described the steps required to establish a RTO to deliver accredited training and was consistent with the HWU's proposal to establish its own standalone training organisation. The second document was DET's proposal for a partnership between the HWU and the TAFE sector. It appears that this email may have represented the transfer of responsibility from the PPO to the Office of the Minister for Health.

Telephone records indicate that Health Advisor A spoke to Ms Asmar and one of her colleagues on several occasions in the days following their receipt of the PPO's email. Notably, they also spoke to the relevant deputy secretary in DHHS, Executive Officer A, on 23 May 2018.

Health Advisor A did not recall the contents of these conversations, but accepted it was likely that they were about the HEF proposal. In respect of their conversations with Executive Officer A, Health Advisor A said it was their normal practice to check with DHHS before sending anything through. They said they would have conveyed to Executive Officer A that the proposal to be forwarded to DHHS had merit, insofar as occupational violence was an ongoing political issue.

45 Health Advisor A has disputed that such perceptions were reasonable in light of the actual content of the communications between Health Advisor A and DHHS officers. IBAC has rejected Health Advisor A's submission on the basis of the evidence described in this chapter.

On 24 May 2018, an HWU official sent Health Advisor A an email containing a funding estimate for the proposed training of security staff. It is likely that Health Advisor A then used that information to make inquiries about whether the proposal could be funded.

Telephone records reveal that on 12 June 2018, Health Advisor A apparently again spoke to that HWU official. That day, the same HWU officer sent an email to other representatives of the HWU, saying that they had 'just been contacted' by the minister's office, and 'they would like to see the proposal one last time before the department contacts us'. Health Advisor A said in evidence that the purpose of their involvement in the proposal at this time was to 'reorient' the HWU's proposal to DHHS. In their response to the draft report, Health Advisor A said their involvement was only at a high level and that they had not been involved in the detailed preparation of the proposal.

4.4.2 Health Advisor A submits the proposal to DHHS

Health Advisor A formally submitted the HWU's HEF proposal to DHHS on 13 June 2018 by emailing it to Executive Officer C, who was the Director of Policy and Planning with responsibility for the WWt. In the email, they said:

> Please see attached the proposal for funding for occupational violence training that I flagged the other day. The excel spreadsheet is new and is a more detailed budget proposal. Also attached is the earlier proposal.
>
> The capital request is out of scope – we've already informed them this can't be funded but we will work to identify a suitable facility they could conduct training at (they need a hospital ward) but let's park that aspect of it until after the end of financial year.
>
> The policy intent is for a health service specific professional development program to be rolled out to the existing security workforce.
>
> Are you able to follow up with them? The contact is Diana Asmar …
>
> Funds are available as part of the end of financial year allocation – [Deputy Secretary, Corporate Services] is aware of this request. Apologies for the short turn around on this one.

It can be seen that Health Advisor A had already spoken to Executive Officer C before forwarding the attached February 2018 written proposal and a spreadsheet, which now contained a new budget proposal. Health Advisor A had also already spoken to the Deputy Secretary, Corporate Services, DHHS, and established that funds for the HEF proposal were available before the end of the financial year, and they apologised for the short time in which the funding for this proposal would have to be followed up. It is also clear that consideration had already been given to the funding request by the advisor (and the PPO in the context of developing the TAFE proposal and also preliminary work on potential election commitments), and the HWU had already been advised that the capital works proposed were beyond the contract scope that could be accommodated. The HWU was told that a facility would be identified at which they could do the training.

Chief of Staff A had no recall of anything relating to the HEF proposal beyond remembering that at some point there was a direct procurement of HEF to do training. They could not recall the basis on which they learned that. They had no recollection of any relevant conversations with Health Advisor A or the minister concerning these matters.

Several witnesses volunteered to IBAC that it is not unusual for unsolicited proposals to be received by ministerial offices and referred to the relevant department for consideration. Although this proposal could be viewed as unsolicited when initially submitted to the PPO, it would be erroneous to treat its eventual provision to DHHS as a mere referral for consideration, given the level of the HWU's consultation and engagement with the PPO and Health Advisor A before it was forwarded to DHHS.

It would also be wrong to view Health Advisor A's provision of the proposal as merely a referral when they had already confirmed with the Deputy Secretary, Corporate Services that there was budget available for the proposal and had advised Executive Officer C of this fact. It was an unusual step for an advisor to have approached the Deputy Secretary, Corporate Services to ascertain whether funds for a specific proposal were available. Executive Officer C said that the fact that Health Advisor A had directly approached the Deputy Secretary, Corporate Services made them uncomfortable. Senior DHHS officers testified that while it was usual for DHHS and the minister's office to discuss funding availability, it was wrong for the advisor to tell departmental staff that funding for a specific proposal was available at the time of sending it to the department for assessment.

Health Advisor A in their response to the draft report disputed that they had done anything improper and said they were merely trying to ascertain whether funding might be available before forwarding the proposal. Although their inquiry could be considered to only have been preliminary fact checking, their response again demonstrates their lack of understanding of the nature of the relationship between a minister's office and its department, and of the impact of their interventions on departmental staff. It also underlines the extra care and attention that the advisor showed in pursuing the HWU/HEF interests.

As a result of Health Advisor A's email of 13 June, Executive Officer C said they understood the government had made a commitment to the HWU that there would be funds available to support its proposal. Executive Officer C's understanding and its confirmation is further evidenced from the emails that then passed between them and the advisor on 17 June 2018, saying:

> We have reviewed the docs and on first glance still looks like a pretty [big] ask to deliver. [The Assistant Director, DHHS] is contacting them to discuss but it would be great to have chat with you about what movement we have to negotiate with them.

Health Advisor A replied:

> I'm free tomorrow morning, if that suits? Very keen for you to negotiate and determine an appropriate funding level.

Health Advisor A told IBAC that they only intended to convey to DHHS that they thought the proposal had policy merit, and did not intend to suggest that it was other than DHHS's decision as to whether it ought to be funded. They accepted, however, that by the manner in which they expressed themselves, DHHS may have understood it was expected that some level of funding should be allocated to HEF.

In their response to the draft report, Health Advisor A also said that their reply on 17 June was evidence that they intended DHHS to negotiate and make decisions about funding. However, their reference to negotiations with the HWU might also be interpreted as reinforcing the idea that the HWU would ultimately be asked to provide the services.

Health Advisor A suggested that by the time they sent this proposal to DHHS, they thought it had already considered the HWU's earlier proposals and communicated to them that the HWU would be contracted to do a training program, as 'the proposal had sufficient merit' and only funding remained to be determined. They suspected that Executive Officer A had communicated that when they initially spoke with them.

Had Executive Officer A done so, it would have accorded with the evidence of Executive Officer B, who believed there was an expectation that DHHS would work with the HWU as the 'key lead' in developing training and that Executive Officer A held a similar view. Executive Officer A said in their evidence that it was obvious both the HWU and the minister's office held the expectation that the HEF proposal would be supported.

Although Executive Officer A made clear that despite their regular contact with Health Advisor A, they were not aware of the role Health Advisor A had played with the HWU in bringing the HEF proposal to DHHS, they were of the view that the HEF proposal would at last deliver on the election commitment the government had made in 2014, and the Auditor-General's 2015 recommendation and a 2016 recommendation to the same effect.

Health Advisor A did not recall having been given any specific approval to pursue the HEF proposal as they did, but thought they 'would have' had the minister's approval to submit the proposal to DHHS for consideration. They also said they 'would have' obtained approval to make the inquiry about whether there was funding available. In their response to the draft report, Health Advisor A said that the report should include a finding that they always acted with the explicit imprimatur of their minister. They said that they always checked in with the minister or Chief of Staff on any critical decision point.

Given the limited recollections of the advisor and the former minister, it is not possible to make a positive finding as to whether the advisor was given explicit authority to do as they did. But it is clear the advisor considered that general support existed for the HWU to deliver a training program and that the HEF proposal was consistent with this. That is reflected by the manner in which the advisor inserted themself into the process and the view held at the most senior level of DHHS. However, the manner in which the advisor inserted themself into what should have been an internal departmental process overstepped the mark and was quite inappropriate. Senior officers who gave evidence to IBAC testified that it was inappropriate; it could have been viewed as an instruction or at least conveyed to the staff a ministerial expectation that the HWU/HEF should be given the training contract.

The former minister, Ms Hennessy, said in evidence that she did not recall being aware of the proposal during this period, though she could not exclude the possibility that she approved funding training regarding occupational violence and aggression in an end-of-financial-year allocation. Ms Hennessy said that she would have expected her staff to seek her approval before providing a proposal of this kind to DHHS. She said that though it is not uncommon for ministers' offices to provide unsolicited proposals to departments for consideration, she recognised that the minister's office must be careful in conveying such proposals that the department is not left with the impression that the procurement process they would ordinarily follow can be bypassed.

The advisor's communications to the WWt and the procurement officer were rightly characterised by Executive Officer B as a 'boundary violation', as the advisor had inserted themself into processes that should have occurred internally within DHHS without ministerial advisor involvement. Executive Officer B's frank acknowledgement of this intrusion is illustrative of the refreshing candour of their testimony in explaining the events that led to DHHS's approval of the HEF proposal.

In a similar vein, the Premier told IBAC it was common for stakeholders to come to government with good ideas and for government to refer those ideas to a department, but it was his resting assumption that the department always remains free and obliged to provide advice, including that the proposal should not proceed. He agreed that, to provide such advice, the department must make its own independent assessment of the proposal.

The Premier agreed that, when a proposal is sent from a minister's office to a department, it is important to be careful about the terms in which the proposal is conveyed, because of the risk that the department's independent assessment might be compromised by the departmental officers' appreciation that the minister's office expects that a decision will be made that the proposal will be funded. Health Advisor A described such an approach as a 'counsel of perfection' and it was reasonable to expect that departmental officers would not "jettison their ethical obligations because of one ill-chosen word." They characterised their actions as being questions about how a matter was progressing. However, if Health Advisor A had been as sensitive to boundary violations and the need to stay at arm's length from the assessment and procurement process as they claim, it would have been reasonable to expect them to take more care in their use of language to avoid any risk that the language of their referral could be construed as a direction. The evidence from departmental officers showed that they experienced the way in which they were spoken to by Health Advisor A as pressure.

4.4.3 DHHS allocates funds for the training

Having only received the proposal from Health Advisor A on 13 June 2018, DHHS proceeded to allocate budget to HEF for the training by the end of the month, to secure the end-of-financial-year funding, which the advisor had discussed with the Deputy Secretary, Corporate Services. The circumstances in which that decision was made are entirely consistent with DHHS staff having an understanding that a decision had already been made that HEF would be funded to deliver the training.

After receiving the proposal, Executive Officer C shared it with the members of the WWt.

Executive Officer C said they told their staff that, despite the apparent direction in the email from Health Advisor A, the HWU's proposal should be treated as any other proposal and assessed on its merits. But even by their own account, they held the view that DHHS was being asked to look at the proposal as a funding proposal at the direction of the minister, as opposed to a request for a competitive procurement. Executive Officer B acknowledged in their evidence that Executive Officer C had raised these concerns with them. The impression Executive Officer B had was that the staff felt they were heading down a particular pathway ahead of a decision that would involve getting 'HEF across the line'. It is clear that this was the perception shared generally by the other staff in the WWt.

The members of the WWt who first considered the HWU's proposal immediately raised doubts about its viability. For example, in an internal email on 15 June 2018, the Acting Assistant Director observed that HEF was not yet a RTO and 'are a long way off having anything of substance'.

The Acting Assistant Director spoke to representatives of the HWU, including Ms Asmar, on 20 June 2018, and met with them on 22 June. In their account to the Ombudsman, they said that, at that first meeting, it was apparent there were many gaps in the proposal, including timelines, delivery and content. They suggested that, since HEF was not yet a RTO, to enable HEF to undertake the training, an 'interim approach' might be for HEF to provide professional development for security staff.

Health Advisor A continued to be involved throughout this period. Telephone records reveal that, between 20 June 2018 and 22 June 2018, Health Advisor A spoke to Ms Asmar on multiple occasions. Health Advisor A gave evidence that they had a broad recollection of being involved in discussions to reorient the proposal to achieve alignment between the HWU and DHHS, which likely related to the creation of the revised professional development proposal. In their response to the draft report, Health Advisor A said that nothing should be inferred from the conversations, that they did not want to get involved in procurement, and that they were not involved in the detail of the proposal.

Seemingly in response, on 26 June, Ms Asmar submitted a revised 'professional development proposal', in which it was proposed that HEF would develop and deliver a professional development package for security officers and non-security personnel in the health system, in relation to occupational violence and aggression. The training was to commence by mid-October 2018 and be delivered through to June 2019 to 350 security staff and 1,200 non-security personnel. The revised proposal had an estimated budget of $3,355,000.

Ms Asmar told IBAC that the professional development proposal was created in part because HEF did not need to be a RTO to deliver the training, and the course itself did not need to be accredited.

After receiving the revised proposal, the WWt consulted the DHHS Procurement Services team. Executive Officer C told IBAC that Procurement Services was an expert team within DHHS, who provided advice as to the process that had to be followed. They said they sought advice at an early stage because DHHS had not solicited the proposal. Executive Officer C stated that it was not an easy proposal to assess: the training proposed was new, there was no comparable program, and they were highly conscious of the risks regarding HEF's ability to deliver, especially given it was a newly formed organisation, which had not previously delivered training (although HEF claimed its directors, members of the proposed advisory committee and its project manager had relevant experience in training, a claim which is addressed further below).

The Procurement Services team initially advised that funding the proposal before the end of the financial year would be impossible, given what was sought was a Procurement Plan to justify DHHS going to HEF as a single provider. The obstacles identified by the Procurement Services team included that HEF had no experience in delivering courses, was not yet a RTO, and was not on the established panel of providers for education and training; and concerns about the financial viability of HEF, given its recent establishment. Notwithstanding these obstacles, on 27 June, Health Advisor A again intervened and spoke to the Deputy Secretary, Corporate Services to arrange for funding to be allocated on the basis of a ministerial grant being made, as a result of which funds were quarantined for use on the proposal in the next financial year commencing on 1 July 2018.

In their submission on the draft report, Health Advisor A said that there was nothing improper about a decision to quarantine funds for the following year. IBAC agrees, but the advisor's active involvement resulted in the decision being made, and is another illustration of the interventions they were prepared to make in pursuit of the overall goal of securing the training contract for HEF before the election.

Despite the stated urgency to secure the funding for HEF, members of the WWt maintained their concerns about committing to HEF providing the training at that stage and were looking for ways to mitigate those risks. In an internal email on 27 June, the Acting Assistant Director welcomed Health Advisor A's intervention to secure the funding, but suggested that the brief should avoid naming any particular supplier. The following day, the WWt manager, having reviewed a draft of the brief to fund the proposal, emailed the Acting Assistant Director to say:

> I have reviewed the attached brief. I note my previous suggestion to include risks (such as sustainability, costings based on estimates only, unknown ability of HWU to deliver, underdeveloped scope, limited background on HEF and governance relationships etc) and the way in which these will be mitigated (such as detailed contractual agreement, staged transfer of funds based on deliverables post-delivery, further due diligence to be undertaken) have not been included.

> I also note that it refers to HWU but attaches the proposal from HEF which does not provide the context or the associated risks to [Executive Officer A].
>
> I would therefore recommend that the brief is for the approval of funds to use for a) development of security training b) health service grants and c) backfill only ...

Later that day, the Acting Assistant Director emailed Executive Officer C, saying: 'we are concerned regarding how much [Executive Officer A] or [B] would be aware of the risks with this proposal'. They also said: 'Given this will be a grant funding process, this will need to be tightly managed through the funding agreement'.

The final version of the funding brief prepared by the Acting Assistant Director included amendments from Executive Officer C, which the Acting Assistant Director thought made the brief read 'really well and tighter'. Those amendments softened but did not remove the WWt's concerns, and clarified its proposal to work closely with the provider in developing the training program. Executive Officer C endorsed it and Executive Officer B approved it on 29 June 2018.

The brief was titled: 'Approval of funding the proposal submitted by Health Education Federation to develop and offer a training program for security and non-security personnel with code grey and code black responsibilities'. It recommended that Executive Officer B agree to support the HEF proposal and to provide funding totalling $2,313,975 (about $1.1 million of which was to be provided to health services to release staff to attend the training). Contrary to the Acting Assistant Director's view, the brief nominated a particular provider and allocated the funds directly to HEF. Of further concern, the brief did not include most of the risks associated with the HEF proposal set out above, including those identified in the WWt manager's email.

The Acting Assistant Director gave evidence that the risks which the WWt manager identified were not included in the formal briefing document, because it may not have been signed by Executive Officer B if they had been. Executive Officer C testified that they made clear to Executive Officer B it was their understanding that the government had made a commitment to fund the HEF training program.

Executive Officer B recognised that the proposal gave effect to the Violence in Healthcare Taskforce's 2016 recommendations, which included that training be delivered to security staff; and that recommendation had been adopted by the minister. Initially, in evidence, Executive Officer B thought the brief was intended only to secure funding, with the proposal itself still subject to the proper approvals through a procurement process. In subsequent evidence, Executive Officer B said it was clear they had understood that the funds were allocated to HEF. In a later email by Executive Officer B of 15 August 2018 to Executive Officer C, they asked: 'Have we given them the money yet?' Executive Officer B ultimately confirmed in their evidence that, at that time, they believed they had authorised funding to HEF.

The formal approval of the brief meant that DHHS allocated funding for HEF to develop and deliver the training described in its professional development proposal. It did so, despite the responsible DHHS staff holding a range of serious concerns about the suitability of HEF and the viability of the contract, and no procurement process having been undertaken.

Executive Officer B said that in hindsight, the level of risk of allocating the funds to HEF was not sufficiently communicated in the brief that they approved. However, Executive Officer B frankly acknowledged that they should have picked up on the signals from the teams who were 'in a quite a bit of distress'. DHHS had allowed its processes to be steered by the minister's office. They recognised that Executive Officer C had been required to find a way to manage funding HEF, no matter what the risks posed by HEF were, and that the option of escalating the concerns about the risks of engaging HEF was missed, because of the inappropriate involvement in the process by the minister's office.

For the reasons stated above, the formal allocation of funds to HEF came about because of the perception by DHHS officers, at their different levels, that the government was committed to contracting with the HWU to deliver the training. Executive Officer C acknowledged in their evidence that, though DHHS was still working on the proposal, the brief reflected that it was understood that the minister expected DHHS would approve funding to HEF. The contemporaneous and oral evidence demonstrates that DHHS staff understood the desired outcome was that the grant of funds be made directly to HEF and that was achieved through approval of the brief.

Health Advisor A gave evidence at their examination and in their response to the draft report that the urgency of the process related to securing funding, which was only available until the end of the financial year, and that its purpose was to give DHHS time to conduct a procurement process, rather than to bypass it; that their intention was that DHHS should look at the proposal rigorously to ensure it was sound. They maintained that they did not intend to convey any expectation that DHHS deliver the contract to HEF and laboured under the belief that only funding had been approved and that a 'rigorous procurement process' was to be undertaken by DHHS. They apprehended that the proper procurement process was being followed and was told by DHHS that it was conducting a standard procurement process.

As discussed below, the evidence of Health Advisor A's conduct is difficult to reconcile with their claimed intention that DHHS would engage in a rigorous independent assessment of the HEF proposal. Health Advisor A in their response to the draft report contested IBAC's assessment of their conduct and said that their involvement in the process was consistent with their duties and could not reasonably have affected public servants who had to conduct a proper procurement process.

Health Advisor A's version of events does not align with the evidence given by the departmental officers charged with assessing the HEF's proposal and designing and managing the procurement process. Health Advisor A's frequent contact with departmental officers was interpreted as not only being driven by a concern for prompt decision-making, but also by a desire to ensure that the HEF was selected to deliver the training proposal that it had submitted, despite the officers' strong reservations about its capacity to do so. Their frustration with the process they were engaged in was generated by the pressure they felt was being applied by Health Advisor A, as well as the perception that the government and their senior managers expected the HEF to be awarded the contract.

Their perception was not unreasonable, given the rejection of any process by which the suitability of the HEF to deliver the services could have been tested against other potential providers. The officers' evidence provided through testimony and the documentary records of the interactions and processes in which they were involved painted a consistent and compelling picture of public servants attempting to conscientiously perform their duties but being thwarted by the persistent intervention and pressure applied by Health Advisor A and the willingness of their senior managers to find a way to comply with the perceived wishes of the government.

It is not clear on what date Health Advisor A first learned that Executive Officer B had approved funding to HEF, but on 10 July 2018, Health Advisor A received an email from the Acting Assistant Director advising them that funds were available for the establishment of the course to be run by HEF, saying that it would be 'managed through a funding agreement'. This reflected the Acting Assistant Director's understanding of the decision on 29 June; that it was to accrue funds and to go with a single provider.

Within 16 days from the ministerial advisor's delivery of the HEF proposal to DHHS, and despite the serious deficiencies identified with the HEF proposal, DHHS had approved a budget allocation to the HEF for a $1.2 million training program.

In an email to the HWU on the same day, Health Advisor A advised of the funds having been set aside and that a funding agreement and contract would need to be negotiated. Health Advisor A acknowledged in evidence that they knew at that point that DHHS was intending to engage the HEF.

Nevertheless, in their evidence and their submission on the draft report, Health Advisor A sought to say that the selection of HEF was not a 'surety', that the procurement process was genuine and that the HEF still had to meet certain criteria. In doing so, they relied on the procurement emails and conversations leading up to Executive Officer A's decision (described in the next section) that the procurement should be by way of selecting a provider without a competitive process, and on the subsequent evaluation of the HEF proposal by DHHS. They also referred to the various internal DHHS memoranda and conversations with DHHS officers in which the need for a proper procurement process to be followed was canvassed. Health Advisor A said that these memoranda and conversations corroborated their belief that a proper process was being followed.

Health Advisor A said that DHHS assured them it was following a proper process and that they had no reason to doubt such assurances. They also relied heavily on the record of their expressed preference for the minister to make a grant, rather than run a competitive process, and that the subsequent decision to go with a single provider was made by Executive Officer A, the DHHS Deputy Secretary, rather than the Minister for Health, and without any involvement from Health Advisor A.

A more accurate interpretation is that after the funding allocation to the HEF was made by Executive Officer B, the DHHS officers sought to conduct a proper process within the increasingly narrow parameters that they were given. As detailed in the next section, it is telling that the responsible procurement officer felt they might be given their 'marching orders' after a conversation with Health Advisor A, in which they raised concerns about proceeding with a direct approach to the HEF. The next section also makes clear that DHHS officers thought the evaluation process that occurred after the decision to run with a single provider was a box-ticking exercise to arrive at a predetermined outcome.

Health Advisor A's willingness to express a preference for a ministerial grant to be made to a single provider should be seen in the light of the only other alternative at the time, which was a competitive market approach. They were not involved in the subsequent decision by Executive Officer A (rather than the minister) to choose a single provider approach, nor was the possibility of DHHS making the decision included in the previous options for them to consider. They acknowledged in their evidence that the option that was finally chosen would have been a relief to the minister's office.

4.5 The procurement process and the contract with HEF (July–October 2018)

DHHS had allocated budget for the professional development program to the HEF as proposed by the HWU, but it remained necessary for a formal decision to be made that HEF should be contracted to deliver the training. Between July and October 2018, DHHS engaged in a procurement process that IBAC finds was compromised. It was described by one very senior officer as 'a terrible unacceptable procurement process'; one that 'would never be a proper approval process' because they 'had to meet a committed position'. Throughout this period, the overriding perception, which completely undermined the processes of DHHS, was that it was the preferred outcome of the minister's office that HEF should be contracted, despite DHHS staff's enduring concerns about its capability and suitability.

This section describes that procurement process. DHHS first determined that, contrary to procurement advice and the views of the responsible DHHS staff, HEF should be approached to bid for the contract as the sole provider. Subsequently, DHHS approved HEF's bid in circumstances in which DHHS staff felt substantial pressure from the minister's office and senior executives, so that issues concerning HEF's suitability were not properly exposed and evaluated.

4.5.1 DHHS decides to request a tender from HEF alone

Because of the contract cost of the proposed training, the WWt was required to seek advice from the DHHS Procurement Services team and to develop a Procurement Plan for the contract. The senior DHHS executives then had to determine the appropriate means by which the procurement should be considered, in accordance with established processes.

Despite the budget allocation to HEF and the clear understanding of relevant DHHS staff at each level that the process was intended to deliver on a government commitment to contract with the HWU to deliver the training, it remained theoretically open to DHHS to determine that another supplier should develop and deliver the training, or to decide that no supplier should be engaged. In order to depart from the manifest intent to contract with HEF and to correct any impression that HEF would be favoured, a rigorous process would have been necessary.

There were two standard processes (with various sub-options) available to DHHS to facilitate such an outcome that would have minimised any further perception that it was a foregone decision. It could have issued an open and public tender, allowing potential suppliers to bid to provide the training, or approached several known potential suppliers (including HEF) to bid. Alternatively, if HEF from the outset was to be the provider, then the procurement process could be put aside, and DHHS could recommend that the minister make a decision to grant funds to HEF to deliver the training.

Instead, DHHS decided to approach HEF only, and request a bid which it would evaluate as the sole bidder's proposal. That course was open to DHHS as an 'exception to the general rule' requiring procurements at this level of expenditure to be sought through a competitive market process. Such exceptions are, however, limited to, for example, emergencies or other circumstances requiring urgent action, or situations where the goods and services sought are unique to the supplier. What led to that course being chosen is discussed below.

When the WWt sought advice from DHHS's Procurement Services team, they were told that there were significant procurement requirements for the contract given its value. On 27 August 2018, the responsible procurement officer advised that the appropriate procurement options were either that the minister direct a grant of funds to one organisation or, if there was no such direction, that there should be an open tender.

The responsible procurement officer told the Ombudsman that in their first meeting with the WWt they were advised that the minister's office wanted HEF to deliver the training. It was then that they responded that the minister could direct that HEF be funded under a direct allocation, but otherwise there should be a competitive process because of the cost and complexity of the project.

Before the responsible procurement officer identified the competitive process as necessary, unless there was a ministerial direction that HEF be funded, it appears to have been assumed by all involved that DHHS's role was to evaluate HEF's proposal only. For example, on 3 August 2018, DHHS staff met with representatives of HEF, who were told that HEF would be required to be a RTO in order to deliver the training. After the meeting, Executive Officer C reported that Health Advisor A had been updated and was comfortable with the approach. As described in the previous section, there appears to have been a common view, which was shared by Health Advisor A, that the June budget allocation represented a decision to fund training by HEF.

On 22 August 2018, Health Advisor A telephoned the WWt manager to ask about the progress of the training project. The WWt manager recorded in a subsequent email that Health Advisor A had told them the HWU had met with the Premier and was complaining about how long the process was taking. The WWt manager told IBAC that they perceived the telephone call, referring to the union's meeting with the Premier, as a form of pressure being applied by the minister's office to finalise the procurement. IBAC accepts the WWt manager's evidence. Health Advisor A was unable to recall the specific details of their discussion with the WWt manager, but suggested that any reference they made to the HWU meeting with the Premier was not intended to apply pressure to the department. Regardless of whether or not the Premier or someone in the PPO had met with the HWU, IBAC is satisfied that Health Advisor A raised this matter in the call to influence the DHHS staff to expedite the process to secure a contract with the HEF.

The WWt manager told Health Advisor A that there was a procurement process underway, which had certain requirements. Health Advisor A then contacted the responsible procurement officer. The procurement officer said that when they spoke to Health Advisor A, they recommended that the minister approve a grant to directly fund HEF. They said that Health Advisor A wanted to know how long the procurement process would take. The responsible procurement officer felt that the minister's office was applying pressure to speed the process up. The procurement officer later gave evidence to IBAC that, in the conversation, they raised their concerns about a direct market approach to HEF, including the complexity, value and market available for the procurement. They said that they were surprised to receive the call, and that they wondered afterwards whether they would get their 'marching orders'.

In a contemporaneous internal email on 22 August, the WWt manager advised their director:

> [Health Advisor A] notified me that the Health Workers Union had met with the Premier and were complaining about paperwork and how long it was taking.

> I advised [them] that we were moving the project as quick as possible within the procurement process. I advised [them] that given the nature and value of the project there were significant procurement requirements including sign off of the Procurement Plan with the Chief Procurement Officer. I do note that it is in fact the joint procurement committee. [They] stated that [they] didn't want to get involved in procurement but asked if there was a way to speed up the process and who [they] could speak with. I advised that we were working with [the procurement officer] and the plan would be going up through the Chief Procurement Officer however due to the value and nature there were requirements that were being followed and Health Worker's Union were aware that it needed to follow the procurement process which would include response to a RFQ [request for quote].
>
> I am advised by [WWt member] that not long afterwards [the procurement officer] called to let us know that the Minister's Office had called [the procurement officer] to see why it was taking so long and what was involved.

Several witnesses gave evidence that they considered the advisor's telephone calls on 22 August inappropriate. Executive Officer A said that, while it may not be inappropriate for a ministerial advisor to contact DHHS staff to complain about timeframes, it was inappropriate for a ministerial advisor to directly contact staff within Procurement Services, or to relay complaints purportedly made by the HWU to the Premier or someone in the PPO about timeliness, with an intent to pressure DHHS. Executive Officer B said that, generally, ministerial advisors should not speak to public servants below the executive level.

In response to the draft report, Health Advisor A characterised their conduct as legitimate assistance to a stakeholder to navigate departmental processes. They said they made the calls with a view to procuring an outcome whereby the procurement process happened within a reasonable timeframe. Health Advisor A thought that it would be permissible to contact the procurement officer because their name had been given by a more senior colleague. IBAC rejects that submission.

The submission fails to recognise the power imbalance that can exist in the relationship between ministerial advisors (with their proximity to the ministers) and public servants, particularly those who are not executives, and significantly underplays Health Advisor A's conduct by characterising it in such neutral terms as mere 'navigation assistance' to a stakeholder, when the procurement officer clearly experienced it as a direct form of pressure.

The Premier in evidence stated he had no recollection of being aware of the difficulties arising from the way Health Advisor A had dealt with DHHS officers. He said, however, that ministerial advisors may deal with those in a department like the secretary, deputy secretary or sometimes an executive director, who have a role in dealing with the minister's office, but for an advisor to reach down further into the department is not normal or wise, because it places the public servant in a difficult position. He agreed that it places at risk the frank and fearless advice that is looked for from middle management. The Premier referred to the Public Administration Act framework that governs how a senior public servant communicates to more junior bureaucrats, noting it will be quite different to the way in which the ministerial advisor may communicate a question to a senior executive officer.

Health Advisor A in evidence said they did not recall the conversations with the responsible procurement officer. They accepted the general principle that ministerial advisors should only contact executive members of a department. They said the only reason they would have contacted the responsible procurement officer was because a more senior public servant put them in touch. They reiterated this point strongly in their response to the draft report. However, in their examination, they accepted that a ministerial advisor should not contact a procurement officer and recognised that this was because it risks interfering with the procurement process. However, they said they did not know that at the time. Health Advisor A gave evidence that their position in the minister's office was their first role as a ministerial advisor, and they had not received any training or guidance regarding contact with the public service.

As noted above, by this time, it is clear that Health Advisor A was proceeding on the belief that DHHS, having approved funding for HEF to do the training, would seek to contract with HEF. This may in part explain why they did not view their conduct as constituting improper pressure on DHHS staff during an ongoing procurement process. Health Advisor A accepted that Ms Asmar must have been using them to communicate with DHHS because greater influence would then be exerted in getting what Ms Asmar wanted. They said they would have been keeping the Minister for Health's Chief of Staff in the loop regarding the HWU's complaints about DHHS. In their response to the draft report, Health Advisor A said they were only passing on Ms Asmar's concerns about timeliness, which they felt was an appropriate action for an advisor to undertake on behalf of a stakeholder.

Following their receipt of the responsible procurement officer's advice, certain staff within the WWt took the firm view that they should maintain that the only appropriate procurement process would be a competitive tender. The Assistant Director said the team preferred a competitive process because it would allow them to assess whether there was a market for the training, and whether HEF's proposal was value for money. However, they were conscious that the minister's office was frustrated about how long it was taking for DHHS to deliver.

This staff view was reflected in a draft Procurement Plan prepared by the WWt manager in consultation with the procurement officer. On 29 August 2018, the WWt manager emailed the draft plan to Executive Officer C, squarely pointing out the need for a competitive tender. They said: 'As there is no rationale for going to HEF only, we are recommending that we change the Procurement Plan to go to up to 4 providers'. The plan itself indicated that market competition for the provision of the training was expected to be strong and proposed that a request for tender be made to four suppliers, including HEF.

On 30 August 2018, the Assistant Director emailed Executive Officer C, setting out two options, which already departed from the recommendation of the Worker Wellbeing and Procurement Services teams and were:

- first, a 'standard procurement process' involving a call for expressions of interest from two or three suppliers, in which HEF could be invited to participate
- second, 'for the department to work directly with HEF to ensure the training program aligns with the department policy and guidelines'.

The Assistant Director also noted that both options would take approximately six weeks and neither option would guarantee that HEF received funding.[46]

Executive Officer C then forwarded the email to Executive Officer B, noting that: 'we are aware that HEF have approached the [PPO] and we understand there is a degree of frustration regarding the process'. Executive Officer C importantly noted: 'as discussed, for us to progress option 2 we will require a clear direction. Our preferred option is the first which is already being progressed'.

In their evidence, Executive Officer B confirmed that they knew the preference of the team was for a competitive process, and their view was that any direct grant should be made by ministerial direction. Executive Officer B did not adopt the preferred procurement course of a competitive tender. By the next morning, the Assistant Director had sent a further email to Executive Officer C, saying: 'Given [Executive Officer B] has approved an approach which looks like option 2 below, I would propose we progress along this path.'

In subsequent emails, Executive Officer C and the Assistant Director agreed that the advice from Procurement Services was that in order to proceed with DHHS working with HEF on a training program, the minister would need to give a direction to effect that course. That same day, Executive Officer C sent a further email to Executive Officer B, saying: '[Health Advisor A] has advised us to put up formal briefing seek Min approval to fund as a grant. This is option 2.'

46 The latter point was stressed by Health Advisor A in their submission on the draft report as showing that they thought a proper procurement process was being followed.

Health Advisor A did not recall giving that advice to DHHS, but said in evidence that the minister would have been consulted as to whether she wished to make a direct grant. If as Health Advisor A thought, the minister was asked whether she was content for DHHS to put up a brief seeking ministerial approval for a direct grant to HEF, Health Advisor A recognised that there would be a political risk to the minister in making a grant to HEF, because of its relationship with the HWU. Ms Hennessy has no recollection of Health Advisor A seeking her approval as to this course.

In short, after receiving advice from Procurement Services, the members of the WWt considered that the appropriate form of any procurement process was a competitive tender, which would enable DHHS to properly assess HEF's proposal, but believed, as the minister's office or PPO was 'frustrated' with the length of time the process was taking, that in order to give effect to what they understood was the government's preferred position that HEF receive the contract, the minister make a direct grant to HEF.

Health Advisor A submitted in their response to the draft report that if the officers thought a competitive tender was a preferable course, they should have recommended that option. Any decision taken because of a belief about the ministerial office's frustration with the timeliness of the process would be unreasonable and illegitimate. For the reasons provided earlier, IBAC thinks that such a criticism is unfair because of the way in which Health Advisor A conducted their relations with DHHS officers and the expectations Health Advisor A had created.[47]

In their evidence, Executive Officer C maintained they and their staff believed they had been given an implied direction to fund HEF and to work with them to develop a proposal. They confirmed, as the contemporaneous evidence suggests, that, after assessing the proposal, their view was that either the training should be the subject of a competitive tender, or the minister should make the decision.[48] The WWt prepared a draft brief to the minister, presenting the two options for the minister's determination: to invite up to four training providers to tender for the development and delivery of health service security training, or to provide a grant to HEF to develop and deliver the training.

The draft brief recorded that Procurement Services advised that the options for funding the training were the two presented. It included the following information for the minister's consideration in making the decision:

6. Option a) will test the market for providers who may wish to tender to develop and deliver health service security training. The tendering process will take an extended period of time. Given the need to undertake this work in 2018-19, the direct funding proposed in option b) may provide some time efficiencies.
7. If option a) is progressed there may be criticism that the response to this issue is not timely given the importance of ensuring health service staff are better equipped to deal with violent and unsafe situations. Option b) may be criticised for not considering the capacity and capability of other providers to deliver this training.
8. Regardless of the preferred option, the department will:

…

b. Ensure that the provider has the capacity to meet relevant registration and standard requirements;
c. Undertake due diligence to ensure the provider has the capacity and capability to undertake and deliver the required work;
d. Assess the proposal against consistent and relevant criteria (Attachment 3);
e. Provide payments based on agreed deliverables; and
f. Undertake standard requirements such as financial checks, confirming registration as a Registered Training Organisation and other legal and insurance requirements.

47 See Section 4.4.3

48 Health Advisor A in their submission characterised Executive Officer C's belief about the implied direction to work with HEF as unreasonable. They also claimed that the two procurement options identified by the executive showed that DHHS was exercising its independent judgment about what processes were to be followed. The better view is that DHHS was trying to maintain a semblance of probity compliance within the constraints being imposed by the advisor's repeated interventions.

9. In addition, it is recommended that an advisory committee guide the development of the security training. The advisory committee should include the department as well as expertise in security, physical restraint, health literacy, legislative requirements, mental health, alcohol and other drugs, medical, nursing, and occupational health and safety as well as representatives from other health professional groups.
10. The proposed advisory committee will help ensure the training program meets the needs of the participants, the health sector and aligns with existing resources and tools as endorsed by the Violence in Healthcare Reference Group and meets best practice security requirements.
11. The Health Education Federation is a newly formed not-for-profit provider of professional development and training established in partnership with Health Workers Union. The Health Education Federation Directors and their background and experience are set out in their proposal at Attachment 2.
12. The proposal acknowledges that the Health Education Federation is working towards becoming a registered training organisation. The total value of the proposal received is $3,355,000. This includes costs associated with delivery such as participant accommodation, meals and travel. These are costs health services would typically accommodate for participating staff.

The brief did not contain any information about HEF's capacity to deliver the training, despite DHHS staff continuing to hold the concerns about HEF's lack of expertise and suitability, which the WWt manager described in their email of 28 June (see above).

The draft brief did not include a recommendation as to which of the options should be selected, as DHHS staff who prepared the brief believed that the minister wanted HEF to be granted the contract and understood that the purpose of the brief was to formalise the ministerial direction that it would be funded.

On 5 September 2018 at 6.30 pm, Executive Officer B forwarded the draft ministerial brief to Executive Officer A, saying that: 'this appears to be the best way of clearly resolving the procurement issues'. Executive Officer B further wrote that 'I understand that the minister is aware that this is the best way of resolving the issue'.

Executive Officer B said in evidence that they had no direct knowledge of the minister's attitude – their advice to Executive Officer A was probably derived from Executive Officer C's account of what Health Advisor A had said, which Executive Officer C had conveyed to them on 31 August.

However, that evening, Executive Officer A decided that the brief should not go to the minister, and that DHHS should itself approach HEF to tender for the contract as the sole bidder. It is necessary to set out the circumstances of that decision in some detail.

At 7.02 pm, about half an hour after they received the draft brief, Executive Officer A sent a text message to Executive Officer B, saying: 'can I check – is it clear or likely that option 2 (HEF) will be faster for delivery than option 1 (market process)?'. This appears to have been a reference to the final sentence of paragraph 6 of the draft brief. Executive Officer B responded:

> Yes – and I discussed with [Chief of Staff A – they were] unhappy to be in this position- but said HEF were difficult and I had discussed some of these risks with [their] team. [They] also knows there [sic] lack of rto status needs to be rectified.

Executive Officer B could not recall if Chief of Staff A explained why they were unhappy, but said that receiving the brief put the minister in an 'unenviable position'. Health Advisor A said in their evidence that 'we would have been relieved' that DHHS had made the decision. They later noted that they had no involvement in the decision.

It is highly likely that the minister's office thought it undesirable that the minister make a decision either to approve a competitive tender, which would upset the HWU, or give a direct grant to HEF, which would carry an obvious political risk for the minister. On the former, Health Advisor A testified that they thought Ms Asmar would have reacted poorly if she had been told at that point that HEF would be required to go to a competitive tender process.

It appears that, immediately following the text message exchange described above, Executive Officer A had separate telephone conversations with Executive Officer B and Chief of Staff A, after which Executive Officer A decided that the brief should not go to the minister.

Executive Officer A initially said they spoke to Chief of Staff A because they had a draft brief to the minister, which they did not think needed to go to the minister, and it would be sensible to check with the minister's Chief of Staff to see whether they had a different view. In their evidence, they did not recall how Chief of Staff A responded to their view that the brief did not need to go to the minister. They only recalled Chief of Staff A being comfortable with their proposed course of action. Subsequently, Executive Officer A gave a more expansive account of their conversation with Chief of Staff A. They said the sense they got from Chief of Staff A was that it would be acceptable that the brief not be submitted to the minister and that the decision to go with one provider, namely HEF, be made by Executive Officer A.

Executive Officer B in their evidence said that while they had said in the email to Executive Officer A attaching the draft brief that the best course was for the minister to make the decision, they believed they would have told Executive Officer A that HEF should be the sole provider. Like Executive Officer A, they said they had a sense that the contract would deliver on a government commitment. Executive Officer B recognised that if DHHS made the decision, they were fixing a problem for the minister.

Given the evidence in IBAC's possession, it is likely that Chief of Staff A gave some intimation to Executive Officers A and B that the preferred course was that the department make the formal decision.

At 7.10 pm, following that conversation, Executive Officer A sent a text message to Chief of Staff A, now indicating which option they would select. They said: 'I am inclined to just direct my team to procure training from HEF instead of going to market.' The evidence strongly suggests that Executive Officer A resolved with Chief of Staff A that they and not the minister would make the decision. As Executive Officer A suggested in evidence, the text of their email to Chief of Staff A supports the view that Executive Officer A had not indicated in the conversation before 7.10 pm what their decision would be.

Executive Officer A's decision was recorded in an email to Executive Officer B at 7.27 pm, saying:

> Thanks for the brief and answers to my questions over the phone tonight.
>
> I do not want to proceed with this brief but would instead like the team to proceed directly with option 2.
>
> I note that:
> Even with necessary steps for HEF to fully establish, option 2 will deliver the required results more quickly than option 1. I am conscious of timing imperatives for government and the workforce in this program.
>
> Value for money in option 2 is reasonably expected to be equivalent to option 1, on the basis of comparison of component costs with similar recent procurement in this program – the market has been tested.
>
> Workforce engagement is a critical factor in successful delivery – HEF will have significant advantages in this regard over any other providers that might choose to submit a bid in a competitive process.
>
> On the basis that direct engagement of HEF (option 2) will deliver either the same outcome (contract for HEF) or equivalent value for money in shorter timeframes, I would like the team to proceed with that option instead of a market process.
>
> I have copied [the Director, Strategy and Policy, Procurement Services] into this email in case they have contrary advice.
>
> I am happy to sign a brief to this effect if this email is not sufficient.

As stated above, Executive Officer A held a clear view that the HEF proposal was aligned with a government commitment, prior to the 2014 election, to deliver training to security staff in hospitals. They said that, when they came to consider the HEF proposal, they knew the HWU had expectations that its proposal would be supported, and they knew the minister's office wanted the proposal to proceed. As noted above, Executive Officer A had been the first person that the minister's advisor contacted before providing the HEF proposal to DHHS. They also acknowledged they knew that the minister's advisor had been in communication with DHHS, and had conveyed the message that there was frustration about the length of time it was taking to approve the proposal.[49]

Executive Officer A's direction to their division to proceed with directly engaging HEF differed from the options that the Worker Wellbeing and Procurement teams had initially put forward, namely, a competitive tender or a ministerial direct grant to HEF. Executive Officer B acknowledged that they knew the teams' view was that a competitive tender was necessary and that if HEF was to be chosen as the sole bidder, that would have to be 'the Minister's call'. Instead, as appears below, Executive Officer A decided, contrary to the views of the Worker Wellbeing and Procurement Services teams, that DHHS should contract directly with HEF as the sole bidder.

The next day, an amended brief was submitted to Executive Officer A. It now contained a recommendation that Executive Officer A 'agree to proceed with finalising the Procurement Plan which proposes to approach a single provider, the HEF, to develop and deliver public health security specific training'. The amended brief contained the arguments Executive Officer A had suggested in their email to Executive Officer B the previous night to support the recommendation that HEF be approached as a single provider. They were that approaching a single provider would be quicker; that the value for money would be equivalent; and the workforce engagement was a 'critical factor'. The brief also contained a Consultant Definition Tool, which was needed for HEF to be engaged as a consultant to DHHS. The brief was approved by Executive Officer A on 10 September 2018.

Executive Officer A accepted that they had been aware of the concerns held by staff about HEF's suitability, but said they assumed they had resolved the concerns.

Executive Officer A said they placed great reliance on the content of the amended brief as supporting this assumption, together with the fact that the draft brief for the minister had proposed both options. They said that, if the team had a view that HEF was incapable of delivery, it should have said so in the brief. Instead, the brief said that the risks would be managed and mitigated by the team. They did not recall being told that there were any risks which could not be managed.

In their response to the draft report, Executive Officer A also said that the views of the Procurement Services team were important and if the fact of the team's preference for either a competitive tender or direct ministerial grant had been included in the brief, they would have taken that into account in deciding whether to approach HEF as a sole provider.

Executive Officer A said that the advice in the amended brief provided the basis for their decision. Under the heading 'Benefits and risks of engagement approach', the following was said:

7. Given the importance of ensuring that health service staff are better equipped to deal with violent and unsafe situations, approaching a single provider should provide some time efficiencies and it is expected work would be able to be commenced in 2018-19.
8. In this particular case the single provider works in partnership with the Health Workers Union, which should position them positively with the intended workforce to be trained. Engagement of the workforce is a critical successful factor for this program of work.
9. A risk to this approach is that the broader market will not be tested for other providers who could potentially tender for the project and could be criticised for not considering the capacity and capability of other providers to deliver this training.
10. This approach does not test the market for value for money on this occasion, however recent similar proposals from other entities do provide a comparison. This proposal would appear to be relatively consistent with those other proposals.

49 Health Advisor A said that Executive Officer A's perceptions were not the result of Health Advisor A's conduct and in any event, they were under a duty to ignore any such preference and conduct a proper process. IBAC thinks that in light of the evidence of Health Advisor A's interactions with Executive Officer A and departmental officers in Executive Officer A's division, it is likely that Executive Officer A's perceptions were at least partly generated by Health Advisor A's conduct.

Paragraph 7 repeated what was said in paragraph 6 of the draft brief as to the purported 'time efficiencies' of the direct option. However, the factual basis for that statement should be doubted given the content in the Assistant Director's email of 30 August 2018, that both options would take about six weeks to complete.

The other two factors contained in Executive Officer A's email had not been raised in the draft brief. Regarding value for money, Executive Officer A in evidence accepted that there was no reference to cost comparisons in the draft brief and said the idea must have come from their conversation with Executive Officer B. Executive Officer C was unable to explain how paragraph 10 came to be included in the amended brief. They said there had been discussion in the team about whether there were comparable training programs in terms of cost, and that there was no specific comparison.

Executive Officer B gave evidence that they had probably thought at the time that the proposed cost was reasonable and was comparable to similar tenders for the development of training in other areas, but they acknowledged in their evidence that they could not explain the basis for that view, as no cost comparison or market testing had been done. As described earlier, the Assistant Director said that one reason the team would have preferred a competitive process was to ensure HEF's proposal would represent value for money.

Regarding workforce engagement, Executive Officer A said they had their own knowledge of the importance of workforce engagement, from their involvement in the ANMF's delivery of training, which was a precedent for a union being a training provider for a workforce.

In their response to the draft report, Executive Officer A reiterated the reasons for their decision, including the content of the revised brief, their conversations with Executive Officer B and their experience of methamphetamine (ice) training for frontline health workers, and noted their long experience of competitive and non-competitive procurement processes. Nevertheless, IBAC is satisfied that there was little or no real evidence to support the justifications made by Executive Officer A for their decision. Executive Officer B accepted that these justifications may have been made at their suggestion but admitted they did not have sufficient verification and did not stack up. The strong inference arises that these poor arguments were advanced to give some semblance of support to the recommendation now made in the amended brief.

Significantly, the amended brief (unlike the draft brief to the minister) did not include any reference to the advice by Procurement Services that the training should be the subject of either a competitive tender or a ministerial grant to HEF. Instead, it said that 'a Procurement Plan is being drafted in line with the recommendation by Procurement Services'.

The amended brief was written so that it appeared Executive Officer A's decision would be implementing the Worker Wellbeing and Procurement Services teams' recommendation that approaching HEF as the sole provider was the appropriate procurement outcome. The amended brief was prepared by the Assistant Director and was said to be endorsed by Executive Officer C (though they did not recall formally endorsing the brief before it went to Executive Officer A). The recommendation clearly misrepresented the opinion of the Worker Wellbeing and Procurement Services teams that HEF should not be approached as the sole provider. Their view, which had been consistently stated until the brief was amended, was to require either a competitive tender or a direction by the minister, if HEF was to be approached as the sole provider.

It was Executive Officer A's suggestion that a brief be submitted to them that contained a recommendation: a recommendation that the Worker Wellbeing and Procurement Services teams considered unacceptable. Those who amended the brief for Executive Officer A may well have felt they had no choice but to comply with the request Executive Officer A had made of them. As with the earlier funding approval brief to Executive Officer B, the brief did not set out the risks and mitigation measures the WWt manager had suggested in their email of 28 June (see above).

Executive Officer C testified that they had given their opinion in the earlier draft briefing, and that the amended brief contained the advice that Executive Officer A had indicated they would approve. But it is clear the amended brief submitted to Executive Officer A misrepresented the teams' view. Of particular concern is the explanation Executive Officers B and C gave that they believed there was a culture within DHHS that departmental officers may be required to make a recommendation in order to meet the wishes of their superior, even though they do not believe such a recommendation should be made.

As Executive Officer B in their frank evidence acknowledged, such a course is indefensible, yet the recommendation was then presented as their advice or opinion. The formal decision made by Executive Officer A was now represented as being made on the basis that it would be giving effect to the opinion held by the responsible DHHS teams. Executive Officer A maintained, however, that it was the responsibility of their staff to ensure all the risks were made clear to them in the brief they submitted. Executive Officer A did concede, with the benefit of hindsight, that they put too much weight on speed and they did not have adequate information about the risks inherent in the option they chose.

Reflecting on the decision, Executive Officer B again said in evidence that they knew the team was uncomfortable with providing a grant directly to HEF and preferred a tender process. They said that, in hindsight, they thought the team considered a ministerial grant was the best alternative, because they felt directed by the minister's office in the process. Executive Officer B accepted that they may have been influenced by what they understood was the preferred outcome of the minister's office but did not believe that was clear to them at the time.[50] The strong preponderance of evidence is that Executive Officers A and B understood at the time that the course adopted did not reflect the Worker Wellbeing and Procurement Services teams' positions as to the proper procurement process and was designed to deliver on a government commitment.

Executive Officer A's claim that the brief had satisfied them that there were no longer concerns about the HEF's suitability cannot be accepted. Executive Officer B in their text message to Executive Officer A had recounted their conversation with Chief of Staff A of that evening in which they had outlined the risks of approaching HEF as the sole provider. Executive Officer A was aware of their team's view that they preferred a competitive tender. The fact that their team had prepared a brief, leaving it to the minister to choose between two options, should not have provided them with any comfort.

As Executive Officer B explained, the draft brief had been formulated that way so as to make it the minister's call if the only provider was to be the HEF. Neither of the alternative courses posed for the minister were expressed as recommendations by DHHS. Significantly, Executive Officer A admitted it probably did occur to them that DHHS did not want to make the decision to select HEF because it would reflect poorly on the department. Although they did not explain why, they would have realised that the reputational risk of engaging with a single provider whose suitability was in question was obvious. The issue of reputational damage in selecting HEF was specifically referred to in a subsequent note from a procurement officer, who referred to the strong market that was available for such a contract and the danger of going to a single provider so aligned with the HWU.

The strong inference arises from this body of evidence that the draft recommendation was intended to leave the decision to the minister and avoid DHHS making a decision that would reflect poorly on it.

Executive Officer A said it was uncontroversial that public servants are prone to bias in decision-making based on what they think the government wants. They said in evidence that their knowledge about the preferred outcome of the minister's office may have been a factor in their decision. They understood that their team was aware of the expectations of the union and the minister's office. They accepted this susceptibility to potential bias may have resulted in bias in the way the material was presented to them.

The danger that the content of the amended brief would not contain material that was dispassionate and objective was exacerbated, because they had instructed the team to recommend a particular outcome, having declared that they intended to approve it. The amended brief was Executive Officer A's creation. As a result, it made a formal recommendation which indicated that DHHS had concluded it was a proper procurement decision to approach HEF as the sole bidder. That course was calculated to result in the brief not containing any cogent reason against making that decision.

50 Health Advisor A in their submission to the draft report said that either of the two procurement options submitted by the WWt would have been proper, and any direction about the preferred choice did not come from Health Advisor A. This position is inconsistent with the content of the earlier email from Executive Officer C to Executive Officer B that stated that Health Advisor A preferred the ministerial grant option to the competitive tender option. Health Advisor A submitted that Executive Officer B's evidence about the ministerial office was unreasonable.

Executive Officer A would have appreciated that the team prepared the amended brief on the basis that the minister's office and they intended to deliver on the outcome that HEF be approached as the provider of training. They would have understood that those presenting the brief to them would not disclose any serious risks in selecting HEF and would not return to their view that a competitive tender was necessary.

Given Executive Officers A and B's understanding of their teams concerns and the circumstances in which the amended brief came into existence, the content of the amended brief could provide no foundation for Executive Officer A's claim that there were no longer concerns about the HEF's suitability. Also, as appears below, during the course of the contract, when it became apparent over a protracted period that HEF was quite unable to discharge its contractual responsibilities, Executive Officer A admitted they did not make any inquiry of anyone in DHHS to ascertain how it came about that HEF had been regarded as the appropriate entity with whom DHHS should contract. Executive Officer A did not need to inquire; they knew how that had come about.

The conclusion is inescapable that this DHHS decision was heavily and improperly influenced by the understanding that this was the outcome the minister's office and the senior executive required.

Minister Hennessy told IBAC that she did not see this draft brief, nor did she recall discussing it with Chief of Staff A. Her evidence was that she had no recollection of being aware of this course of events.

This sequence of decisions marked the final occasion on which DHHS formally considered whether to approach any other potential supplier who might have been able to deliver the training, or to permit any other interested party to tender. That was despite the advice from Procurement Services and the view of the WWt that a competitive process was required, in light of concerns about the HEF's capacity to deliver the training and despite no formal evaluation having yet been done as to its capacity.

At each stage, the DHHS decision-making appears to have been improperly influenced by the commonly held view that the minister's office wanted HEF to be contracted to deliver the training and the intrusion of the ministerial advisor into DHHS's internal processes. Health Advisor A ensured that DHHS allocated funds for the training before the end of the financial year. The involvement of the minister's office throughout the process culminating in the conversations with the minister's Chief of Staff fortified the internal view that the department was required to deliver on a preconceived outcome.

As Executive Officer B volunteered in their evidence: 'there was much, much too much intrusion by the Minister's Office'. Importantly, they also acknowledged that DHHS allowed itself to be influenced by the minister's office's objectives. The teams' and executive officers' perceptions that the government had committed to funding HEF and granting them the contract contributed to the presentation and content of the draft brief to the minister and the amended brief.

Executive Officer A's decision to approach the HEF alone for a bid, supported by Executive Officer B, was also influenced by their joint perception that the engagement of the union's entity delivered on a committed government outcome. The outcome was that Executive Officer A's decision precluded a competitive tender for the contract. It culminated in a contract with the HEF, which they and numerous other witnesses, including the former minister responsible for the administration of the contract, recognised should never have been made.

For their part, Health Advisor A said the concerns expressed to them by public servants were never fundamental as to HEF's ability to deliver the contract, and that they would not have expected the public service to sign off on a contract which could not be delivered. While their conduct may in part have been influenced by their knowledge that DHHS had already approved funding for the HEF to deliver the training, their significant intrusion into the DHHS procurement process was improper. As Executive Officer B said, the intrusion 'manipulated' and unduly influenced the work of DHHS officers and was a prime reason why the team did not in the end maintain its view that a competitive procurement was necessary. Their role, carrying with it the apparent endorsement of the minister, proved critical to the outcome that the HEF alone was offered the opportunity to bid for the contract.

Health Advisor A, in their submission on the draft report, rejected such a conclusion as being untenable and said they were being scapegoated for DHHS's decision not to send up the ministerial brief for which they had expressed the view that a ministerial grant decision would be preferable to the alternative option of a competitive market tender. They characterised their interactions with the department as a 'handful of emails' and raising issues about timeliness.

As evidence of their focus on timing, Health Advisor A in their submission on the draft report relied on a timeline for a possible competitive procurement process that they received from the Assistant Director of the WWt in response to a request from Health Advisor A in advance of an upcoming stakeholder meeting. IBAC does not dispute that Health Advisor A was focused on timing, but finds that the focus led them to intervene inappropriately in the procurement process and that a complementary purpose was to ensure that HEF were awarded the training contract.

While Executive Officer A was responsible, after consultation with the Chief of Staff A, for the decision to evaluate a proposal from a single tenderer, IBAC takes the view that Health Advisor A's energetic interventions left little doubt in departmental officers' minds about the need for a speedy process to be found to appoint the HEF to provide the training services.

Finally, while Ms Hennessy told IBAC that she generally supported providing resources to industrial organisations for the delivery of occupational violence and aggression training, she did not recall authorising Health Advisor A to proceed on the basis that she would provide a grant to HEF for the training or approve the contract to HEF.

It might appear surprising to an outside observer that the minister did not know her advisor had submitted the HEF proposal to her department, or that funding approval had been obtained, or that a decision to approach the HEF as sole provider had been made, notwithstanding the demands of a busy portfolio and given that her Chief of Staff was aware of the decision.

Ms Hennessy in her response to the draft report contested the characterisation of her absence of knowledge as 'surprising' and referred to her necessary focus on other issues. She also stated that Health Advisor A was not acting in their capacity and within their authorisation as Ms Hennessy's advisor in relation to their conduct concerning the HEF contract. They was working independently "at the behest and in the interests of others."

Health Advisor A asserted that they would have sought approval on each of these steps. Plainly these are matters of which the minister should have been aware, especially because of the potential conflict of interest in awarding a contract to a stakeholder associated with the Australian Labor Party.

Whatever Ms Hennessy's precise knowledge of the conduct of her advisor or the manner in which her department went about the procurement process, as a minister she remained accountable for the conduct of her advisors and her department under the Westminster convention on ministerial responsibility. Ms Hennessy conceded that constitutional theory supports the view that an advisor is the 'alter ego' carrying out the instructions of the minister, but in reality, she said it is accepted that advisors often acted independently of their minister and without the minister's consent or knowledge.

What does that mean in this context? The Premier submitted in his response to the draft report that:

- the scope and application of that convention is uncertain, unclear and contested and subject to 'parliamentary practice and the politics in play at any given time'; and
- the determination of such matters is ultimately for Parliament.

However, IBAC considers where there is a finding that the minister, at best, was ignorant of the conduct of their staff, that the convention requires, at a minimum, the minister to account to parliament for it and explain what (if possible) has been done to address any problem arising from it or will be done to minimise the risk of any like problems occurring in the future. Depending on the seriousness of an advisor's conduct, a minister might be held personally responsible by parliament for matters about which they ought reasonably to have known, or where they have failed to provide adequate guidance to their staff as to the ambit of their authority, or systems and processes to aid their staff to understand such limits.

As Ms Hennessy is no longer a minister nor a parliamentarian, IBAC acknowledges that this observation is hypothetical. It does, however, raise questions about the adequacy of staff supervision in ministerial offices, which is addressed in the next chapter, and how, without an investigation such as Operation Daintree, members of parliament would acquire the knowledge to hold ministers to account in such circumstances.

4.5.2 Acceptance of HEF's tender for the contract

Executive Officer A's decision on 10 September 2018 was formally limited to a determination as to the form of the process by which DHHS would procure the contract for the training. As described above, the decision was made that the HEF alone should be approached to tender for the contract. It remained necessary for DHHS to finalise a Procurement Plan, request a quote from the HEF, evaluate the HEF's submission, and make a decision whether to engage the HEF. While the WWt followed this process, IBAC found that the staff who were required to evaluate HEF's submission felt pressure both from the minister's office and their senior executives to approve HEF's bid, notwithstanding their continuing serious concerns about its capabilities.

4.5.3 The Procurement Plan

The first step for DHHS was to finalise a Procurement Plan for the contract.

HEF was advised soon after Executive Officer A's decision that it would be asked to tender for the training. In a meeting on 18 September 2018, representatives of HEF, including Ms Asmar, were told by the Assistant Director that up to $1.2 million was available for the training, as well as the criteria which would form the basis of DHHS's assessment of the proposal. Telephone records show that, on that day, Health Advisor A spoke to Ms Asmar twice, once for more than 13 minutes. It is not known what was discussed, but given the timing of the conversations, it is likely that they spoke about the proposal.

Reflecting the earlier decision, the final Procurement Plan prepared by DHHS expanded on the recommendation describing the plan as a single-source process via a Request for Quote (RFQ) to a targeted vendor, HEF. Relevantly, it reiterated each of the considerations that Executive Officer A had requested be included in the brief to them for approval. It also brought the project timelines forward from the draft Procurement Plan so the contract was planned to commence before the 'caretaker period' on 22 October 2018, rather than after the state election on 3 December 2018. The plan recorded that the competition was expected to be 'weak (i.e., monopolistic/unique)'. As a justification for the single-source process and the revised timelines, it said in part:

> The [Violence in Healthcare] Taskforce's report indicated that ideally the security training module should be developed by December 2016 and that staff be trained in it by December 2018:
>
> > Given the urgency to meet these timelines and deliver healthcare specific security training to public hospital personnel to improve prevention and management of occupational violence and aggression as soon as possible, it is recommended that the department proceed with an invited RFQ with Health Education Federation as a pilot program. ...
> >
> > In this particular case the single provider works in partnership with the Health Workers Union, which should position them positively with the intended workforce to be trained. Engagement of the workforce is a critical successful factor for this program of work.
> >
> > This will deliver value for money in the short-term while enabling the department to appraise the pilot and apply these learnings to a procurement to the broader market to deliver sustained value for money in the longer term.

As stated above, there was no evidence proffered to IBAC suggesting a justification for the characterisation of the competition as 'weak'. No market testing had been performed. Departmental staff held the view that there were several other potential suppliers, hence the initial proposal envisaged a limited tender to four suppliers. The Assistant Director told the Ombudsman that they did not know the strength of the market, because it had not been tested.

Executive Officer A endorsed the Procurement Plan on 20 September 2018. It was approved on 21 September 2018 by the Chief Procurement Officer, having been prepared by the Assistant Director and responsible procurement officer.

The WWt manager, who had prepared the draft Procurement Plan, did not sign the final plan. They said they were concerned about the rationale to approach HEF as a single provider, given that it was newly formed and had never delivered training before, and that they considered there to be strong competition. Similarly, the Assistant Director said that the WWt manager did not want to sign the final plan, and though the Assistant Director was similarly uncomfortable, they felt obliged to proceed because the senior executives had decided it was the intended approach.

The responsible procurement officer told IBAC that the justification to approach HEF directly was that it would be a pilot program, with other organisations to be looked at in the long term if HEF could not deliver. They said that they signed the Procurement Plan, despite being uncomfortable with the process. Drawing on what eventuated, they said it was evident the department should have gone to market.

The approval of the Procurement Plan meant that HEF was the only potential provider invited to bid for the contract for the training.

4.5.4 The Request for Quote from HEF

Shortly after the approval of the Procurement Plan, DHHS issued a RFQ to HEF, requesting that it submit a quote for the development and delivery of the professional development program. The RFQ set out the 'key deliverables' of the project, which included:

- the establishment of an advisory committee to support the development and delivery of the programs
- the development of the content of the programs
- a pilot of the programs
- delivery of the programs to 575 participants between May 2019 and June 2020.

It also set out 10 evaluation criteria:

1. Currency as a registered training organisation or a contractual arrangement with a registered training organisation
2. Demonstrated experience developing and delivering training programs to health service personnel
3. Demonstrated experience convening advisory groups
4. Sound governance structures
5. Demonstrated knowledge of the healthcare security workforce and security training requirements, consistent with departmental guidance including the Guide for violence and aggression training in Victorian health services (2017)
6. Demonstrated ability to ensure that training will meet current best practice
7. Demonstrated knowledge of the Victorian public health service sector
8. Demonstrated financial capacity and commercial arrangements to successfully deliver the project
9. Demonstrated ability to meet the required timeframes and successfully deliver the project within the specified budget
10. The bidder demonstrates a commitment to environmental sustainability (eg environmental policy, environmental management systems and environmental approach)

The RFQ also contained three requirements that warrant particular mention in the context of this investigation. Although the HWU in its response to the draft report said that it had no knowledge of DHHS' procurement policies or that normal procurement processes were not being followed, it cannot avoid responsibility for possible breaches of the RFQ process that were set out in the RFQ document.

The first requirement was a prohibition on lobbying during the assessment of the proposal, stating: 'Any attempt by any bidder to exert influence on the outcome of the assessment process by lobbying, directly or indirectly, department staff or members of parliament, will be grounds for disqualification of the tender from further consideration.'

The Ombudsman's initial investigation identified some evidence that suggested the HWU's conduct after DHHS issued the RFQ could have constituted lobbying. The responsible procurement officer said that in a normal procurement, if there is evidence of lobbying, the bidder is automatically disqualified.

HEF was required to submit its bid by 3 October 2018. Ms Asmar said in her evidence that, during this period, she understood this was a competitive process and that other bidders would be able to tender for the contract.

Telephone records reveal that Health Advisor A spoke to Ms Asmar for more than 18 minutes on 26 September 2018, and for more than six minutes on 2 October. Ms Asmar did not recall speaking to Health Advisor A about the RFQ, and neither did Health Advisor A. However, the likelihood is that they did so. If that assumption is correct and given Ms Asmar's understanding that the HEF was engaged in a competitive process, it suggests Ms Asmar had no concerns about the risk of exclusion from the process arising from her contact with Health Advisor A. That contact reflected the access Ms Asmar had to the government and also the favourable treatment she expected to and did receive.

In their response to the draft report, Health Advisor A disputed that Ms Asmar received special treatment. Health Advisor A said that they were only assisting an important stakeholder to navigate departmental processes. Any discussion with Ms Asmar would not have been about the details of the HEF submission.

In their response to the draft report Ms Asmar, the HWU and HEF ('the union stakeholders') rejected the proposed finding that they enjoyed favourable treatment from, and access to, the government. Health Advisor A made a similar submission.

IBAC does not accept these submissions, as the evidence before it is strong in relation to:

- the union stakeholders' regular communications with ministerial advisors
- Health Advisor A's intervention in the procurement process in the union stakeholders' interests
- the intervention in or influence of advisors during the contract management phase on the union stakeholders' behalf.

Both the union stakeholders and the Premier responded that the IBAC does not appear to have made inquiries to develop a broader perspective on how Ms Asmar, the HWU and HEF's access might compare to other entities. IBAC acknowledges that it did not undertake such a comparative analysis. It did not conclude that the HWU's access was exclusive, rather that it was judged to be better than that of many other stakeholders on the evidence of its frequency, duration and intensity.

In addition, the appropriate comparator might not be other unions but other training providers. Compared to other training providers in the market who might have wished to tender for the work, the HEF received highly preferential treatment in being able to submit a proposal that was assessed and accepted without being subjected to a competitive process.

In response to the draft report both the union stakeholders and the Premier commented that a range of stakeholders have access to the Government. The union stakeholders said that there was nothing unusual or improper about unions having close relationships with the ALP or the government. These relationships are well known and are a reality of state and federal politics. The union stakeholders said that it was unusual for the HWU to deal with ministers or shadow ministers, but relations were maintained and representations were made when policy or policy implementation issues arose.

In his submission on the draft report, the Premier noted that access included access to the PPO, with stakeholders often advocating 'good ideas' (or to address a need) that required further work or development before it could be properly considered.

In their response on the draft report, PPO Advisor A also disputed that the union stakeholders received privileged access, noting in particular that PPO Advisor A's role was to be the key point of contact with unions for the PPO. They referred to the busy nature of the environment and their evidence that the HWU was about 'number 10' on the list of 30 unions that they worked with.

IBAC does not dispute this evidence. However, given the HWU's persistent lobbying of the minister's office and PPO, and those offices' efforts to accommodate or appease Ms Asmar during the procurement and management phases of the HEF contract, it is not satisfied that the HWU in this context could be regarded as merely a routine stakeholder. Nor could all of the HWU's representations to the PPO and Minister for Health's office on the procurement process and contract administration be characterised as representations on policy and policy implementation issues.

While IBAC accepts or does not dispute a number of the submissions the union stakeholders have made, it considers a number either misconstrue the focus of IBAC's investigation or are irrelevant. Most importantly, while acknowledging the reality of the special relationship between the ALP and many trade unions, IBAC cannot assert strongly enough that such special relationships mean that where a union or a related entity is involved in an ALP government procurement exercise, the government and relevant department should take special care to ensure that any actual or perceived conflict of interest is appropriately managed. In emphasising the importance of this point, IBAC does not dispute the HWU's, or any other stakeholder's, right to lobby the government for policy change, nor the circumstances that prompted the HWU to submit its HEF training proposal to the government in this case.

The need for extra care to be taken when dealing with a 'special' stakeholder is further underlined by the way in which Health Advisor A represented the HWU's interests to DHHS. As explained previously,[51] Health Advisor A's actions were not consistent with the duty to allow the public service to conduct a fair and impartial procurement process and to refrain from interfering in that process.

51 See Section 4.4.3

The contact made by Ms Asmar with the ministerial advisor during the RFQ process was undesirable and might have formed grounds for HEF's disqualification under the RFQ rules.

The RFQ's second requirement was for HEF to 'declare … any matter or issue, which is, may be perceived to be, or may lead to a conflict of interest regarding their participation in the supply of the goods and services described … and [to] describe a strategy so that any conflict of interest will be avoided'. In its response to this requirement in the RFQ, HEF indicated:

> At this point in time HEF has not identified any actual conflicts of interest or circumstances where there may be a perceived conflict of interest associated with providing services to the DHHS. … It should be noted that the HWU, which is related to the HEF and Ms Asmar and [HEF Director A] who are [two of the three HEF Directors and] Officials of the HWU, will abide by their statutory obligations under the Health Services Union Rules to avoid any conflicts of interest that may arise in the future.

The risk of a conflict of interest arising between the HEF and HWU's interests in the delivery of HEF's services under the contract were relatively high. The Royal Commission into Trade Union Governance and Corruption noted a number of potential issues with unions controlling related entities, including:

> The fact that union resources are used for the benefit of such funds can mean that the officials controlling such funds are doing so while in a position of conflict between interest and duty or duty and duty. The officials are acting for the benefit of the fund, not for the benefit of the union or its members.

This conflict of interest risk was not merely theoretical and arose during the training program when Ms Asmar directed the HEF project manager 'to go direct to line managers through Health Workers Union membership only', rather than Health Service CEOs for the first training programs, so that the initial training sessions were only available to HWU members. Under examination, Ms Asmar denied issuing such a direction, but conceded she 'may have said to make sure that union members get priority' access to the training. She defended her position on the basis that HWU members worked in the sector for the long term, whereas non-HWU health workers in the same roles did not. In addition, she indicated that such priority access for HWU members is 'not what's happening … [and] most of the people getting training are not even members'.

The HEF's entry in its response to the RFQ on the issue of potential conflicts of interest was potentially inadequate.

It is noteworthy that the HEF's response to the conflict of interest section in the RFQ makes no mention of the HWU's affiliation with the ALP and consequently, the government as a potential party to the contract. While a separate entity, the HEF's own response notes that it is 'related to' the HWU and two of its three directors are HWU officials. The non-inclusion of the affiliation with the ALP in the HEF's response to the RFQ may be because the HEF assumed that it was not a concern as DHHS had requested it to submit a quotation. In any event, as the next section will show, the DHHS staff who undertook the subsequent evaluation considered they had been presented with a fait accompli and, therefore, undertook a fairly cursory evaluation of the HEF proposal.

The third relevant requirement of the RFQ was that the HEF sign a letter of commitment to the Victorian Government's Supplier Code of Conduct. The HEF's response to the RFQ contained that letter signed by Ms Asmar on 3 October 2018.

Among other things, the Supplier Code of Conduct requires suppliers to:

- be ethical in their business activities, including relationships, practices …
- respect [Victorian public sector employees'] obligations [to behave in accordance with the values set out in the Public Sector Employees' Code] in their dealings with public sector employees
- avoid financial, business or other relationships that may compromise the performance of their duties under their business arrangements with the State
- not take any action in order to entice or obtain an unfair or improper advantage.

It appears that DHHS staff did not consider whether Ms Asmar's conduct, as the representative of the HEF, was inconsistent with its obligations under the Supplier Code of Conduct. Such an omission might be explained by their experience of the process leading up to the submission of the RFQ response.

Whenever the Supplier Code of Conduct is relevant, parties to the procurement process and the public servants engaged in the process should be mindful to ensure that the proposed supplier acts in accordance with the values set out in the VPS Code of Conduct in their dealings with public sector employees; that the prospective supplier does not seek to place the public servant under pressure or gain improper advantage through leveraging any access they may have to staff in the minister's office or the PPO, or arising from any special relationship with a party to the procurement process.

HEF submitted its response to the RFQ on 3 October 2018. It responded to each of the ten key criteria.

Relevantly, the first criterion (HEF's currency as a RTO) was satisfied by HEF's purchase of Seven Seas Education Services Pty Ltd, which was a RTO, in September 2018. That organisation was registered to provide training in the areas of leadership and management, accounting and bookkeeping. Ms Asmar told IBAC that the HWU purchased the organisation to satisfy this criterion, but accepted that its acquisition did not provide HEF with any relevant expertise or experience in security training or the healthcare sector.

This same issue was evident throughout HEF's response to the RFQ. Many of the criteria were qualified with the requirement that the bidder be able to demonstrate the required experience, knowledge, ability or capability. That was a challenge for HEF, given it was a newly formed organisation that was yet to develop or deliver any training. To compensate for the absence of any 'track record', HEF's response to the RFQ pointed to the experience of its directors, staff or external advisors, asserted its confidence in its ability to deliver, or simply outlined its aspirations to develop and deliver quality training.

Without undertaking a detailed assessment, the experience claimed was often irrelevant to the proposed security training, other than showing a depth of knowledge of the public health industry and its working environment, or education and training providers and/or experience training in other fields or health disciplines. Similarly, the referees provided in HEF's response to the RFQ could not have given any useful insight into HEF's capability to develop and deliver the required type of training based on past experience, other than through potentially extrapolating their observations of the directors' or staff's performance in the context of other types of training.

These difficulties for HEF in responding to the RFQ should have been sufficient to 'ring alarm bells' within DHHS. The reason it did not appear to is dealt with in the next section.

4.5.5 DHHS's evaluation of HEF's bid

HEF's bid was evaluated by three members of the WWt, who conducted an interview with representatives of HEF on 10 October 2018.

IBAC found that, in evaluating HEF's bid, the staff felt unable to assess the proposal on its merits. They felt pressure from both the minister's office and senior executives in DHHS to approve the bid.

The Assistant Director said they felt pressured by the minister's office, particularly around the timing. They were approaching the caretaker period before the forthcoming election. Although Health Advisor A submitted that no significance could be attached to the approaching caretaker period in considering the procurement process, IBAC considers it to have been a strong contributing factor to the pressure applied by the ministerial office to deliver the HEF contract as quickly as possible.

There was particular anxiety that the minister's office thought HEF was going to get the contract, even though they were not directed to give the contract to HEF. Although the Assistant Director would have preferred a competitive process, they genuinely believed there was no guarantee that HEF would get the contract. However, they said that on the information provided, HEF met the selection criteria, but that did not mean someone else would not have been better. Principal Policy Officer A said the interview was a 'tick box' exercise, and that in their view, it was a fait accompli that the project was going to proceed.

Principal Policy Officer B told IBAC that they felt overwhelming pressure to sign the Procurement Evaluation Report, and that they had considered not signing the report, but feared being seen as a troublemaker. They were concerned about the negative repercussions for their career and had seen others who had been seen in that light suffer within DHHS. They said the WWt included safeguards in the contract, including an advisory committee, the requirement for pilot courses, for an evaluation of the pilot courses before broader rollout, and for DHHS to retain the intellectual property and approve all subcontractors before their engagement. They also said:

- although they were told to assess HEF on its merits, it was assumed they would get through the interview, and that they felt pressure to sign the report
- HEF answered the interview questions satisfactorily, but they believed the PPO was putting pressure on the minister's office, which was in turn pressuring the department
- HEF was treated differently to other organisations in their experience, and that they were sure if there were a range of alternate bidders, they would not have selected HEF
- they felt everyone felt resigned to the process and was trying to conduct the interview as professionally as they could.

For their part, the responsible procurement officer told the Ombudsman that they considered the procurement process was a formality, and that it was a given that the contract would go to HEF after the decision was made to request a quote only from HEF.

In their response Health Advisor A said that any findings about pressure in the evaluation process were not a product of their conduct or were not a reasonable consequence of the communications with departmental officers. IBAC does not accept Health Advisor A's submission and prefers the evidence given by departmental officers that is documented in this chapter about their experience of the interactions with Health Advisor A.[52]

Health Advisor A also claimed that the Assistant Director's evidence made it impossible to conclude that the evaluation exercise was a fait accompli. IBAC acknowledges the Assistant Director's evidence but the weight of evidence from the other evaluators and the process as a whole is consistent with a finding that the evaluation process was influenced by Health Advisor A's interventions and pressure.

The evaluation panel prepared a Procurement Evaluation Report, recommending that HEF be awarded the contract, which was endorsed by the responsible procurement officer. Relevantly, it stated that HEF 'offered the best value for money by fully meeting all of the key evaluation criteria at a cost that was within the department's budget for this project', and that HEF had 'experience developing and delivering training programs to health service personnel'. The report found that HEF met each of the key selection criteria. The report was submitted to Executive Officer A on 25 October 2018, with a decision required by the next day, because of the imminent caretaker period. The accompanying brief said that HEF met all key evaluation criteria and recommended that Executive Officer A sign the report.

The report also referred to an independent third-party financial check of the HWU, as HEF's parent entity. The check 'strongly recommended' that DHHS obtain a guarantee from the HWU for any financial and contractual obligations, because of a deficiency in the HWU's working capital at that time, and advised that consideration be given to obtaining security. However, the report stated that Procurement Services had advised that, because DHHS would be making payment in arrears for works completed, there was no considerable risk to DHHS and no need to seek a guarantee.

The report was accompanied by a Procurement and Contract Risk Management Plan, which was required because of the value of the contract. It identified nine risks, two of which were identified as high, being:

- Direction to go to a single supplier, where the market competition is strong' …
- Reputation risk to the department for choosing to go to market to a single supplier and one so closely aligned to the Health Workers Union.

The remaining seven risks were assessed as medium and included risks as to HEF's financial capacity and expertise to deliver the training.

The plan shows that the members of the WWt, who had been involved in the assessment of the proposal since its reception by DHHS in June, continued to hold serious concerns about the procurement process and HEF's suitability to deliver the training. During their evidence, Health Advisor B was shown the HEF response to the RFQ and they acknowledged it did not meet the criteria requirements, and they were critical of the assessment process and the approval outcome.

As discussed in the following section, on 23 October, the Premier announced an election commitment of $2.2 million for occupational violence training for 1,000 frontline health services staff to be delivered 'in partnership' with the HWU. Health Advisor A explained that they were involved with advisors in the PPO in the preparation of this election commitment. Even though DHHS had not yet determined that HEF met the DHHS contractual requirements, Health Advisor A and the HWU

52 Health Advisor A also said even if the procurement decision was a formality because HEF was the only tenderer, which was disputed, Executive Officer A was responsible for choosing the process. Health Advisor A's preference was for the minister to make the decision by a grant.

understood that the HWU's RTO, HEF, would be the vehicle to deliver this large occupational violence and aggression training program in the partnership. The PPO advisors involved in developing the election commitment were open to that possibility, but did not see it as necessarily guaranteed, and emphasised the need for HEF to partner with a TAFE institution in implementing the commitment.

As Health Advisor A explained, the advisors and government would not have pursued such a commitment without an understanding that DHHS was satisfied that HEF had met the contractual requirements. Health Advisor A considered by early October that the process on the HEF proposal was finalised: all that remained was the formality of signing the contract.

Executive Officer A formally approved HEF as the provider in the Procurement Evaluation Report on 26 October 2018.

The approval of the report marked the end of the formal procurement process. It is plain that departmental staff at all levels were influenced, in various ways, by their perception that the minister and her office, and the PPO, had a preferred outcome. That perception, combined with the improper pressure from the minister's advisor, resulted in a course that would not otherwise have been followed – that HEF should deliver the training. The antidote to that influence and pressure should have been the rigorous application of the requirements of the procurement process. That could not be said to have occurred in this case.

For example, the Assistant Director said that they believed senior executives within DHHS directed the WWt to approach HEF because they were directed to do so by the minister's office. The Assistant Director said that they had received a telephone call from the minister's office, which they described as 'assertive', to the effect that DHHS should progress with HEF. They said that the minister's office interfered with the decision-making process, although it had no role to endorse the process.

The WWt manager said that, during the procurement process, the WWt felt its concerns were not heard, and they were fearful of speaking up due to the level of involvement of the DHHS senior executive, as well as the minister's office.

4.5.6 The contract

Following the approval of the Procurement Evaluation Report, a contract drafted by DHHS was sent to HEF. The contract provided that DHHS would make payments to HEF on delivery of certain milestones.

Email records show that, on receipt of the contract from DHHS on 29 October 2018, the HWU's accountant alerted Ms Asmar to the fact that the contract did not contain an upfront payment and, while noting this was a standard term, suggested that she contact Health Advisor A to request it be changed. The emails recognise that going through Health Advisor A would be more likely to generate the preferred result than liaising directly with DHHS. This is indicative of the general pattern of communication used by Ms Asmar to negotiate with DHHS by using the influence of the ministerial office to obtain a benefit for HEF.

Health Advisor A telephoned Executive Officer A at 3.13 pm on 29 October 2018, leaving a message that the HWU had 'concerns with some of our contract clauses', although they did not know the specific issue. Executive Officer A's office forwarded the message to Executive Officer B.

It is not clear when Health Advisor A's message to Executive Officer A was transmitted to the Assistant Director but, at about that time, the Assistant Director spoke to Ms Asmar to negotiate the payment schedule, with the result that the contract was amended so that HEF would receive $121,500 in advance, with the remaining payments to be made in arrears, in accordance with the original version of the contract.

The Assistant Director said they had a discussion with Ms Asmar about ensuring that HEF had the ability to continue the project in a timely way and reached an agreement to roll up some of the earlier milestones into a payment. They said it was not usual to have an upfront payment linked to a milestone. This agreed position required a variation to the contract that had been submitted to the HWU.

Health Advisor A did not recall the payment issue. They said that, at that time, they were on leave to run a local campaign, and would not have engaged with the issue beyond passing it on to someone else to deal with. Health Advisor A said that Ms Asmar came to them for everything, and they would have passed it to DHHS to follow up, because it was not appropriate for them to express a view on contractual terms.

In their response to the draft report, Health Advisor A denied that Ms Asmar's call was characteristic of a pattern of negotiations, despite their acknowledgement that Ms Asmar came to them for 'everything', or that their actions amounted to pressure. They said that there was nothing objectionable in their conduct. IBAC's view is that while they might only have been passing on a message, the inherent power of the ministerial office would have lent weight to the message, and it would have been preferable for the advisor to have asked Ms Asmar to contact DHHS directly.

The final contract was provided to Executive Officer A, with the accompanying brief requesting that they sign the contract by 30 October 2018 to enable it to be executed before the caretaker period commenced, which they did.

Under the contract, HEF was obliged to develop and deliver security training to prevent and manage occupational violence and aggression. The contract expired on 30 October 2020, and required HEF to establish an advisory committee, develop the training, deliver a pilot program and ultimately, to deliver the program to a total of 575 participants. HEF was to be paid a total of $1.2 million.

4.6 The election commitment to train 1,000 workers

On 23 October 2018, the Premier announced a $2.2 million commitment, if his government were re-elected at the 2018 state election, to train an additional 1,000 frontline health workers in managing occupational violence and aggression. The then Minister for Health, Jill Hennessy, and the Secretary, HWU, joined the Premier at the Austin Hospital for that announcement.

The media release issued after the announcement of the election commitment did not refer to how the government, if re-elected, expected the training program to be delivered. However, the Premier indicated in his announcement that it would be delivered 'in partnership' with the HWU.

Operation Daintree has investigated what the various parties involved in the development of this commitment understood to be the government's intention or preference in relation to the delivery of the promised training program. This line of inquiry was important for identifying what some witnesses believed was the outcome of the HEF's initial proposal, even though it was still being evaluated, and for gaining an insight into how they believed the HEF would deliver the election commitment training. The investigation results provided further evidence of:

- the belief of advisors in the PPO and Health Minister's office that DHHS would enter into a contract with HEF to deliver the initial training (as it did seven days after the announcement of the election commitment)
- the motivation, at least in part, of the minister's office and the PPO (through the minister's office) for intervening in DHHS's subsequent management of the contract with HEF, which is discussed further in the next section
- the extent of the favourable treatment the government was prepared to give to HEF and the HWU, despite the HEF's unproven capacity to deliver any relevant training.

An internal briefing prepared by PPO Advisor A dated 30 August 2018 (but finalised later) for the Chief of Staff listed various commitments sought by unions in the lead up to the 2018 State Election. The brief included a request from the HWU to '[c]ommit to funding Security Officer training delivered by the [HEF], a RTO set up by the HWU'. The brief described the existing commitment to the first HEF proposal as DHHS having 'committed to support the HWU to deliver two key pieces of workforce training in the areas of security and patient transport'.

The HWU request for a further commitment was conveyed to the Premier in a letter from Ms Asmar on 6 September 2018. Ms Asmar also complained about the delays the HWU had encountered in securing funding for the HEF to deliver the initial professional development course and requested the Premier's intervention to resolve the matter.

In a memorandum to the Premier dated 21 September 2018, PPO Advisor A and two other advisors noted that, after a series of discussions with the PPO and a meeting with DET and the office of the Minister for Training and Skills to explore a joint TAFE/HWU partnership, the HWU withdrew from the discussions, citing that they were not interested in partnering with a TAFE. The memoranda noted that subsequently the Minister for Health had engaged DHHS to develop a short-term funding arrangement which was in a direct tender process; that the HWU (rather than HEF) was the 'preferred tenderer'; that it appeared that the HWU may be more open to a TAFE partnership but that this would require intensive work with the HWU to explore options; that no specific details should be discussed with Ms Asmar and that she should be directed to engage with Minister Hennessy's office. They recommended that the Premier and the Minister for Training and Skills meet with the HWU to encourage Ms Asmar to work with DET to partner with a TAFE to provide any additional training.

Health Advisor A was at this time working with the PPO advisors in developing the election commitment and is the likely source of the PPO advisors' expectation and advice to the Premier that DHHS would be engaging HEF to develop the initial training program. The substance of Health Advisor A's evidence to IBAC was that when the discussion about an election commitment commenced with the PPO, there was a clear desire that DHHS complete the procurement process on the HEF proposal, and the successful outcome be known in order to permit the election commitment to be made. The content of the PPO memorandum is revealing in the way it describes the minister's office's utilisation of DHHS to develop a funding arrangement for HEF and its recognition that the procurement process with HEF was expected to be finalised before the commencement of the caretaker period.

A meeting between the Premier and the HWU was arranged for 4 October 2018. Before the meeting, the PPO prepared a further memorandum containing similar information and recommendations to that in the memorandum from 21 September 2018, with the addition that the Premier should inform Ms Asmar of a 'proposed $1 million scholarship program to facilitate upskilling health services workers'.

The Premier did not recall reading Ms Asmar's letter or either memorandum prepared for this meeting, although he accepted that he would ordinarily receive such a document as part of a briefing. Both memoranda referred to Ms Asmar's request for funding for the HEF to deliver further training.

According to Health Advisor A, the meeting between the Premier and Ms Asmar would not have proceeded on 4 October without prior discussion of what the election commitment would look like. They said that knowledge of the procurement outcome for the HEF would provide confidence that an election commitment involving the HEF was a legitimate proposal.

Despite the advisors' expectations of the evaluation outcome, the evaluation process had not commenced at the time of the meeting on 4 October, as the HEF had only provided its response to the RFQ on 3 October. The evaluation panel's report and its approval did not occur until later in the month, with Executive Officer A making the necessary decision to approve the panel report on 26 October, three days after the announcement of the new election commitment.

The meeting between the Premier and Ms Asmar nevertheless proceeded on 4 October. In his evidence, the Premier did not recall what was discussed in the meeting. Ms Asmar gave evidence that the meeting involved a discussion about the importance of occupational violence and aggression training for security officers. At that meeting, she said she provided the Premier with a briefing pack, which included, among other things, a copy of the motion she had moved at an ALP Conference to amend the ALP Victorian Branch 'Skills for Victorians' policy to '[g]ive preference for government funding to training providers that are . . .[n]ot for profit and . . .and [a]ssociated with a registered trade union.'

She said that the Premier made a commitment to provide funding for the security officer training. Telephone records show that Health Advisor A spoke to both Ms Asmar and PPO Advisor A on 5 October 2018. It is likely that they discussed the outcome of Ms Asmar's meeting with the Premier. Health Advisor A later emailed Minister Hennessy to advise that Ms Asmar had told them the Premier had committed to 'a recurrent funding source', but that the HWU needed to partner with a TAFE. That evidence was broadly consistent with the advice contained in the PPO's pre-meeting memoranda.

Following the Premier's meeting with Ms Asmar, the PPO developed the proposal for HEF to deliver training in partnership with a TAFE, with the assistance of Health Advisor A.

On 11 October 2018, Health Advisor A emailed a senior PPO advisor with draft costings for a proposal that 1,000 frontline healthcare workers complete a three-day training course in occupational violence and aggression, to be delivered by HEF in partnership with a TAFE over four years. Health Advisor A estimated that the total cost would be $1.13 million based on 'the budgets I've seen for their [ie: the HEF's] existing program' and explained the number of workers as follows:

I'm still waiting on workforce numbers for allied health, ward clerks etc but have picked 250 a year because it's roughly what [the HEF] are delivering now and so presumably have capacity to do but we may need to revisit when the workforce numbers come through.

The senior PPO advisor replied by email, copying in one of their colleagues and attaching a 'fact sheet'. It described Health Advisor A's proposal, including that '[t]he training [will be] delivered in partnership with the [HEF] and TAFE Victoria', together with an additional $1 million allocated to the cost of backfilling staff attending the training.

Health Advisor A told IBAC that they were comfortable with the commitment being framed in this way because, by that stage, they believed DHHS was going to enter into a contract for the initial training with HEF. They believed HEF had satisfied the criteria to be awarded the contract and the process had been finalised. Health Advisor A's approach is consistent with the evidence of DHHS staff that the ministerial expectation was that the HEF procurement had to be approved.

The evidence before IBAC suggests that Minister Hennessy did not have a detailed understanding of Health Advisor A's role in developing the election commitment or its relationship with the initial training. On 13 October 2018, Health Advisor A forwarded the fact sheet to Minister Hennessy, and sent her an email advising that DHHS was in negotiations with HEF on the contract (for the initial training), and explaining that it was now proposed that HEF deliver the course to 1,000 more workers over the next four years (which was the election commitment). They told Minister Hennessy: 'I think its fair to say the HWU has high expectations and I think someone is going to have to take a proposed package back to them for further discussion to ensure those expectations are delivered upon.'

Health Advisor A concluded the email by suggesting:

'If there are issues with TAFE delivery, etc., it can be delivered as continuing professional development (this the proposal I've put forward).'

IBAC understands that this suggestion was for the HEF as a RTO to deliver the training without TAFE involvement, which would avoid antagonising the HWU in the same way that the earlier PPO-driven attempt to create a TAFE partnership had.

Minister Hennessy did not recall receiving this email. She gave evidence that, while she knew DHHS was looking at funding for occupational violence and aggression training, she did not recall knowing the mechanism. However, she agreed that, at this time, she probably knew DHHS was about to sign a contract with HEF to deliver training.

Speaking notes for the announcement prepared by the HWU for its Secretary, Ms Asmar and the Assistant Secretary conclude with answers to 'QUESTIONS ABOUT [HEF] (RAISE ONLY IF ASKED)' including 'HEF is a completely independent entity, similar to PICAC, a registered training authority for the Victorian plumbing industry.' This answer to a possible question appears to have been written to deflect any criticism that the occupational violence training was a case of 'Labor looking after its union mates'. It also suggests that the HWU believed HEF would deliver the announced training.

The Premier initially said in his evidence that the announcement did not involve a commitment to any particular provider. He was then played a video clip of his announcement that showed the commitment as being one in partnership with the HWU. The Premier had no memory of that commitment and could not say what the nature of the partnership was that he had referred to, but added that a 'partnership' with a union could take many forms and did not necessarily mean that it would provide the training.

The Premier submitted that his evidence on this matter aligned with the memoranda of advice that the PPO had prepared and earlier discussions focused on a joint TAFE model that would not see HEF deliver the training itself. However, a full examination of the contemporaneous records passing between advisors at the PPO and the Minister's office in the ten days before the announcement show that there was careful discussion about the nature of the commitment which was the genesis for the announcement. The coincidence in time between the impending formal contract with the HEF, and the announced commitment to fund training in partnership with the union is significant.

PPO Advisor A confirmed that they expected that, if HEF successfully delivered the initial training for DHHS, it would likely deliver the ongoing training, preferably in partnership with a TAFE. They were not aware of any commitment to the HWU that it would deliver the training, although they accepted that the Premier's announcement risked conveying to the HWU that there was such a commitment.

As discussed below, Ms Mikakos, who became the Minister for Health after the 2018 state election, testified that she understood there was a 'clear commitment from the Premier's office' that the HEF would be awarded the election commitment contract.

The Premier had no recollection of what he discussed with Ms Asmar, no recollection of any discussion with his advisors that led to this announcement and no awareness that they and the Minister for Health's advisor had discussed a detailed proposal including costings ten days before the announcement that the HEF should deliver training to 1,000 workers over a four-year period.

It is highly likely that the Premier was informed of the commitment proposal as formulated by his advisors and conveyed the substance of the intended commitment to Ms Asmar when he met her before making the announcement. During his examination, the Premier ultimately accepted that he may have done so.

After the Premier realised that his recollection of what he announced was faulty he left open the possibility that he may have made a commitment to Ms Asmar but remained quite uncertain that what he announced amounted to a commitment. He maintained that what he said was not a 'tender announcement' and that if the union was to be the provider, he would have been very clear about that.

On 23 March 2021, in the context of ongoing disputes over the management of the DHHS/HEF contract, a representative of the HWU forwarded a link to the video of the Premier's announcement of the election commitment to PPO Advisor A. Asked about this email, PPO Advisor A told IBAC they had received a telephone call asking whether the budget contained funding for the training. Similarly, on 23 July 2021, Ms Asmar wrote to the Minister for Health, Martin Foley, complaining about DHHS's failure to provide the funding that had been 'promised by the Premier'. When she gave evidence before IBAC, Ms Asmar said that the HWU still wants to access the funds, in order to deliver training like that which it delivered under the contract with DHHS.

IBAC has been unable to reach a conclusive view on precisely what form the ALP intended the proposed partnership between the HWU and a TAFE in the election commitment to take, or precisely what role it expected the HEF to play in relation to the promised training. Nevertheless, based upon all of the matters set out above, IBAC is satisfied that the announcement constituted a pre-election commitment favouring the union with funding to deliver the training and that the commitment was informed by the HEF training program that became the subject of a contract with DHHS seven days after the announcement.

It is not clear that, in doing so, the Premier or the PPO were aware of the concerns that had been raised by procurement staff within DHHS. The commitment was made at a time when the flawed procurement process within DHHS – described in detail in the previous sections of this report – had not been completed. Further it was made without there having been any consultation with DHHS or any consideration of what procurement process should be undertaken.

The propriety of making such an election commitment in relation to the HWU/HEF while DHHS was simultaneously conducting a procurement process in relation to the HEF for closely related training is a matter for Parliament. As examined in detail in section 5.3 of this report, the Premier is accountable to Parliament for the conduct of his staff.

As it transpired, the next Minister for Health accepted DHHS's advice to conduct an open tender process to determine which body or consortium should deliver the training that had been the subject of the election commitment. While DHHS staff had indicated that HEF was welcome to participate in that process, that did not constitute any guarantee of HEF's success. Given the performance difficulties DHHS had encountered with HEF's development and delivery of the initial training, it would seem to have been a remote prospect.

4.7 The delivery of the contract

Health Advisor B was responsible for the policy area of occupational violence and aggression. Health Advisor B assumed the 'lead role' in the minister's office for dealing on a day-to-day basis with the HWU during the following months. They said in their response to the draft report that there were many 'touch points' in the newly established ministerial office for the HWU, and that they only became the lead in October 2019. Regardless of how their role was characterised, the investigation found evidence from at least March 2019 indicating their active involvement in the HEF's training contract.

The consistent messaging, which Health Advisor B explained was given to the minister's office throughout this period by the PPO, was that the union had a contract in place that needed to be delivered on and the role of the minister's office was to make it work. They did not believe that the option of ceasing the contract was open, with pressure applied by the PPO that they had to make it work. In their response to the draft report, Health Advisor B said that they believed that their conduct was at all times appropriate in a challenging and complex situation involving multiple stakeholders, and which was a situation that was inherited from the former Minister for Health's office.

IBAC's investigation revealed that DHHS consistently found HEF's performance under the contract to be poor. Many of the risks that had been specifically identified by departmental staff in the course of the procurement process came to fruition, resulting in delays and disputes. In particular, when HEF first delivered its proposed training content, DHHS staff considered it to be poor quality. The pilot programs for the training program were substantially delayed, and when they went ahead, received negative feedback.

DHHS continued to hold concerns about the quality of the training material and the capabilities of the trainers. Nevertheless, the training proper was allowed to commence in November 2019, after the intervention of the minister's office, and at a time when DHHS staff considered it to be unready. Subsequently, DHHS learned that HEF's status as a RTO had been suspended, that a subcontractor was claiming to be unpaid, and that the subcontractor was asserting intellectual property in the training material held by DHHS.

Meanwhile, the relationship between DHHS and HEF deteriorated. The HWU, primarily through Ms Asmar, continued to make representations to the PPO and ministerial office expressing its dissatisfaction with DHHS, both to Health Advisor B and to PPO Advisor A. IBAC found that the continued intrusion of ministerial advisors, combined with an enduring perception among departmental staff that the government was committed to HEF's delivery of the training, influenced DHHS's management of the contract.

4.7.1 Initial development of the training program

The contract, as signed in October 2018, required HEF to develop its training content by January 2019, with pilot programs to be run in March 2019 and the training delivered to 575 workers between May 2019 and October 2020.

However, the evidence shows that by January 2019, the WWt, which was responsible for managing HEF's performance under the contract, had already formed the view that HEF might be incapable of developing and delivering the training. When the training materials first developed by HEF (through a subcontractor) were provided to DHHS, the WWt considered them to be inadequate. In an email on 24 January 2019 summarising the progress of the project, the WWt manager said they had provided 'broad feedback' to HEF on the first draft of the training content, as follows:

(a) The whole resource appears to be plagiarised and not quoted/referenced in any way.

(b) It is not specific to security (provides a lot of information in depth not necessary for security personnel) and is written for health care professionals.

(c) It does not provide strategies/scenarios or case studies relevant to security for them to work through what the issues mean for them and what they are required and able to do within their role.

(d) It utilises existing training such as our eLearning modules and Ice training as assessments which should be prerequisites not part of a new training package.

(e) Grammatical errors throughout the whole document.

(f) Physical restraint is not developed and suggests prone techniques that may not be supported by experts.

(g) Reminder to state as draft and not for further circulation as we did not want it circulated broadly in its current form.

The WWt manager went on to say that they were 'increasingly concerned about the risk to the sector and the department of this training', including:

1. Lack of capability of the developer to understand the intricacies of security within healthcare.
2. Lack of engagement of experts within the advisory group to enable the right content to be incorporated into the program and no formal funding arrangement requiring formal advice and accountability for expert advice.
3. The lack of direction within the content for security officers to understand their role and responsibilities, with particular concerns regarding physical restraint.
4. Related to the delivery of the training with a training developer who does not have credibility within the security or health sector.
5. Reputational risk of the department if the training is not delivered to an appropriate standard, level of safety and within the committed timeframe.
6. Risk of injury of patient/staff/community if security officers complete the training, delivered by HEF's program developer and undertake unsafe practices as a result.
7. Risk of not being able to deliver the program due to the lack of capability of HEF to deliver on a complex training program and no previous experience in delivering training.

IBAC found that concerns of a similar kind were repeatedly expressed by departmental staff throughout the life of the contract. Health Advisor B confirmed during their examination that the WWt manager raised these issues with them.

Following its initial review of the training program, DHHS sought legal advice in relation to contract breaches and other risks identified by the WWt. The WWt manager said that at that stage, there was a lot of evidence to support cancelling the contract, but it was difficult to do so because there was a push to keep working with HEF.

On 25 March 2019, DHHS sent a letter to HEF outlining its concerns, including that HEF had engaged subcontractors to develop the training content without DHHS's prior knowledge or consent, that the advisory committee, which was required to be established, did not contain a sufficient breadth of representatives, and that the training content was inadequate. It notified HEF that the training programs were not in a position to proceed to pilot, which was then scheduled for 25 March 2019, and proposed to delay the pilot until June 2019.

It does not appear that the new minister's office had any particular involvement in the management of the contract at this early stage, though Health Advisor B said that the WWt manager raised with them the issues listed in the email, and DHHS advised Health Advisor B that it was sending the March letter to HEF (Health Advisor B subsequently provided it to the PPO).

On 16 April 2019, Ms Mikakos held a meeting with representatives of the HWU, including Ms Asmar. Health Advisor B gave evidence that it was an introductory meeting, and on their recollection, the election commitment regarding the delivery of training to 1,000 frontline workers was discussed, but the existing contract with HEF was not raised.

However, two days later, Ms Asmar sent an email to the WWt manager and copied both Ms Mikakos and Health Advisor B, attaching a letter from her (on behalf of HEF) responding to DHHS's March letter.

The letter was prefaced as follows:

> [The occupational violence and aggression project] is an initiative of the Andrews Government which decided that the establishment of the HEF would facilitate a collaborative partnership between the main employers in the sector and employee representatives. The Government saw the potential for an HEF type entity, working on a not-for-profit basis, becoming an enduring asset to the public health sector.

In the letter, Ms Asmar proceeded to take issue with many of the points raised by DHHS. She also said: 'If we reach an impasse, the minister, Jenny Mikakos, has indicated that she is prepared to facilitate a dialogue between all of the parties to ensure greater focus on the shared objective of guaranteeing that vulnerable workers receive the training they need'.

Ms Asmar's description of the genesis of the training program in the preface to the letter exaggerated the government's position in relation to the training. So too did her description of the minister's offer to convene a meeting between HEF and DHHS. Ms Mikakos indicated that she could not 'recall the specifics of what was discussed' in their meeting, and Health Advisor B said that the offer was only to set up a meeting if required. Ms Asmar's invocation of the minister's purported interest in the training, while also copying her into an email to the WWt manager, was plainly an attempt to demonstrate her access to ministerial support in order to influence DHHS.

The inclusion of the minister in correspondence with DHHS is also consistent with Ms Asmar's practice of communicating with DHHS via ministerial offices, which continued throughout the life of the contract. Indeed, a few days later, Ms Asmar wrote again to Ms Mikakos, saying in part:

> The HEF is keen to continue its constructive relationship with DHHS (and any other key stakeholders) as we progress the project towards a pilot testing phase. With this in mind, we appreciate your offer to assist with the development of the OVA [occupational violence and aggression] project by facilitating a meeting between the HEF and relevant DHHS officers.

Ms Mikakos gave evidence that she was informed following the April meeting with Ms Asmar that she had complained to the PPO that Ms Mikakos was tardy in meeting her, and she was not getting the attention from the minister or her office that she deserved. Ms Mikakos said she felt the PPO would 'move heaven and earth' to keep the union movement happy, as illustrated by the enterprise bargaining agreement (EBA) outcomes for the unions. The Premier contested this view, at least in relation to the HWU, in his evidence when he told IBAC: '[L]et me assure you the work of [the HWU] played a very, very small part in the political fortunes of my government.'

The WWt manager said that the exchange of letters did not help the relationship with HEF. They later described a breakdown in communications with Ms Asmar, who was regularly in contact with the minister's office.

HEF proceeded to develop an updated version of the training material, which it provided to DHHS in early May 2019. DHHS provided further feedback, and the pilot programs were subsequently rescheduled for August – five months behind schedule.

Departmental staff recorded their concerns about the contract in a departmental brief to the Acting Executive Director, dated 2 July 2019. It was now evident that notwithstanding the election commitment, DHHS was restating its earlier option of a competitive tender for delivering of the promised additional training. It said:

> After five months of work, the content developed by the HEF is not at an appropriate standard to pilot and HEF have requested further time to consult to develop and refine the program. ...
>
> In addition to the security professional development training currently being developed, the Government has made an election commitment of $2.2 million to fund occupational violence and aggression training for 1,000 frontline healthcare workers, including front-of-house staff and allied health staff in high-risk areas. The Minister's office has indicated its expectation that HEF will be involved in the delivery of this project as well.
>
> A competitive tender process will be undertaken to engage a provider for the $2.2 million election commitment to deliver occupational violence training and HEF will be able to apply.

The brief noted that the WWt had revised the risks contained in DHHS's Procurement and Contract Risk Management Plan, including the risk that HEF had a 'lack of expertise to deliver all aspects of the training'. The brief said that the risk was revised to 'high' due to:

- extension of timelines for deliverables
- composition of the advisory committee not including representatives of medical disciplines and practice areas, including nursing, mental health and medical practitioners, or any members of the Australian Medical Association. The department has raised this issue with HEF in regular meetings and in its letter of 25 March 2019. In response, HEF has advised that it is satisfied with the composition of the committee and that the members have the skills and experience necessary for performance of the role, and that it has undertaken sector consultation. The department still holds concerns about the composition of the advisory committee and the lack of input from a range of disciplines
- quality of the draft training materials: the department continues to hold concerns about the quality of draft training materials, submitted on 5 May 2019. If training programs are delivered without substantial changes to the content, there could be risks to the safety of patients, health service staff and community members, as well as reputational risk to the department. To mitigate this risk, the department will continue to monitor the project carefully, request revisions to the drafts to improve the standard of the content (following an independent review to be engaged by HEF), and seek expert advice (legal, security and mental health) on the content

- multiple complaints from health services on the appropriateness of HEF's engagement with them throughout the consultation process, including the manner in which they have conducted their visits, and their knowledge and preparedness.

In the lead up to the pilot program, HEF continued to revise the training material, and DHHS continued to provide feedback. As late as August 2019, the WWt considered that it 'remained inappropriate as well as incorrect and unsafe'.

As the relationship between HEF and DHHS deteriorated, the minister's office became increasingly involved. Health Advisor B told IBAC that when Ms Asmar would not talk to DHHS, she would call them. Health Advisor B said they would relay the concerns to DHHS and try to work with DHHS to resolve the issues. In their response to the draft report, Health Advisor B added that the minister's office would try to refer the HWU and DHHS back to each other, in an effort not to become involved in detailed contract matters.

However, as the minister's office became involved, there was a recurring and persistent conflation of HEF's existing contract and the government's election commitment to train a further 1,000 workers regarding occupational violence and aggression. Health Advisor B gave evidence that, when they commenced their role, they did not appreciate the distinction between the training contract on foot and the election commitment. They said they were told by a member of the PPO that the HWU would be involved in the election commitment training. They said that, by June or July 2019, they had formed the view that the HWU would not necessarily be involved in the delivery of that training, but that HEF would likely be a bidder for that project if it successfully ran the 'pilot' training.

Ms Mikakos did not appreciate that there was any distinction between the election commitment to train 1,000 workers and the HEF contract. She told IBAC that, when she took office, the contract was described in her briefing as an election commitment which had to be delivered. She always viewed the contract and the election commitment as interrelated. She said that the PPO and Premier had made very clear to all ministers that election commitments had to be delivered in a timely way. She said that, as far as she and her staff were concerned, HEF had been contracted to develop training, and the election commitment was that HEF would roll it out more broadly. Health Advisor B had reported that the PPO had explained the commitment in these terms and that HEF would move from the contract to the $2.2 million training commitment. Both Ms Mikakos and her advisor thought that that was the government expectation.

The DHHS brief on 2 July 2019, extracted above, recorded an expectation from the minister's office that HEF would be involved in the delivery of the election commitment for further training. Health Advisor B said they conveyed that view to Executive Officer C, because that is what the PPO wanted. Ms Mikakos told IBAC that that comment may have related to her office's understanding that the contract was part of the election commitment. It might also have reflected the commonly held view among (at least) ministerial staff that if HEF delivered the training under the contract with DHHS, it would likely deliver the further training, which had been promised in the election commitment.

As well as liaising with the minister's office, the HWU also began to approach the PPO. On 18 June 2019, PPO Advisor A met with Ms Asmar in relation to the training; they subsequently referred her to Chief of Staff B. It is likely that one of the matters discussed was a request by HEF for further funding from DHHS in relation to extra expenditure in developing the training program. On 3 July 2019, Health Advisor B sent PPO Advisor A an email, saying: 'Following our chat, I contacted Diana [Ms Asmar] and followed up with a text message essentially asking for a short brief outlining the additional funding they have expended in regard to the pilot'. Health Advisor B felt obliged to follow up PPO suggestions with the department and thought the PPO had the authority to suggest contract variations that would enable the bringing forward of funding payments.

In August, Health Advisor B advised the WWt that HEF was seeking further funds and queried whether there was a possibility of bringing forward funding from the $2.2 million election commitment. DHHS told them that the election commitment training would need to undergo a separate procurement process. Health Advisor B added in their response to the draft report that DHHS also advised that HEF was welcome to apply for the election funding. It is likely that Health Advisor B was prompted to make this suggestion by PPO Advisor A, who suggested that the contract could be varied to bring forward payments to HEF to assist with their cashflow issues.

4.7.2 The delivery of the training in November and December 2019

HEF delivered pilot programs between 26 and 29 August 2019, at the Royal Children's Hospital, and between 2 and 5 September 2019, at Bendigo Health, with a total of 34 participants. Each was subject to a series of evaluations, including with focus groups, participant surveys and evaluator observations.

Consolidated participant feedback was poor. For example, nearly 60 per cent of participants believed the trainers were not organised or prepared; nearly 80 per cent of participants believed the trainers did not have in-depth knowledge of occupational violence and aggression; and nearly 80 per cent believed the trainers did not provide a program that was relevant to the health sector.

The contractor who evaluated the pilot also had concerns, including about the length of the training and its objectives; the training content and lack of alignment with existing resources; and the trainers' lack of expertise in the healthcare sector.

DHHS also received feedback from participants in the pilot. For example, on 25 October 2019, a representative of Monash Health told DHHS that three of their staff who had attended had 'significant concerns' about a 'range of issues they identified with the training', especially 'the standard of the instructors and their lack of expertise and knowledge of the hospital security environment'. Monash Health, Eastern Health and Mildura Base Hospital each indicated to DHHS that they would not send their staff to the training due to quality and safety concerns.

Following the delivery of the pilot programs, HEF engaged a new subcontractor to redevelop the content and a private security company assist in its delivery. Again, HEF did not seek prior approval from DHHS to engage the subcontractors, as required. The evidence is that DHHS was concerned about the engagement of the security subcontractor, as it did not have experience in health services, but subsequently approved the arrangement.

DHHS was later informed that the security firm staff had undertaken 'shadowing' of health service security staff at Peninsula Health without prior approval. The WWt manager[53] told IBAC that they had told them not to do so.

Following the pilot programs, DHHS continued to engage with HEF to develop the training program. However, the WWt's view remained that the training was not ready to proceed to full delivery. The WWt manager recorded DHHS's findings in an evaluation of the pilot programs as follows:

> The key findings of the evaluation identified issues with the training objectives, structure and length of the program, duplication of content, modes of delivery, lack of any healthcare expertise across trainers and no psychological supports for participants.

Although Health Advisor B understood it was commonly the case that senior public service executives would speak to the minister's advisor, they did not think there were any protocols that regulated who they should talk to. Health Advisor B typically spoke to persons at director level, but more junior personnel were not 'off-limits'. Their preference was to go to persons who they knew would have the information they were interested in. Health Advisor B felt they could talk to the department about anything that fell within their portfolio.

On 22 October 2019, the WWt manager updated Health Advisor B about the progress of the training program; the WWt manager's file note shows that she told Health Advisor B the training content 'required a significant amount of work to be safe, appropriate and effective and at the earliest February 2020 roll out was recommended'.

The file note also records that Health Advisor B told the WWt manager that Ms Asmar had contacted them about cashflow issues and seeking further funding, and requested that the WWt manager contact Ms Asmar to determine the funding needs. The WWt manager told Health Advisor B that no further funding was available.

53 The WWt manager worked as the Acting Assistant Director of the WWt between July 2019 to February 2020. To avoid confusion, they are referred to as the WWt manager throughout this report.

Health Advisor B said they spoke to PPO Advisor A about the potential delay of the training and that, though they were comfortable with the training being delayed until early 2020, PPO Advisor A was 'pretty adamant' that some training should be done in 2019. Records show that, on 22 October, representatives of the HWU spoke to PPO Advisor A; and a few days earlier, the HWU had sent PPO Advisor A copies of correspondence between HEF and DHHS. Health Advisor B also said that, by that stage, they had no direct relationship with Ms Asmar, who had escalated matters to the PPO, and they felt it had been taken out of their hands. Hence, at the PPO's insistence, they pushed DHHS to allow the training.

PPO Advisor A, in their response to the draft report, said they liaised between Health Advisor B and Ms Asmar as part of their role and in an attempt to resolve the dispute. They saw themselves as performing a mediation role. They contested the statement that they were 'quite adamant' about training occurring in 2019 and said it was open for the health minister's advisors to ignore their advice or recommendations. Nevertheless, it was clear from the evidence of other ministerial advisors that the views of the PPO carried great weight, especially as PPO Advisor A was the advisor responsible for union issues in the PPO.

In their response to the draft report, PPO Advisor A accepted that although at the time they thought a resolution could be reached between the HEF and DHHS because they thought the HEF had the capability to deliver the training, they now understood that they had not been in possession of all of the information available to DHHS about HEF's underperformance. They also pointed to DHHS's evaluation and decision to appoint HEF as providing a basis for assuming that HEF could competently deliver the training.

On 30 October 2019, Health Advisor B told DHHS that the minister's office had agreed with HEF that the training program would run in early December, thereby overruling DHHS's continuing concerns.

The WWt manager subsequently recorded in an email to Health Advisor B that the delivery of the training at that stage was not endorsed by DHHS, in light of the 'quality and safety risk' and issues with low attendance, health service support and contract management. The WWt manager continued to raise issues about HEF's performance with their managers.

The views of the WWt at this time are recorded in a draft internal brief, prepared by the WWt manager in about November 2019, though it was not established by evidence that it was endorsed. The WWt manager recorded that DHHS had recommended that the training be delayed until February 2020, but that the minister's office had advised that the training should commence in December 2019. The draft brief said that DHHS was working with HEF to implement the training, but noted 'a range of potential risks', including the 'safety and appropriateness of the program'.

The draft brief also said that prior to the advice from the minister's office that the training should proceed, the WWt had been considering options regarding how to progress the training program after the pilot, including terminating the contract. However, it said: 'A change in contractor is unlikely to be supported by the Minister'.

Executive Officer C, to whom the draft brief was directed, told IBAC they did not recall seeing the brief, but said that, in general terms, there was a sense that the minister was unlikely to support a termination of the contract, because the minister's office, via Health Advisor B, was still pushing for the program to be delivered.

Health Advisor B said they did not know why DHHS had formed the view that the minister would not support a change in contractor, and that it would not have been their personal view. However, they said that the consistent message they delivered to DHHS was to try and make it work, because that was the message coming from the PPO. They said they thought Ms Mikakos would not have had an issue with changing the contractor, but had left it to them and the Chief of Staff to manage.

For her part, Ms Mikakos said that DHHS should not have speculated about what she would decide, and that they should have come to her if they had concerns. She reiterated this position in her response to the draft report.

The evidence is that Health Advisor B had regular contact with the WWt manager about the progress of the training program. In addition to their involvement in the scheduling of the training, Senior Advisor B helped the parties to book training rooms at Bendigo Health and the Royal Children's Hospital, although they said in their response to the draft report that they only became so involved because of the breakdown in relations between HEF and the department.

HEF ultimately delivered four programs of training at the end of 2019: between 18 and 21 November 2019 at Bendigo Health, 26 and 29 November 2019 at the Royal Children's Hospital, 10 and 13 December 2019 at the Royal Children's Hospital, and 16 and 18 December 2019 at Bendigo Health, to a total of 38 participants.

On the day the training commenced, the WWt manager sent an email to Health Advisor B, saying:

> Training manual content was received Thursday afternoon. This content is not able to be endorsed by the department. The content is inaccurate in some parts, plagiarised, does not identify relevance to security or health services, is missing content and includes some inflammatory statements.

It is abundantly clear that the DHHS staff with responsibility for managing the contract with HEF did not consider that HEF was delivering an adequate product and did not support HEF delivering the training that it did. Nonetheless, they did not feel able to prevent its continuance.

4.7.3 Ongoing issues and the suspension of the training in March 2020

After the first block of training was delivered, DHHS became aware of apparent non-compliance by HEF with certain terms of the contract, in addition to its continuing concerns about the quality of the training program and the expertise of the trainers.

In December 2019, DHHS became aware that HEF's registration as a RTO had been suspended by the Australian Skills Quality Authority. HEF had been required to obtain registration as a RTO in order to secure its contract with DHHS, and it had done so by purchasing Seven Seas Education Services Pty Ltd in September 2018.

It should be noted that the occupational violence and aggression training was not an accredited course, meaning there was no regulatory requirement that HEF be a RTO in order to deliver it.

On 31 December 2019, DHHS sent a letter to HEF, noting the suspension and requesting further information. Before sending the letter, DHHS informed Health Advisor B, who asked DHHS to hold off until they could speak to Ms Asmar; Health Advisor B separately informed the PPO. In their response to the draft report, Health Advisor B said they did not recall the conversation, but that it was not unusual to inform a stakeholder of incoming correspondence as a matter of courtesy.

On 14 January 2020, HEF responded, saying the suspension was the result of 'historical non-compliance' and that the occupational violence and aggression training would be unaffected.

On 17 January 2020, DHHS notified HEF by letter that the suspension raised 'serious concerns' and, in light of HEF's repeated non-compliance with a number of contractual terms relating to process, quality and timeliness, it would seek to implement an independent rapid review of the training services delivered by HEF.

Meanwhile, on 19 December 2019, HEF had written to DHHS requesting $132,917 to pay the invoices of a subcontractor, which it said arose from the 'redesign of this program' leading to a 'significant financial shortfall'. DHHS also responded to that request on 17 January 2020, saying that it had made all due payments to HEF, that it was HEF's sole responsibility to pay subcontractors and that DHHS would not provide further funding.

On 20 January 2020, DHHS received an email from the subcontractor directly. The subcontractor had been contracted by HEF to develop the training content after the delivery of the pilot programs. They advised DHHS that their invoices to HEF had been unpaid and also raised a series of other concerns about the training, including in relation to HEF's ability to competently deliver the training. They also advised that they intended to assert their intellectual property rights over the training content.

HEF had scheduled a training program to commence on 21 January 2020, but cancelled it the day before. The WWt manager said that HEF cancelled the training because the independent reviewer was intending to attend. IBAC has been unable to corroborate whether that was the reason and notes other factors may have caused the apparent cancellation, such as lack of participant interest.

On 24 January 2020, the WWt manager emailed Executive Officer C draft speaking notes to be provided to the new executive director, who had replaced Executive Officer B, and Executive Officer A, in preparation for a meeting with the minister. In the speaking notes, the WWt manager recorded that:

> The department has had significant concerns about the capability of HEF and the subcontractors, their method of training development, expertise, consultation and experience as well as the quality of the training content and its delivery over the period of the project.
>
> HEF's limited capability in healthcare training as well as project management and the lack of healthcare expertise has resulted in significant delays in delivery of milestones and ongoing concerns about the quality and safety of the training program.
>
> The department, following pilot program findings, recommended that HEF needed to make significant changes to the program and therefore the program should not start until February 2020. Your office requested that the department support HEF to run the programs in November and December 2019.
>
> The programs, as requested by the Minister's office, commenced in November and December 2019, without the department's endorsement.

The WWt manager went on to recite that HEF's status as a RTO was suspended; that there were concerns about its financial viability; and that DHHS had engaged Safer Care Victoria to conduct a review. They said that Monash Health, Eastern Health and Mildura Base Hospital had each told DHHS they would not send their staff to the training due to quality and safety concerns, and that departmental staff had observed the training and did not consider that it was sufficient to meet the Violence in Healthcare Taskforce's recommendation to develop training. They said that DHHS would consider whether the contract should be terminated following that review.

The WWt manager also updated Health Advisor B directly, raising the same issues. Ms Mikakos, in her response to the draft report, advised that she had no recollection of receiving a briefing on the matter and she would have had no qualms about accepting a recommendation from the department to terminate the contract if it had serious concerns about poor contract performance.

DHHS sent a further letter to HEF on 29 January 2020, providing information about the review of the training program, and requesting further information about the intellectual property rights to the training material and the subcontractor's unpaid invoices. On that day, Executive Officer C sent an email to the new Executive Director summarising the difficulties with the contract. They said the team had been briefing Health Advisor B and Chief of Staff B 'regarding the difficulty in gaining any traction with HEF to assist them improve the quality and safety of the program'.

In response to the letter, HEF advised DHHS that training had been deferred indefinitely.

In early February, DHHS obtained internal legal advice about the process to terminate the contract with HEF. Emails indicate that Health Advisor B did not involve themself on the issue of termination and continued to encourage DHHS to meet HEF to discuss the training program.

The PPO was also engaged with the matter. A memorandum dated 17 February 2020, which was drafted by PPO Advisor A and another advisor within the PPO, referred to the dispute between HEF and DHHS regarding its status as a RTO. It recorded that a meeting was scheduled between the minister's office and the PPO, with the 'next steps' being for the minister's office to 'develop a plan to resolve disputes and facilitate roll out of training'. The document referred to the election commitment to train frontline workers, rather than the training program underway.

Moreover, on 18 February 2020, a representative of the HWU emailed copies of correspondence between HEF and DHHS to PPO Advisor A, referring to a discussion between them and Ms Asmar earlier that day. Ms Asmar said she sent these to PPO Advisor A because there was a relationship breakdown with DHHS and she was frustrated with DHHS's approach. She did not accept that she was contacting PPO Advisor A in the hope that they would change DHHS's attitude to the contract.

On 19 February 2020, Health Advisor B contacted the WWt manager to suggest that DHHS handle the issues with HEF by a meeting, rather than an exchange of letters.

On 20 February 2020, DHHS, via external lawyers, sent a further letter to HEF, setting out DHHS's position in relation to the RTO issue, the independent review, HEF's failure to deliver updated training materials and to commit to recommencing delivery of the training, the intellectual property issues and the non-payment to the subcontractor.

In early March, HEF informed DHHS that it intended to run further training from 11 March 2020, and it was continuing to amend the training material.

On 10 March, after receiving the material, the WWt manager emailed HEF, saying:

> From a preliminary review in the very limited time available to the Department, it is clear to the Department that the updated materials are not of a sufficient quality to enable training to proceed using those materials. The deficiencies in the training materials compound the Department's concerns as to the proposed method of delivery of the training and, in particular, the absence of appropriate healthcare sector experience in the proposed trainers.

Accordingly, HEF was directed to cancel the training scheduled for the following day, as well as a further session, which was scheduled the following week.

Shortly after receiving the email, HEF forwarded the WWt manager's email to PPO Advisor A. Telephone records reveal that PPO Advisor A and Ms Asmar had two conversations on that day, at 2.26 pm (lasting about six minutes, immediately after which the email was forwarded to PPO Advisor A) and at 7.12 pm (lasting more than 12 minutes).

The WWt manager told IBAC that, shortly after sending the email, Executive Officer A requested that it be recalled. However, they were unable to do so. Regardless of having received the email, the training to 11 participants went ahead.

At 11.15 am on 12 March, a meeting was held between advisors in the PPO and the minister's office, including PPO Advisor A and Chief of Staff B. Telephone records show that, at 2.24 pm, PPO Advisor A and Ms Asmar spoke for about twenty minutes. PPO Advisor A accepted that, on one occasion, DHHS wanted to cancel scheduled training and they intervened through the minister's office, with the result that the training was not cancelled. However, they said in their response to the draft report that it was open for Health Advisor B and Chief of Staff B to decide not to reverse the decision to cancel the training. Once again, this appears to underplay the weight of influence that PPO Advisor A was able to exert.

PPO Advisor A said they mainly dealt with Chief of Staff B, who Ms Mikakos described as the 'gatekeeper' to her huge portfolio, in trying to resolve the dispute, as they were best placed to formulate the government's approach to the dispute. PPO Advisor A noted that they were outranked by the Chief of Staff in such discussions.

DHHS continued to engage with HEF about the quality of the program. On 16 March 2020, the WWt manager emailed HEF, summarising DHHS's concerns with the latest training material. The WWt manager forwarded their email to the minister's office, who provided it to PPO Advisor A.

However, on 19 March 2020, HEF advised DHHS that all further training was postponed due to COVID-19. HEF never delivered any further training under the contract. In total, HEF delivered five training sessions to 83 participants. It was paid a total of $335,000 under the contract.

On 23 November 2020, the Minister for Health approved a brief to commence the procurement process for the training promised under the election commitment, to train 1,000 workers; that procurement process involved public tenders. Ms Mikakos told IBAC this was her express wish, as things had not been going well with the contract. She understood when she resolved to have a proper procurement process that there would be 'hell to pay' from HEF and the HWU, because they had been given a clear commitment by the PPO.

Despite Health Advisor B's efforts to make the contract work, they freely acknowledged in their testimony that HEF had not performed to an adequate standard, and were not the right organisation to have developed and delivered the training program.

Reflecting on HEF's performance under the contract, Principal Policy Officer B said that HEF had underperformed at every stage, did not have the ability to take on feedback, and had constantly sought assistance from third parties without DHHS's knowledge or prior approval. They said that HEF was always treated differently by the department, and that the WWt was told to work harder by department executives to help HEF.

In her evidence, Ms Asmar disputed the accuracy of the criticisms levelled at HEF during the management of the contract. She did not accept that departmental staff might have sincerely formed a view that HEF was incapable of delivering on the contract, because, she said, it did deliver, until stopped by COVID-19.

In responding to the draft report, the union stakeholders strongly disputed the findings about HEF's poor contractual performance. They said that:

(a) IBAC did not have the expertise, nor did it seek to obtain it, to make such an assessment. In relation to its proposed findings on the personnel HEF engaged, IBAC appears to have taken on face value DHHS comments without analysing their credentials, not taken into account Ms Asmar's evidence nor (to their knowledge) have interviewed the trainers involved in developing the final training package or delivering the training.

(b) IBAC did not undertake a detailed examination of these issues.

(c) the HEF worked assiduously with the Department to deliver on their obligations under the contract right up to the middle of April 2020.

(d) IBAC did not take into account the fact that no comprehensive occupational violence and aggression training in the health sector had previously been provided in Victoria or anywhere else in Australia and, consequently, no 'off the shelf' materials, no recognised standards nor blueprint against which to benchmark a training program.

(e) while the HWU training experience was limited to industrial and occupational health and safety issues, it was most closely involved in the occupational violence and aggression problem from workers' perspective.

(f) IBAC cannot reasonably conclude the contract should not have been awarded to HEF as neither the Department nor HEF approached this matter on the basis that HEF had an existing track record in delivering occupational violence and aggression training. Instead, the RFQ proposed a staged process that involved HEF/HWU preparing course materials, conducting a pilot program and then delivering the programs over the balance of the contract period. Further, the contract permitted HEF to engage contractors to perform work on its behalf in the preparation of materials and delivery of the training.

(g) criticisms of the pilot should be significantly discounted on the basis that the purpose of the pilot was to "road test" the material and training in order to obtain feedback.

(h) based on feedback from pilot course participants and others and further consultancy work between September and November 2019, the course material was substantially amended.

(i) the feedback obtained from the training delivered in November 2019 and March 2020, the evaluation of the course from participants was overwhelmingly positive.

(j) IBAC's proposed finding that the HEF contract did not represent 'value for money' is not based on clear findings of fact and sound reasoning. The impact of the COVID-19 outbreak curtailed any judgment about whether value for money had been delivered.

(k) were it not for the advent of COVID in early 2020, the union stakeholders are confident that they would have delivered a successful training program in accordance with the HEF's contract.

IBAC accepts some of the supporting points for the HWU/HEF submission, including that the development of the training program was a staged process and that the contract enabled the HEF to engage contractors to undertake the development and delivery of the course. However, on the evidence of the interactions of the HEF with DHHS staff and the materials that the staff prepared during the administration of the contract, as described in the preceding paragraphs,

IBAC is not persuaded that the HEF had improved the quality of the training materials and course delivery to such a level that, were it not for the COVID-19 pandemic, it would have successfully delivered the balance of the program.

The evidence received by IBAC as to the current status of the contract was somewhat unclear. The contract itself was expressed to expire in October 2020. However, when they gave evidence, Executive Officer C understood that it was in abeyance. Ms Asmar thought that it had been terminated by DHHS. In any case, it is plain that DHHS does not intend to continue to engage HEF to deliver occupational violence and aggression training.

4.7.4 The involvement of ministerial advisors in management of the contract

As described above, both the minister's office and the PPO were increasingly drawn into the management of the contract as the relationship between DHHS and HEF became worse. Despite the relevant departmental staff holding a firm view that HEF's training was underdeveloped and inadequate, and later that HEF was in breach of various contractual terms, the relevant ministerial advisors continued to engage directly with HEF. They encouraged DHHS to continue to implement the contract, becoming increasingly involved in operational matters, such as the scheduling of training, and sometimes overriding the course that DHHS was proposing.

The principal point of contact between government and DHHS staff was Health Advisor B. They told IBAC that, when they assumed their role, they received a limited handover from Health Advisor A to the effect that the HWU required 'a bit of hand holding' in relation to DHHS. They explained it was a policy objective to deliver the training.

However, Health Advisor B told IBAC that, throughout 2019, their relationship with Ms Asmar deteriorated to the point where Ms Asmar would not respond to phone calls and that Ms Asmar would escalate issues to PPO Advisor A. They had a perception that Ms Asmar thought the PPO would assist her when the minister's office would not. Health Advisor B said that PPO Advisor A would call them and make suggestions about solutions to Ms Asmar's issues. Because the HWU also stopped talking to DHHS, they ended up in a 'really odd communication loop' in which Ms Asmar would call PPO Advisor A, who would call Health Advisor B, who would, in turn, call DHHS. They acknowledged they were a conduit in the loop between Ms Asmar, the PPO and DHHS, and this was inefficient.

As to the significance of PPO Advisor A's suggestions, Health Advisor B said they only contacted them on limited occasions, but that when someone from the PPO called, they would 'take heed'. Health Advisor B explained that PPO Advisor A would proffer solutions to them that they should raise with DHHS, in order to keep the HWU happy. As mentioned earlier, Health Advisor B felt PPO Advisor A's involvement meant that matters had been taken out of their hands and this undermined their role.

PPO Advisor A's view of the interactions, expressed in evidence and their response to the draft report, was that they were not on the union's 'side' and were only trying to facilitate a resolution by mediating between the parties, which was part of their job. While they dealt mainly with Chief of Staff B, they also would pass on Ms Asmar's complaints to Health Advisor B with a comment such as 'She's ringing me again…can you try and resolve it'.

IBAC does not accept that PPO Advisor A's interactions are to be characterised as impartial mediation, especially as the advisor still thought HEF could deliver the training and was not in possession of the details behind DHHS's frustration with the low quality of the program for much of the period in question.

Chief of Staff B said that PPO Advisor A thought DHHS was not engaging with the HWU constructively to assist them to deliver the contract. On 18 March 2020, they forwarded to PPO Advisor A an email from the WWt manager to HEF containing substantive feedback. They did so to show them that DHHS was being reasonable.

Ms Mikakos said the role of Health Advisor B was to see the election commitment implemented, to make sure it happened, and to remain informed about problems that arose for the stakeholder. She said all ministers and their advisors were working under a clear direction of the Premier that election commitments must be delivered.

Ms Mikakos also said that across government, advisors direct departments on implementation of policies and election commitments in many ways.

Ms Mikakos told IBAC she spoke to Health Advisor B about the training no more than a handful of times, but that she could not recall the details of the conversations. She said Ms Asmar had a reputation in her office as the most difficult stakeholder they dealt with, and that she had a 'very difficult' relationship with Health Advisor B. She said that if DHHS had serious concerns about the contract, they should have come to her.

Having been shown a history of the matter, Ms Mikakos said it should have been escalated to her much earlier on in the process. Had she been properly briefed about the risks emerging from the management of the contract, she said she may have taken steps earlier to deal with this contract. While Ms Mikakos had no recollection of Health Advisor B raising with her matters that DHHS had raised with Health Advisor B, the former minister made clear that she considered it DHHS's responsibility to escalate these contractual problems directly to the minister.

Ms Mikakos was clear that this was not a contract she would have entered into and would have advised against it. She made reference to her unease about contracting with a trade union on training issues, given the findings of the Royal Commission into Trade Union Governance and Corruption. She noted that the PPO takes a special interest in stakeholder relations with a union, and did not believe the PPO would have proposed the election commitment had it been a private provider that would do the training. She volunteered her opinion in concluding her evidence that with the benefit of hindsight, it appeared the contract had only been entered into to placate Ms Asmar during the election period, and looked like a 'way … of injecting funds into the HWU'.

PPO Advisor A told IBAC they became re-engaged in the matter after HEF began to develop and roll out the training program. They recalled that, from mid-2019, Ms Asmar began to express her view that DHHS was being 'purposefully difficult' to the HWU and would provide examples. They said they would relay the HWU's complaints to Health Advisor B.

When asked why Ms Asmar came to them, PPO Advisor A said they understood that she did not feel the minister's office was responsive to their concerns. They said their role in the PPO was to provide guidance to stakeholders who had some issue in their dealings with government and to communicate to the relevant parties on their behalf. They described that activity as a 'reflection of … Cabinet governments and the central role the Premier's office plays in sort of coordinating and facilitating … the execution of policy'. They said the purpose of their actions was to work collectively with the ministerial office to reach a resolution, rather than to unduly influence them. They said it was an ordinary incident of their role to manage a dysfunctional relationship between a stakeholder, a department and the relevant ministerial advisor.

PPO Advisor A said that, in their dealings with the training contract, they took a 'pretty persistent and optimistic view' that the issues could be resolved, and they had a 'fundamental belief' that the HWU should have been capable of delivering the training. Their belief was that, if both parties were putting in the effort they said they were, then the issues should have been resolved; and they considered it possible either that the union had failed to meet DHHS's expectations or that, as Ms Asmar had told them, DHHS 'kept changing the goalposts'. However, it does not seem that PPO Advisor A sought to establish whether Ms Asmar's complaints had substance.

PPO Advisor A said they had regular meetings with their superiors in the PPO, during which they would say what they were working on, but there is no evidence that the Premier was made aware of PPO Advisor A's conduct in relation to the contract.

In relation to her communication with ministerial advisors, Ms Asmar said she complained to PPO Advisor A because she considered that DHHS had an 'axe to grind' against HEF and was not listening to them. She said she wanted PPO Advisor A to facilitate a 'proper discussion' with the WWt manager's superiors in DHHS. She said that she went to PPO Advisor A because she did not know who else to go to; she said that, unlike Health Advisor A, she received no assistance from Health Advisor B.

Ms Mikakos described the current government as 'very centralised with the PPO having its tentacles everywhere'. She referred to the constant tension between ministerial offices and the PPO. She described her handover meeting with Ms Hennessy as being principally focused on how interventionist the PPO and Premier had been in the health portfolio.

She described the PPO as the 'gateway for any announcement' and gave the example of her proposed announcement of the redevelopment of the Frankston Hospital as a public private partnership. Ms Asmar was said to be unhappy with it being a public private partnership and, as a result, the PPO was not prepared to have Ms Mikakos make the announcement, if it would attract a hostile reaction from Ms Asmar and the HWU. Ms Mikakos also cited the situation of ministerial media advisors, who are stationed centrally at the PPO and answer to the communications deputy Chief of Staff at the PPO.

As the Premier acknowledged, ministerial advisors may have a role to play in managing stakeholders' relationships, both with government and with departments, but the extension of that role to operational matters such as contract management is fraught with difficulty and danger. In the context of the events investigated in Operation Daintree, that task is quintessentially DHHS's responsibility. However, both ministerial advisors and departmental staff believed the delivery of the contract and the election commitment meant that the government was committed to HEF's continued engagement. These combined perceptions served to undermine DHHS's ability to engage in effective management of the contract.

This problem is seen most clearly in the evidence of those departmental staff members who had direct responsibility for managing the contract.

Executive Officer C said they perceived there to be an 'underlying implied driving force' that the minister's office wanted the program to run, and that it would be difficult to terminate. They said they believed that the Premier and Ms Asmar were in contact.

The WWt manager said that despite HEF's failures under the contract, the minister's office communicated to them that the training needed to continue. They said the office's involvement hindered the contract management process. They said they were constantly explaining the issues to the minister's office, and it delayed the team taking action to cancel the contract. They felt that Health Advisor B generally understood the complexity, and was also frustrated, but that they were having separate conversations with HEF.

Principal Policy Officer A said the minister's office understood the risks, but just wanted the training to be delivered, more quickly than they thought it should be, given the continuing deficiencies in the program. They said their perception was that when HEF went through the minister's office it got whatever it wanted.

The intrusion of ministerial advisors compromised the independence and probity of DHHS's implementation and management of the contract. It appears the advisors considered that their involvement was part of their duties and included intervening in operational matters, particularly as the contract was delivering on a government commitment. It must have been obvious to them that by doing what they did, they were able to affect the manner in which DHHS discharged its responsibilities. Yet they gave no indication that they were conscious they were engaged in any 'boundary violation'. They received no guidance from their Chief of Staff or minister that it was improper to intrude in such ways into DHHS's functions.

The evidence of Ms Mikakos on this issue was revealing. While she accepted responsibility for the conduct of her office and DHHS, she said it was not her role to supervise ministerial staff, as that was the role of her Chief of Staff. As this and other evidence from the investigation illustrates, it is necessary to again refer to ministerial responsibility for the conduct of advisors, including their Chief of Staff and their department. The conventions of individual ministerial responsibility (and the Code of Conduct for Ministers and Parliamentary Secretaries) required the minister to ensure that her advisors understood the boundaries within which they could operate.

At a minimum, the convention requires a minister to answer questions from the parliament about the conduct of their advisors and its consequences (in the sense of any remedial actions that have or can be taken to address any problems it has caused or prevent a recurrence of such problems in the future), even where they are ignorant of such conduct. In addition, where the conduct has serious consequences, some commentators suggest the convention is that the minister ought reasonably to have known about the conduct and be held personally responsible for it. That is a matter for parliament to determine. In any event, Ms Mikakos is no longer a minister or a parliamentarian, so the application of the convention or the code to her is now theoretical. Nevertheless, her office's intervention in DHHS management of the HEF contract does raise issues about the adequacy of the supervisory arrangements in ministerial offices, which is addressed in the next chapter.

It is of particular concern that the Premier's submission to the draft report suggests there is a 'modern' and 'nuanced' approach to the convention, but does not articulate what the standards now are that should be applied. These are matters which require parliament's urgent consideration, so there is clarity for ministers, parliament and the public about the standards that are now to be applied if they have changed.

The Premier was similarly accountable for the conduct of his advisor within the PPO, even if he was unaware of how the stakeholder was engaging with his advisor and the action the advisor was taking in response. Again, it appears there was insufficient instruction or understanding as to the boundaries within which the advisors in the PPO should operate. The Premier's response to the draft report noted that the following appropriate management structures and processes were in place at the relevant time to ensure the Premier was briefed or advised, or his instructions sought, when necessary:

(a) Senior Advisor A reported to the Director, Policy and Stakeholders, who in turn reported to the Chief of Staff

(b) Senior Advisor A was expected to brief their Director on all aspects of their role, including policy development and stakeholder issues, so the Director could decide whether to brief the Premier or seek departmental advice to assist with briefing the Premier

(c) There were regular meetings between Senior Advisor A and the Director, the Director had an 'open door' approach so he could be alerted to issues at any time, informal briefings and advice and written briefings and advice

(d) The Director reported to the Chief of Staff and had regular meetings and other communication with the Chief of Staff

(e) The Chief of Staff provided another level of risk assessment, oversight and judgement in deciding when to brief the Premier or seek his instructions on a matter

(f) The volume of issues within Government at any time means the Premier must rely on his staff to 'collect and test information and advice' as well as seeking his instructions

(g) The Chief of Staff has an 'almost constant' and direct engagement with the Premier and thus is able to keep him appraised of matters raised through the office structure and processes.

Without attempting to assess the soundness of this management structure, given PPO Advisor A's evidence, there is no reason to conclude that their information and views were not conveyed in accordance with this process. Whether the substance of this information found its way to the Premier cannot be determined. In either event, the Premier remained accountable for the action taken.

As the Minister for Health, Ms Mikakos, was also accountable for the manner in which her department discharged its functions. The minister was also accountable for the way in which her office (sometimes at the urging of, or on the advice of, the PPO) undermined the proper functioning of her department. While DHHS kept the minister's advisor informed of the difficulties it was experiencing with the HEF contract and appeared to assume that she would convey this information to the minister, Ms Mikakos saw it as the department's responsibility to raise the matter with her.

Besides seeking to defend her advisor, this view is difficult to reconcile with her claim in evidence that the time pressures she was under, compounded by the COVID-19 pandemic, were 'why [her] staff would've been very cautious about what got escalated to [her]'. In her response to the draft report, Ms Mikakos said the context for her remark was in relation to the membership of the HEF's advisory group, which was an example of a minor issue that did not need to be elevated to her. Again, Ms Mikakos is no longer a minister or a parliamentarian. However, these events do raise questions about the adequacy of supervision of staff in ministerial offices, and effective communication between departments, ministerial offices and their ministers, which are addressed in Chapter 5: Adequacy of systems, policies and controls.

4.8 Conclusion

Operation Daintree did not find sufficient evidence to establish that any person had committed corrupt conduct within the meaning of the IBAC Act - noting that this would include a requirement to be satisfied that a relevant offence had been committed.

The investigation did, however, reveal a range of concerning conduct or failures to act in breach of the public duties and ethical obligations of ministers and ministerial advisors. It also identified conduct and omissions by senior public servants that fell short of the required Victorian public standards. IBAC considers that such conduct, if not addressed, makes Victoria more vulnerable to corrupt conduct as defined in the IBAC Act.

Those findings are that:

- HEF did not have, nor did it acquire, the expertise and capacity to effectively develop and deliver the required training. With the benefit of hindsight, some key witnesses suggested HEF should not have been awarded the contract, given its poor performance. The advent of COVID-19 meant HEF could not deliver the program in full. However, its development and delivery of the program to that point was of sufficient concern to DHHS to have caused it to have begun to commission an independent review of the program by Safer Care Victoria, and actively consider terminating the contract (notwithstanding the government's policy commitment to deliver occupational violence and aggression training in the health sector)
- the intervention of Health Advisor A, senior advisor to the Minister for Health, Ms Hennessy, in the DHHS's assessment and procurement of HEF's 'unsolicited proposal' to develop and deliver occupational violence and aggression training to hospital security and patient transport staff, improperly influenced and undermined the department's processes in assessing the proposal and approving the contract
- Health Advisor A's improper conduct was influenced by their relationship with, and lobbying by, the Secretary, HWU, Ms Diana Asmar
- the interaction of Health Advisor B, advisor to the next Minister for Health, Ms Mikakos, with DHHS over its management of the training program contract with HEF was similarly inappropriate and compromised the department's ability to perform its functions properly in relation to management of the contract
- Health Advisor B's intervention into DHHS's management of the contract was, on occasion, at the urging or suggestion of PPO Advisor A, following contact from the Secretary, HWU, Ms Diana Asmar, which was also improper in the circumstances

- the various advisors considered their interventions in the procurement and management of DHHS's contract with HEF was a justifiable part of their role in managing stakeholders and issues for their ministers and the government; however, what they actually did constituted repeated trespasses into independent processes for which DHHS alone should have had carriage and compromised both the process and the outcome
- the ALP's 2018 election commitment for a larger occupational violence and aggression training program in which the HWU (or its related entity, HEF) would be a 'partner' is likely to have influenced the advisors' behaviour towards the department in the management of the initial training contract with HEF
- Executive Officers A and B in DHHS allowed their understanding of the minister's preferred supplier to improperly affect the course followed by the advisor and DHHS in procuring HEF to develop and deliver the training (including by ignoring the advice of their own staff and the Procurement Services team on a more defensible approach)
- DHHS's perception of Minister Hennessy's preference also caused it to forgo the protections afforded it (and the government), where a perceived or actual conflict of interest arises in procuring a program from a union-related entity under a Labor government by insisting on the rigorous application of the normal procurement processes
- the extent to which the responsible health ministers during the procurement and management phases of the contract, Ms Hennessy and Ms Mikakos respectively, were aware of their advisors' and DHHS's conduct in relation to the HEF contract remains unclear; however, despite their purported ignorance of the conduct, they remained accountable to parliament about it , including explaining what had been or would be done, if possible, to address the problems identified or prevent a recurrence of the problems in the future. It would be a matter for parliament to consider (if they were still ministers) whether the conduct of their advisors in this case was sufficiently serious for the ministers to be held personally responsible for it on the basis that they ought reasonably to have known about it
- similarly, the reliance both former Ministers for Health placed on their chiefs of staff or the advice, encouragement or requests emanating from the PPO did not relieve them, while they were ministers, of their accountability to parliament for their advisors and department's conduct under the convention of ministerial responsibility including to the extent that it is codified in the Code of Conduct for Ministers and Parliamentary Secretaries
- under the same convention and code, the Premier is similarly accountable to parliament for the improper conduct of his advisor in relation to DHHS management of the contract with HEF (through their pressure on advisors in the Minister for Health's Office in response to the HWU's lobbying), notwithstanding his claimed ignorance of that conduct. It would be a matter for parliament to consider whether the conduct of his advisor in this case was sufficiently serious for the Premier to be held personally responsible for it, on the basis that he ought reasonably to have known about it.

Adequacy of systems, policies and controls 5

5.1 Strategic governance issues

The perception of improper influence causing governments to favour special interests has been growing in Australia across the last two decades.[54] The Grattan Institute has suggested:

> Well-resourced interests – such as big business, unions and not-for-profits – use money, resources and relationships to influence policy to serve their interests, at times at the expense of the public interest. … The perception of undue influence undermines trust in government and makes policy making harder: 'Undue influence – whether real or perceived – erodes the social contract underpinning democracies, and hence the system's credibility and legitimacy.'[55]

Such political patronage can manifest in a variety of ways, including relevantly for Operation Daintree, the awarding of contracts.[56]

Influence itself is not inimical to good government. Indeed, it is a necessary and healthy aspect of effective democracy that individuals and groups are able to 'advocate for themselves and make representations to their government', provided that such activity does not crowd other individuals and groups out. If certain groups or individuals obtain a disproportionate amount of influence relative to others, this imbalance can divert policy making from its public interest objectives to preferential treatment of special interests. [57]

The first section of this chapter analyses the particular influence of trade unions, specifically the HWU, on government decision-making, and whether more safeguards are necessary to ensure that influence is not gained at the expense of the public interest. It examines the failure to identify and manage actual, potential or perceived conflicts of interest, the creation of improper reciprocal obligations between government and particular interest groups, and the overall lack of transparency in the relationship between the HWU and the government.

The following sections then analyse the various aspects of how the attempts to influence government decision-making affected the relationship between successive Ministers for Health, their advisors, the PPO and DHHS. Governance issues have emerged that echo similar concerns and themes that have been experienced in many other jurisdictions in Australia and overseas.

The relationship between ministers and their portfolio departments has changed significantly in Victoria over recent decades and reflects similar changes at the Commonwealth level and in other states. Departments have become less powerful as ministers demand greater responsiveness to government agendas; departmental heads and their executive officers have lost security of tenure; and governments have increasingly looked outside the public service for policy advice and, in the case of outsourcing and privatisation, introduced greater competition and reliance on the private sector for service provision.

The role and influence of ministerial advisors is a significant theme that has become highly topical over recent decades. The number and influence of ministerial advisors has grown significantly. As well as looking beyond the public service for advice, ministers are also looking within their own offices for analysis and ideas. Advisors have become more active in initiating and delivering new policies. The growth in the number and influence of ministerial advisors has presented new issues about their accountability for their actions and the nature of their relationships with their portfolio departments. The willingness of the relevant department in this investigation to allow a ministerial advisor to interfere with its processes, and the failure to give frank and fearless advice to their minister, is one of the key themes of this report.

54 D Wood, D Griffith, K Chivers, G 2018 *Who's in the room? Access and influence in Australian politics*, Grattan Institute, p. 12.
55 Ibid., pp. 3 and 12 with the quotation from OECD. 'Preventing Policy Capture', 2017, *Paris: OECD Public Governance Reviews*, OECD Publishing), p. 3.
56 Daley, *Gridlock*, op. cit., n.24, p. 54.
57 D Wood, D Griffith, K Chivers, G 2018 Who's in the room? n.54 p.13

A third, related theme was the growth in power and influence of the Premier and the PPO. Again, a shift to more centralised control within government has become characteristic of contemporary government, but it raises important questions about individual ministers' power and responsibility for their portfolios. Similar considerations play out in the relationship between the Premier's and relevant minister's advisors.

The focus of Operation Daintree differed from the Operation Watts investigation and report, completed in 2022, in which IBAC and the Ombudsman investigated the misuse of publicly funded electorate officers and ministerial advisors by members of parliament and ministers from the Moderate Labor faction of the ALP.

The Operation Watts investigation uncovered misconduct that was so serious it justified recommendations for new offences to be created to plug gaps in the criminal law. IBAC does not intend to make recommendations for the creation of any new criminal offences as a result of this investigation.

However, both Operation Watts and Operation Daintree point to the need for non-criminal misconduct to be addressed, where it offends community expectations of public officials and diminishes confidence in the institutions of government.

IBAC notes the passage of the *National Anti-Corruption Commission Act 2022* and the wider definition of 'corrupt conduct' used in that Act, which might provide a basis for a more consistent approach between Australian jurisdictions.

Operation Watts found numerous breaches of relevant codes of conduct where the processes for making complaints and investigation were inadequate. The report made recommendations to improve such processes.

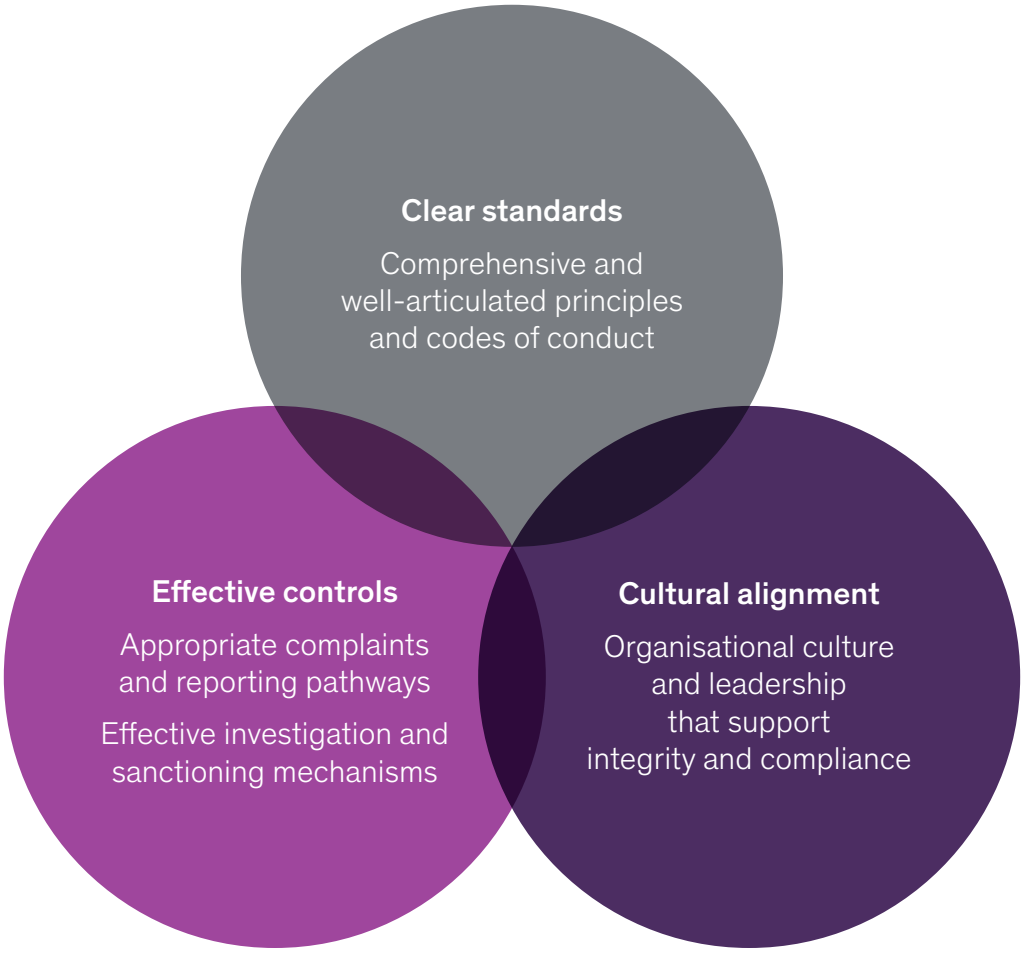
Similarly, Operation Daintree has found ample evidence of the misuse of power and influence by ministerial advisors and departmental executives who breached codes of conduct and established conventions, and a lack of appropriate supervision and control within those ministerial offices and departments, for all of which their ministers were ultimately accountable to parliament.

The pursuit by advisors of the perceived interests of their ministers, including the Premier, at the expense of proper process and standards is another example of the phenomenon of grey corruption that is of increasing concern to integrity bodies around Australia. As the Operation Watts report observed, grey corruption involves the bending or breaking of rules, even if that might not amount to criminal behaviour, but that unfairly favours the allies, friends and networks of decision makers. It corrodes standards of public governance, decision-making in the public interest and trust in government,[58] and if left unchecked increases the risk of corrupt criminal offending.

While the specific issues of public governance are different to those explored in Operation Watts, they can nevertheless be assessed against the same general integrity model used in that investigation:

58 IBAC and Victorian Ombudsman, 2022 *Operation Watts Report,* paras 812–3.

Integrity model



This model is consistent with models used elsewhere and can be applied in a variety of contexts.[59] It provides a clear and simple framework of accountability, based on its three elements, which are:

- Clear standards are comprehensive, providing both high-level principles and relevant, specific guidance for participants. Principles and guidelines are monitored and updated for relevance and effectiveness. They are visible, promoted and well understood.
- Effective controls ensure the standards are respected and that alleged breaches can be fairly and efficiently investigated. Sanctions are proportionate and are sufficiently strong to demonstrate the consequences of misconduct.
- Cultural alignment underpins the overall effectiveness of the model. Any integrity model is weak if organisational participants do not understand and support the standards and apply them in their daily activities. The role of organisational leaders in promoting an ethical culture is essential for an effective integrity framework.

59 See, for example, Organisation for Economic and Cultural Development, 2020 OECD Public Integrity Handbook, Table 2.1.

The strength or weakness of each element strengthens or weakens the other elements.

In examining the conduct of the organisations and people involved in Operation Daintree, the investigation asked whether the relevant standards were clear and understood, whether there were effective controls in place to ensure compliance and sanction non-compliance with those standards, and whether there was a culture of integrity and compliance that supported the standards.

IBAC's investigation has identified governance and integrity shortcomings that compromised the procurement process and subsequent contract management to such an extent that the program failed to deliver its intended policy outcomes. From October 2018, when the contract was signed, until March 2020, when the training was suspended due to the COVID-19 pandemic, only 83 of a planned 575 staff were trained and the quality of the training was assessed as poor.

Some of these issues have also emerged in other recent IBAC investigations and been identified in Professor Coaldrake's report *Let the sun shine in: Review of culture and accountability in the Queensland public sector*.[60] They point to systemic problems that, if addressed appropriately, would assist to slow the erosion of the community's trust in government that has been evident over recent decades.[61]

After the next section on third-party influence, this chapter then examines other public governance issues, and what might be done to mitigate the risks they pose in terms of the conduct of various actors investigated in Operation Daintree: ministers, ministerial advisors, public servants, and a union and its related training entity.

Both Ministers for Health, Ms Hennessy and her successor, Ms Mikakos, disclaimed any detailed knowledge of the circumstances surrounding the HWU's successful application for funding. Section 5.3: Ministerial advisors analyses the supervision and accountability arrangements between ministers and their advisors.

The role of ministerial advisors is also discussed in Section 5.3, including:

- their relationship to their portfolio department and attempts to influence public servants
- the guidance provided (or not) by the applicable Ministerial Staff Code of Conduct. IBAC notes that this Code of Conduct was substantially updated and released on 15 July 2022. The new version is referenced in relation to relevant changes, but the provisions of the earlier Code of Conduct issued in 2016 were applicable to the actual conduct of the advisors at all relevant times for this investigation. The guidance issued by the VPSC for ministerial officers and their interaction with public sector entities is also relevant to this issue
- their relationship and accountability to their minister
- the increased policy role, capability and motivation of ministerial advisors.

The conduct of public servants is then examined, in Section 5.4: Public servants, with a particular focus on the:

- failure to give frank and fearless advice or to resist inappropriate influence
- interference with procurement processes and contract management
- reasons for the failure to meet the necessary standards
- responsibility of leaders to ensure their employees' safety and wellbeing.

The chapter concludes with some general observations about leadership and culture, and a suggested timeline for implementation of the report's recommendations.

60 Coaldrake op cit (n.6).
61 See, for example, Wood, D et al, 2022 *Orange Book 2022: Policy priorities for the federal government*, Grattan Institute, pp. 113–114; ANU, 2019 'Trust in Government hits all time low' at anu.edu.au/news/all-news/trust-in-government-hits-all-time-low; and Wood, D 2019 'Implications of falling trust for Australia's politics and society' at grattan.edu.au/news/implications-of-falling-trust-for-australias-politics-and-society.

5.2 The influence of third-party stakeholders

5.2.1 Failing to identify and manage conflicts of interest

All major political parties have special interest groups with which they are aligned or share political views.

The governing party in Victoria at the time of the events investigated in Operation Daintree was the ALP. Trade unions, many of which are affiliated to the party at a state level, continue to exercise considerable influence over the ALP in a variety of ways, such as voting rights at state and national conferences, supplying candidates for preselection and operating as something of a 'training ground' for advisors.[62]

The HWU, as a union affiliated to the ALP, has a direct interest in trying to ensure that ALP policies relevant to its work are implemented. Ms Asmar made the point that she was required to exercise her duties in good faith in the best interests of the HWU, and that one of the main objects and main priorities of the union was the "protection, health and safety of the members."

In response to the suggestion that the Labor government might have a conflict of interest between acting in the public interest and acting to implement ALP policies that affected a union stakeholder, both the Premier and HWU submitted that policies formulated by the ALP, while influential, are not binding on a Labor government. IBAC accepts that submission. However, IBAC observes that the special relationship between the union and a Labor government can create an actual conflict of interest when the government contemplates conferring a benefit on the union, which needs to be carefully managed.

The Premier's, HWU's and Health Advisor A's rejection of the existence of a conflict of interest between the government and the HWU, by reason of the HWU being an affiliated union, is difficult to reconcile with the evidence before IBAC.

The awareness within the government and/or the ALP of the perceived or actual conflict of interest in Labor 'looking after its union mates' was demonstrated in former Minister Mikakos and Health Advisor A's testimonies, the brief to the Premier outlining options for dealing with the HWU's original training proposal prepared by PPO Advisor A, and the feedback from the Head of Scrutiny for the ALP's 2018 election campaign on the proposed election commitment training.

Health Advisor A's submission in response to the draft report went so far as to characterise the relationship of the government and the union in this context as, not so much a conflict of interest, as a 'confluence of interests' in seeking to improve or advance the interests of workers. That submission fails to recognise the need to act in the public interest and ensure that both the process to determine, and the decision to select, the most appropriate training provider should be beyond reproach.

Unsurprisingly, the HWU sought to use its affiliation to the Victorian branch of the ALP and the relationships it has developed within the party to pursue its objectives. The objectives in this case were to broaden the skills of some of its members to equip them better to deal with occupational violence and aggression. A secondary benefit was that it would create opportunities for these members to reach new classifications (and thus receive better remuneration) under the relevant enterprise agreement.

The government was faced with an actual conflict of interest in entertaining and delivering on a request from an affiliated union for a contract to enable it to deliver a training program to health workers. An election commitment for a larger program in which the union (or its related entity, HEF) would be a 'partner' was likely to have been an influential factor within the authorising environment in which the advisors and the department were working, and also contributed to most of the failings identified in this report.

62 Coaldrake op cit (n.21).

Some of the hallmarks of the union's privileged status relative to other stakeholders were evident from when it first started lobbying government on its training proposal, and during the procurement and contract management phases. For example, although it appears that the two Ministers for Health during this period did not actively prioritise the HWU's access, Ms Asmar, the Secretary of the HWU, was able to gain frequent and continuing access to advisors in the PPO and ministers' offices, and exploited that access to apply pressure to DHHS. She would also 'forum shop' among the advisors to gain maximum leverage to pursue her union's agenda.

This conduct became quite evident as DHHS became increasingly concerned about the HEF's performance, and Ms Asmar used her connections in the PPO to press the minister's office to have DHHS moderate its intentions to formally exercise its contractual rights. The HWU benefited from its access privileges, although it also encountered difficulties from time to time, for example, when PPO Advisor A sought to establish a program that would involve TAFE, or the increasingly difficult relations with Minister Mikakos, whom Ms Asmar criticised in a letter to the Premier in September 2020, and with her advisor, Health Advisor B.

An example of the overall privileged position enjoyed by the HWU was the amount of attention PPO Advisor A devoted to the HWU's original proposal, which they conceded under examination was considerably more than had the proposal been submitted by a commercial entity. In their response to the draft report, PPO Advisor A said their work only reflected the union-based nature of their liaison role. Former Minister Mikakos cast the level of union influence on the Victorian Government in a broader context stating:

> … the impression that I had was that the Premier's office would bend over backwards to accommodate any union concerns. … they would move heaven and earth to keep the union movement happy. … You just need to look at all of our EBA outcomes.

The Premier put a contrary view in his evidence suggesting that the HWU had a marginal influence on 'the political fortunes of [his] government'. Regardless of the Premier's view of the HWU's importance, it was plainly given preferential treatment by his and the Minister for Health's advisors, which resulted in an outcome that did not serve the public interest.

The long-standing historical relationship between the union movement and ALP alone should have been enough to alert those in the minister's office and DHHS dealing with the HWU's proposal of the need to manage the perceived or actual conflict of interest that would arise if the department entered into a contract with the union's related entity, HEF. It should have been readily apparent that considerable care was required to ensure the process would be, and would be seen to be, proper and able to withstand scrutiny and any allegations of preferential treatment or other impropriety.

In addition, as Ms Mikakos alluded to during her examination, the findings of the Royal Commission into Trade Union Governance and Corruption on unions' use of training funds[63] should have been a further 'red flag' about entering into a non-competitive procurement for the development and delivery of a training program by an organisation associated with and effectively administered by a union.

Ms Mikakos conceded during her examination that it 'certainly look[ed] … now' as if the HEF contract 'was a way … of injecting funds into … the HWU which had two of its high-ranking officials on the [three-member] Board of HEF'. IBAC makes no finding on this speculation, but this evidence exposes the risk of such a perception; this should have dictated that extreme care was warranted in undertaking the procurement of this training program.

However, this was not the case when considering the various advisors' conduct. The manner in which the PPO and the minister's advisor dealt with the union secretary, the referral of the proposal to DHHS, the department's response to the referral and their subsequent interaction in managing the contract, indicate little was done to address this risk.

63 Royal Commission into Trade Union Governance and Corruption *Final Report*, 2015, Vol I, paras 74–78.

Simple adherence by the advisors to the probity rules around procurement, as the Ministerial Staff Code of Conduct requires, would have shielded DHHS from the union's pressure, and helped to preserve some integrity in the process and subsequent contract management. For example, the advisors should have:

- refrained from advising DHHS of the HWU's purported airing of its frustrations with the Premier (a claim that was false and/or may have been an exaggeration of a communication with an advisor in the PPO) over the length of the process
- asked the HWU to desist from copying the minister into its correspondence with the DHHS
- declined to discuss or prosecute the HWU's wishes during DHHS's negotiation of the contract.

Further, the risk of perceived preferential treatment would have become readily apparent to the minister, had the brief that Health Advisor A agreed the WWt should prepare for the minister been formally submitted. Yet communications between Executive Officers A and B and Chief of Staff A resulted in the brief not being submitted, and Executive Officer A approving the sole source procurement from the HEF. This decision did not manage the actual conflict of interest in awarding the contract to a union-related entity without any competitive process and using justifications that could not be substantiated; rather, it deflected the risk of any allegations about preferential treatment or a lack of impartiality from the minister to DHHS.

Similarly, during the contract management phase, the advisors should have resisted the HWU's insistence that they intervene. For example, they should have:

- refused to become involved in the DHHS's request that HEF defer the training
- not pressed the DHHS to desist from formally exercising its contractual rights.

An important issue in Operation Watts was the failure of the executive branch of government to properly manage potential conflicts of interest. Operation Daintree also involves the management of conflicts of interest arising out of the government's relationship with an affiliated union. It provides an example of this serious integrity issue, and strengthens the evidence for the recommendation in IBAC and the Ombudsman's joint report on Operation Watts that the government should:

- undertake a comprehensive review of existing conflict of interest controls for ministers and ministerial staff to strengthen the identification and management of conflicts of interest
- make appropriate revisions to the codes of conduct for ministers and ministerial staff to recognise the particular risks in this area
- develop associated guidance to raise awareness of the risks associated with unmanaged conflicts of interest, and provide appropriate mandatory training for ministers and ministerial staff.

IBAC reiterates the recommendation in Operation Watts and adds that the review and related revisions and associated guidance should include consideration of conflicts of interest, in relation to employee and employer associations, and other bodies that might be seeking government funding or to increase their influence on government decision-making.

5.2.2 Creating a sense of reciprocal obligations

The creation of a sense of reciprocal obligation is another possible consequence of the preferential treatment received by some interest groups from government. For example, favourable treatment may lead to an interest group supporting the government during an election, or conversely, electoral support may generate a political commitment to future favourable treatment for the interest group.

Operation Daintree provides an example of this type of reciprocity in action. In her examination, former Minister Mikakos suggested she saw the 2018 election commitment to train a further 1,000 frontline health workers as:

> … a bone being thrown to [the HWU] to placate them during an election campaign … given [its Secretary] Diana Asmar had a reputation for being a very difficult stakeholder … [that bone being thrown b]y the Premier's office … [as she thought Ms Asmar had] complained to the Premier's office that other unions were receiving significant election commitments and she felt her union hadn't.

In her open letter on 23 September 2020 to the Premier calling for the resignation of Minister Mikakos, the Secretary of the HWU, Ms Asmar, described her union 'as a once supportive stakeholder of your government'. The threatened withdrawal of support in this letter can be seen as an attempt to influence government – in this case, to rescind its plans to have the new Frankston Hospital developed under a public private partnership – and restore the union's privileged access to the government.

While the inflammatory tone of the letter and language used in it could be regarded as 'sabre-rattling', it also points to the power and influence Ms Asmar felt she wielded over the Victorian Labor Government, and lends support to Ms Mikakos' perception that the PPO 'would move heaven and earth to keep the union movement happy'.

The Premier contested this view in his evidence, suggesting the HWU's influence on 'the political fortunes of [his] government was miniscule'. As noted previously, notwithstanding that assessment, the HWU was plainly given preferential treatment by his and the Minister for Health's advisors, that influenced the awarding and management of the HEF contract and did not serve the public interest.

5.2.3 Lack of transparency

Some commentators consider that the problem of privileged access and improper influence is compounded by the lack of transparency around government decision-making. The Grattan Institute has suggested:

> … it is hard to dispel the suspicion that grants and contracts are patronage for those associated with the government in power, because government decisions are becoming more opaque. Cabinet-in-confidence and commercial-in-confidence exceptions are increasingly used to conceal the basis for decisions and the nature of contractual arrangements. This secrecy makes it easier for patronage to flourish.[64]

DHHS's decision to seek a RFQ only from HEF excluded other potential suppliers from competing for the contract. The market and community had no knowledge of DHHS's wish to procure the occupational violence and aggression training program, until DHHS gave notice that it had entered into the contract with HEF on the government's contract website.

In Victoria, the regulation of lobbying activity to reduce the risk of improper influence on government decision-making is somewhat out of step with other Australian and overseas jurisdictions. The regulatory regime is narrow and fails to take account of the breadth of lobbying activity and the diverse nature of the organisations and people who lobby government for policy changes, grants and contracts. In some cases, the purpose of such lobbying is to deliver community benefits and may be in the public interest, but would also benefit the organisation or person undertaking the lobbying activity.

64 J Daley, *Gridlock*, op. cit., n.24, pp. 55–56.

IBAC has recently released the *Special report on corruption risks associated with donations and lobbying*,[65] in which it drew attention to the weaknesses in Victoria's regulatory framework for political lobbying. The government accepted the report's recommendations in principle. IBAC has not focused on the weaknesses of the lobbying regime in this report, but potential measures for more effective regulation of lobbying to improve the transparency of such activity to the community include:

- maintenance of a lobbying register
- publication of ministerial diaries (as currently required in NSW and Queensland)
- records of meetings between ministers and lobbyists
- recording discussions between ministerial advisors and lobbyists (and better training for advisors on managing such interactions)
- defining 'lobbying activity' to ensure that it captures any contact with government representatives that is calculated to influence government and parliamentary functions
- defining a 'lobbyist' to ensure a focus on the activity being undertaken, and that it not be confined to persons in the business of lobbying.

The Queensland Crime and Corruption Commission recently released a report that has also called for improvements in the Queensland lobbying regime.[66] One of its recommendations was to focus more on influencing activity and less on the targeting of specific types of lobbyists. It recommended that current exemptions for trade unions and in-house lobbyists employed by organisations and other interest groups should be removed.[67]

The application of transparency measures such as those recommended in the reports to dealings between governments and unions would assist in improving the conduct and propriety of such activities, and also increase public confidence in their integrity.

If 'lobbying activity' was to be defined to capture any contact with government representatives that is calculated to influence government or parliamentary functions, IBAC considers that union contact such as that identified in Operation Daintree, as well as contact by employer associations, ought to be included within the ambit of lobbying regulation. The reforms would need to be subject to any relevant provisions of the *Commonwealth's Fair Work Act 2009*.

IBAC makes the following recommendation to address the issues discussed in this section:

Recommendation 1:

That the Victorian Government ensures that lobbying activities by employee and employer associations are included in any reforms arising from IBAC's *Special report on corruption risks associated with donations and lobbying*.

5.3 Ministerial responsibility for staff

At a minimum, the Westminster conventions on individual ministerial responsibility in the circumstances of this investigation require ministers to transparently account for what their advisors and department have done[68] and, if possible, act to rectify any harm or errors that have resulted from such actions,[69] and to ensure it will not happen again.[70]

This aspect of ministerial responsibility is partially incorporated into the Ministerial Code of Conduct, through the requirement for ministers to accept accountability for the exercise of the powers and functions of their office.[71] This code also requires ministers to 'be familiar with the requirements of the Ministerial Staff Code of Conduct and ensure that their staff comply with it'.[72]

65 IBAC, 2022 Special report on corruption risks associated with donations and lobbying, Melbourne.
66 Queensland Crime and Corruption Commission, 2023 *Influence and Transparency in Queensland's Public Sector*, Brisbane.
67 Ibid., p.22.
68 Legal and Constitutional Reference Committee, 2006 *Inquiry into the administration and operation of the Migration Act 1958*, Parliament of Australia, para 1.13.
69 Ibid., paras 1.13. See also, Maddigan, J 2011 'Ministerial responsibility: myth or reality?', *Australasian Parliamentary Review*, vol. 26, no. 1, pp. 158–160.
70 D Butler, D 1997 'Ministerial Accountability: Lessons of the Scott Report', *Papers on Parliament*, no. 29.
71 Ministerial Code of Conduct, 2018 s.2.2 III.
72 Ibid, s7.1.

Both former health ministers said they had little involvement in the events investigated in Operation Daintree. If there had been no authorisation of an advisor's actions and the advisor did not at material times report developments to their minister, the key questions would become whether the supervision of their staff was inadequate, and if so, why it was inadequate, and what changes should be made to prevent or deter a recurrence of such problems. A further question would be to define the circumstances in which a minister should bear personal responsibility for the actions of their staff if they were unaware of those actions.

The evidence before IBAC indicates that former Ministers for Health, Hennessy and Mikakos, had limited knowledge of what their respective advisors were doing, in relation to DHHS procuring HEF to develop and deliver the training program, or managing the resultant contract with HEF respectively. Given the conflict between Ms Hennessy and Health Advisor A's evidence, as to the level at which the minister was kept informed, it is not possible to resolve the extent to which Ms Hennessy was informed about Health Advisor A's inappropriate communications with various DHHS staff in the Finance, Procurement and Workforce Wellbeing teams, many of whom were not executives.

It is clearer in Ms Mikakos's case that she had little insight into her advisors' repeated interventions, often through non-executive staff, into the DHHS's management of the contract with HEF (notwithstanding it was showing signs of irretrievable failure).

The evidence revealed that Health Advisor A was operating within what was described as an authorising environment. It appears it was left largely to their discretion as to how that responsibility was to be discharged and what matters they were to seek further direction on from the minister. It is not uncommon that advisors, including those in the PPO, operate within a broad authorising environment in a number of settings.

The nature of the responsibility they are given permits significant discretionary latitude in such settings. It calls for careful instruction and oversight by their respective ministers or senior staff to ensure those responsibilities are discharged within clearly defined parameters and in accordance with the protocols in dealing with the public service.

As noted above, both former ministers told IBAC how busy their roles as health ministers were; that the workforce training program was not a key priority for them; the HEF's parent body, the HWU, was a difficult, but comparatively minor stakeholder; and they relied heavily on their chiefs of staff to manage their office and workloads.

In her response to the draft report, Ms Mikakos reiterated her reliance on her Chief of Staff to manage her advisors and raise the most important issues with her. She said that no process could ensure a minister would be made aware of a particular matter in a large portfolio such as Health. She also referred to the vast number of contracts managed by the Department of Health and the relatively small size of the HEF contract.

IBAC largely accepts the former ministers' evidence. However, their claims as to their near complete lack of knowledge of their staffs' conduct in relation to the procurement and management of DHHS's contract with HEF, including their non-compliance with the Ministerial Staff Code of Conduct, if accepted, raise questions about the efficacy of the Westminster conventions on ministerial responsibility and the Ministerial Code of Conduct as accountability mechanisms, and the adequacy of the supervisory arrangements in ministerial offices.

The fact that the unsolicited proposal was from an entity established and controlled by a union affiliated to the ALP, and the conflict of interest that would have been triggered if it had been acted on, were sufficiently important for the minister's office to elevate the issue to the minister's attention.

It is said that the Westminster conventions are contestable and, to some extent, depend on the circumstances of a matter and its significance. The submissions that IBAC received in response to its draft report suggest the application and scope of the Westminster conventions on ministerial responsibility are, to a degree, uncertain, unclear and contested, and subject to 'parliamentary practice and the political dynamics in play at any given time'.[73] This highlights the need for clarity about the standards that ministers are to apply in managing their responsibilities.

73 Premier's submission, p.4

Ministers must still account for the actions of their portfolio entities to parliament and provide an explanation of what action has been taken to remedy a situation or to prevent it recurring. Among ministers and their advisors, and senior public servants, there has been a growing sense that the extent of personal ministerial responsibility for all actions of portfolio departments and agencies has altered as the complexity of government has increased, as too have the number of formal scrutiny mechanisms for holding it to account. There is uncertainty as to the scope of ministerial responsibility, and a pressing need for clarity on the extent to which ministers ought to be held responsible for their staff's conduct.

It is clear that scrutiny mechanisms for ministerial advisors have not expanded at the same rate as for the rest of executive government, despite the significant growth in numbers and influence of the advisor cohort over recent decades. If the Westminster conventions on personal ministerial responsibility are to have any meaningful application, they should at least apply in relation to ministerial staff.

Considerations of complexity and significance might apply up to a point, but, in the absence of more formal structures and accountability mechanisms, the Westminster conventions remain directly applicable for ministerial staff.

Support for this proposition can be seen in the approach taken to the occasional desire of parliamentary committees to call ministerial advisors as witnesses. Advisors have not been permitted to appear before Victorian parliamentary committees, because of the principle that ministers must be held accountable for the actions of their advisors. It follows that ministers should not be able to disavow their advisors' actions, while they refuse to allow them to testify before parliamentary committees.

The Howard Government's 1998 *A guide on key elements of ministerial responsibility* acknowledged that ministers' direct responsibility for the actions of their personal staff is, of necessity, greater than it is for their departments. The Ministerial Code of Conduct provides for ministers to be accountable for ensuring that the conduct of those in their office, who act on their behalf, is consistent with the responsibilities of their office.

The particular issue that arises in this investigation, in which both health ministers claimed lack of knowledge of the actions of their advisors and of the information known to their advisors, is whether they should be responsible for actions and information that they might reasonably be expected to have known about.

It is not too strict an application of the conventions and principles to say that, in the environment of current political practice and in the absence of robust alternative accountability structures, parliament should be able to hold a minister personally responsible for matters of which they ought reasonably to have known. Otherwise, a minister can conveniently deploy the shield of plausible deniability when being questioned about the actions of their office.

IBAC acknowledges, as former Minister Hennessy put it, 'the life of a health minister is very busy'. It also recognises that these conventions and the Ministerial Code of Conduct might impose an additional burden on an already busy minister.

IBAC accepts Ms Hennessy's evidence that her focus was on issues and stakeholders other than the HWU and HEF's proposed training program during her time in the portfolio. Given the scale of the portfolio's responsibilities, Ms Hennessy testified that she placed considerable reliance on her Chief of Staff and their judgement to keep her appraised of significant and material matters that were not within her current priorities.

Former Minister Mikakos succeeded Ms Hennessy in the Health portfolio. Like Ms Hennessy, Ms Mikakos emphasised how busy the portfolio was and her reliance on her Chief of Staff to act as a 'gate-keeper', while allowing advisors one-on-one access to her. She said she had confidence in the integrity, professionalism and work ethic of her staff and that there was a process in place for them to liaise with her Chief of Staff about issues needing to be raised with her. Ms Mikakos noted that her priorities as Minister for Health were the delivery of the government's large infrastructure program and managing the COVID pandemic.

In that context, she conceded she took 'very little interest' in the 'very small' election commitment to train another 1,000 frontline health workers and considered the HEF training program was 'not a priority'. Ms Mikakos further explained that her considerable workload and priorities were 'why [her] staff would've been very cautious about what got escalated to (her)', such as HEF's poor performance under the contract with the DHHS in delivering and developing the training program. Nevertheless, she said she expected the department to elevate important issues to her and that ministerial responsibility was only meaningful when frank and fearless advice is provided by departments.

Both former ministers' reliance on their chiefs of staff to manage their offices represented a sensible means to try to manage their responsibilities. However, in this case, the respective ministers' reliance on their chiefs of staff and advisors' judgement to prioritise issues for their attention was misplaced, because the chiefs of staff and/or relevant advisors:

- considered they had the authority to act; or
- did not assess the matter as being sufficiently significant to bring to the minister's attention, notwithstanding the need to manage the conflict of interest in the government engaging an affiliated union without a competitive process to deliver the training program; and/or
- sought to manage the issue in a manner that avoided the minister's need to engage with it.

In addition, authorisation of their chiefs of staff does not abrogate their accountability to parliament and potential personal responsibility for actions they authorise, are aware of, or ought reasonably to have been aware of. In such instances, any failure of the Chief of Staff to ensure that the advisors observed their own Ministerial Staff Code of Conduct might also be a failure of the minister. Whether constructive knowledge of HEF's contract procurement and subsequent management should actually be attributed to the ministers (if they were still serving as ministers) would be a matter for parliament.

Coaldrake has suggested that while '[t]he enthusiasm and energy [young ministerial staff] bring to these advice roles is to be admired, … their youthful enthusiasm can be guided by experienced supervision.'[74] IBAC notes that the three most recent versions of the Ministerial Staff Code of Conduct provide that staff who are uncertain about an appropriate course of action should consult with their Chief of Staff or the Premier's Chief of Staff.[75]

PPO Advisor A, in their response to the draft report, said they were in fact in regular contact with their director and Chief of Staff in the PPO about the issues they were managing, and that they acted in accordance with their guidance. If so, it would be reasonable to infer that these were matters about which the Premier and his Chief of Staff knew or ought reasonably to have known.

Whether consultation by advisors in other ministers' offices with the Premier's Chief of Staff is desirable should be revisited, as it has the potential to further diminish the relevant minister's role and further increase the sphere of influence of the PPO.

The failure of anyone to detect and remedy the ministers' advisors' non-compliance with the convention prohibiting interactions with non-executive public servants was a significant contributing factor to the compromised procurement process and subsequent contract management in this investigation. These defects contributed to the approval of the contract and the near complete failure of the training program.

Neither Ms Hennessy nor Ms Mikakos are current members of parliament or ministers. The question of whether they may have breached any standards in the Ministerial Code of Conduct is now redundant in the formal sense but is still relevant to the question of whether changes in the ministerial accountability framework are necessary.

74 Coaldrake Interim Report, n24, p. 21.
75 Ministerial Staff Code of Conduct, 2019, s.6.2, and Ministerial Staff Code of Conduct, 2022 s.6.5.

Mr Andrews is still a member of parliament and the Premier. He is the formal employer of all ministerial advisors and has additional, direct responsibility for the actions of the PPO staff that he authorises. He remains accountable to parliament for the conduct of his staff and its consequences, regardless of whether or not he has personal knowledge of it, and parliament may hold him personally responsible for the conduct of his staff and its consequences, where he was aware of their actions or ought reasonably to have been aware of them.

The management of the large number of staff in the PPO acknowledged by the Premier to be '70 or 80'[76], presents particular difficulties. The Premier acknowledged in his evidence that in a number of settings, there was an authorising environment for advisors to negotiate within the parameters of the government's policy preferences. In this case, the setting was the provision of occupational violence and aggression training to frontline health workers and the policy preference for the use of TAFE to deliver this type of occupational training.

The Premier, as the minister responsible for the conduct of the PPO, cannot assign that responsibility to his Chief of Staff. IBAC notes that the most recent version of the Ministerial Staff Code of Conduct indicates that the Premier has delegated staff employment functions to his Chief of Staff.[77] This makes more public the arrangement that has been in place for managing the employment of ministerial staff in Victoria, since the Ministerial Staff Collective Agreement (Vic) 2015.[78]

It also underlines the importance of adequate communication between the Chief of Staff and their minister, because it does not relieve the Premier of their overarching accountability for the actions of their PPO staff under the Ministerial Code of Conduct and general Westminster conventions.

The question of whether these conventions and the Ministerial and Ministerial Staff Codes of Conduct are sufficiently well known and understood by ministers and their staff is addressed in the investigation's recommendations below.

Recommendation 2:

That the Victorian Parliament request the Parliamentary Ethics Committee (to be established as a result of the Operation Watts report) to prepare guidance about the scope of the convention on ministerial accountability and its application to Victorian government ministers.

Recommendation 3:

That the Premier ensures that:

(a) the Ministerial Code of Conduct is amended to be consistent with any guidance issued by the Parliamentary Ethics Committee in implementing Recommendation 2

(b) the Ministerial Code of Conduct is amended to require all ministers to:

- observe the relevant protocols and conventions in providing instructions to, and communicating with, departments
- ensure that their offices have effective arrangements for the supervision and accountability of staff, escalation of issues and clear lines of communication
- ensure that their staff observe the relevant protocols and conventions in communicating with departments
- complete a mandatory induction program
- undertake mandatory refresher training on the Ministerial Code of Conduct
- be fully aware of their obligations under the Ministerial Code of Conduct and their staff's obligations under the Ministerial Staff Code of Conduct
- ensure the scope of all advisors' authority is clearly defined, and the manner in which they may discharge their functions is consistent with the Ministerial Staff Code of Conduct and the protocols about interactions with public servants.

76 Note that the number of staff employed in the PPO was stated to be 87 in evidence from the Secretary of the Department of Premier and Cabinet to the Parliamentary Public Accounts and Estimates Committee in 2021.
77 Ministerial Staff Code of Conduct, 2022 s.3.2.
78 Clause 1.2 of that agreement defines the Premier as the employer and indicates that '[f]or the purposes of this Agreement, the Premier's Chief of Staff shall be deemed to be acting with the delegated authority of the Premier'.

5.4 Ministerial advisors

Chapter 2 referred to the growth in the number of ministerial advisors, their increasing sphere of influence and the centralisation of government. The Premier, in his evidence, said that 70 or 80 staff were employed in the PPO. In 2021 the government provided data showing that 286 were employed across all ministerial portfolios. Such growth in a part of government that is nearly invisible in formal accountability terms raises many questions about influence and transparency at the heart of government.

The expansion in numbers also brings its own organisational challenges, in respect of how such a large staff cohort is fairly and effectively managed. Measures to respond to such strains can be seen in the Ministerial Staff Code of Conduct and suite of related polices, issued in July 2022, to deal with a range of employment issues[79], the express delegation of employment functions from the Premier to the Chief of Staff, and in the appointment of a general counsel within the PPO, one of whose functions is to be involved in aspects of the dispute resolution and disciplinary processes created in the new Ministerial Staff Code of Conduct.

The introduction of formal internal structures and processes necessary to manage such a large body of advisors invites further consideration of their influence, and the transparency of their work in the context of an open and democratic government. There are no existing standards that govern the relationship between advisors in the PPO and advisors in other ministerial offices.

The increasing number, role and influence of ministerial advisors has generated a concomitant risk of them crossing boundaries into the functions of the minister and their departments, and engaging in conduct that is inappropriate at best and corrupt at worst. The advisors, as was stark in the case of Health Advisor A, were often left to work within an authorising environment with little or no instruction as to how they may discharge their responsibilities.

In the events investigated in Operation Daintree, safeguards designed to protect the public interest through regulating the relationship between ministerial advisors and public servants appear to have been either unknown or ignored. This may be because they were seen not to matter particularly and few, if any, consequences seem to arise from their transgression. Such conduct, and the suspicion of such conduct, can lead to the government acting, or being perceived to act, in favour of special interests and, therefore, against the public interest, and diminishes public trust and confidence in public administration.

The risks of misconduct are exacerbated by the pressures that usually characterise the operation of a ministerial office. Former Commonwealth Minister, Lindsay Tanner, has referred to the 'intimacy in a ministerial office [borne of] … ridiculous hours … living in each other's pockets … [in] relatively small areas … under intense pressure'.[80]

The United Kingdom government has not expanded the role of ministerial advisors, known as special advisors, to nearly the same extent as in Victoria. Nevertheless, it has been sufficiently aware of public concern about the potential size and influence of ministerial advisors to legislate a requirement for the Minister for the Civil Service to publish an annual report detailing the number and cost of special advisors employed by the government.[81]

The Annual Report on Special Advisers 2021 recorded the employment of 113 special advisors, as of 31 March 2021, at a cost of £11.9 million.[82] It also advised that the British Civil Service had 505,090 civil servants at the same date.

79 The code and suite of policies are available at www.Premier.vic.gov.au/policy.
80 Yee-Fui Ng, 2018 *The Rise of Political Advisors in the Westminster System*, Routledge, p. 128.
81 Constitutional Reform and Governance Act 2010 (UK) s.16.
82 Cabinet Office UK, Annual Report on Special Advisers 2021, p. 2.

The Victorian Government does not publish information about the total number of ministerial advisors who work for it, although in response to a question at the Public Accounts and Estimates Committee hearings for the 2019–20 Budget Estimates for the Department of Premier and Cabinet, the department advised that 87 ministerial staff were employed in the PPO and 287 were employed across all ministerial offices. It is unclear whether some of these staff were administrative staff or media advisors. The VPS had 58,452 public servants, as at June 2021,[83] which was just over one tenth the size of the British Civil Service.

The recommendations relating to ministerial advisors and staff appear at the end of Section 5.4.

5.4.1 Ministerial Staff Code of Conduct

The recent publication of the Ministerial Staff Code of Conduct adds to the transparency of government standards and allows more informed public scrutiny of government conduct. The updating of the code and the publication of more specific, complementary policies, such as the Misconduct Policy and Procedure will also improve transparency and public scrutiny. In addition, IBAC considers that the consequences of a breach of the Ministerial Staff Code of Conduct should be included in the Public Administration Act or dedicated legislation specifically dealing with ministerial officers. Such provisions would bring the consequences of breaches of the code into line with those under the VPS Code of Conduct,[84] and signal to advisors, ministers and the community the potential seriousness of a transgression of the code.

Notwithstanding that the current code forms part of their contract of employment and breaches of it could lead to their dismissal, most advisors who appeared before IBAC in Operation Daintree and other operations displayed very little familiarity with its content and their obligations under it. Some had no recourse to it during a lengthy period as an advisor.

Despite their relative ignorance of the Ministerial Staff Code of Conduct, the ministerial advisors (and also ministers), examined as part of Operation Daintree, demonstrated a general understanding of the requirement that the department and its staff should be allowed to perform their roles free from interference, particularly in procurement processes. This appreciation of the risks of such inappropriate intervention did not, however, constrain advisors from engaging in the proscribed conduct, which undermined the procurement. Ministerial or political objectives, combined in some cases with inadequate supervision, overrode the constraints of the code and resulted in the selection of an unproven organisation connected to the HWU to design and deliver an inadequate training program.

Given the advisors' high degree of ignorance of their code and the standards of conduct expected of them that was uncovered in this investigation, IBAC proposes that the government review its induction procedures for all new ministerial staff, to ensure they all understand these standards, how the public sector operates, the role of public servants and the relationship they should have with them.

The changes included in the new Ministerial Staff Code of Conduct, such as the inclusion of 'Respect' as a discrete value, and the clarification recommended by the Operation Watts report that party political work should be explicitly prohibited during work hours, are important steps in lifting the standards of integrity. The new requirement to report unethical behaviour is particularly welcome.

Nevertheless, the new code would benefit from further changes. For example, the types of conduct addressed under the value of Integrity focus on conflicts of interest, public appearances and social media, probity in tendering, government and parliamentary resources, outside employment and post-employment. These are all important matters, but a comparison to the VPS Code of Conduct or ministerial staff codes in other jurisdictions reveals some gaps.

83 VPSC, accessed at https://vpsc.vic.gov.au/data-and-research/data-facts-visuals-state-of-the-sector/employee-numbers/.
84 See definition of misconduct in s.4(1) and ss.33 and 61 of the Public Administration Act.

For example, there is:

- no explicit general requirement to act honestly and with integrity in the course of their employment [85]
- no prohibition on asking, encouraging or inducing a public servant to do anything inconsistent with the VPS Code of Conduct.[86]

The Ministerial Staff Code of Conduct should also include a provision drawing ministerial staff's attention to the responsibility of their minister for the minister's staff's actions, under the Ministerial Code of Conduct and Westminster conventions. The Ministerial Staff Code of Conduct is complemented by the *Guide for ministerial officers in the Victorian public sector*, prepared by the VPSC for ministerial staff on working with the public service. The guide was initially produced in 2011 and the most recent version was published in June 2022. It provides a summary account of the structure of the VPS, the advisor's role and their relationship to the public sector. A short section on building relationships with public servants notes that ministerial officers do not have any legal authority to direct public servants. It also provides that a ministerial office:

> may, at the discretion of the secretary, have direct working relationships with specific senior departmental staff to allow day-to-day activities to take place effectively and efficiently.

IBAC is aware the VPSC is revising its guidance. It recommends that the new version should be more expansive about the nuances of the relationships with public servants and the need for advisors to be aware of the limits of their authority, to be mindful of the power that is inherent in their position, and to act in ways that do not inhibit the capacity of the VPS to provide frank, impartial and timely advice. The guidance would also benefit from a more detailed focus on managing conflicts of interest with third-party stakeholders.

IBAC considers that a comparative analysis of other relevant public sector codes in Victoria and other jurisdictions would assist to lay the foundation for further improvements for ministerial staff in Victoria.

Although the code and guidance could be improved, the greater challenge is to shift a culture where conduct breaches can be ignored or not treated seriously. A greater emphasis on ongoing professional development for ministerial advisors would provide further opportunities to reinforce the importance of the Ministerial Staff Code of Conduct and related guidance, and for advisors to consider ethical dilemmas they may face, or have faced, in light of their actual experience in performing the role.

The importance of compliance with the conduct standards needs to be understood and stressed by those in leadership positions in the government. Of the three integrity elements identified in the integrity model in Section 5.1: Strategic governance issues, lack of cultural alignment is often the most difficult to implement.

The approach that has been adopted in other jurisdictions, such as the United Kingdom and Canada, is to apply the Civil Service Code or a general code of conduct to ministerial staff, with exemptions from any values or standards that would be inappropriate to their role, such as impartiality, and the addition of others that may not apply to public servants, such as prohibitions on lobbying roles for set periods after their employment as advisors.[87] This approach would align and make consistent, to a greater extent, the standards of conduct expected of public servants and ministerial advisors (and the values underpinning them). Some of these considerations could readily be incorporated in the code when it is amended.

85 See, for example: VPSC, *Code of Conduct for Victorian Public Sector Employees*, s. 3.1; and Commonwealth Special Minister of State (Cth SMOS), *Statement of Standards for Ministerial Staff*, s. 1 at www.smos.gov.au/ministerial-staff-code-conduct; and Canadian Privy Council Office, op. cit, n17, p. 90.

86 See, for example: Cth SMOS, ibid., s. 10; [UK] Cabinet Office, op cit, para 5; [Canadian] Privy Council Office, op cit, n17, p. 90; the [Commonwealth] 2022 *Statement of Ministerial Standards*, s.5.2 at www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2022/April/Update_to_Statement_of_Ministerial_Standards; and the [Victorian] *Code of Conduct for Ministers and Parliamentary Secretaries*, s. 2.6.

87 See, for example: [UK] Cabinet Office, 2016 *Code of Conduct for Special Advisors*, paras 8 and 17, and Annex A at www.gov.uk/government/publications/special-advisers-code-of-conduct; and [Canadian] Privy Council Office, 2015 *Open and Accountable Government*, Annex I (p. 89ff) and A (p. 16ff) at https://pm.gc.ca/en/news/backgrounders/2015/11/27/open-and-accountable-government.

5.4.2 Directing or influencing public servants in the performance of their role

IBAC has obtained evidence in Operation Daintree that suggests the practice of advisors instructing, influencing or applying pressure to public servants is not uncommon. Similarly, the Coaldrake review into ethics in the Queensland public sector observed '[o]ne of the most frequent concerns raised during the consultations has been the perceived overreach of ministerial staff'.[88] In her examination, Ms Mikakos advanced the view that 'you will find across government that ministers' offices direct departments on the implementation of policies and election commitments … in many ways'.

As demonstrated in Chapter 4: What IBAC's investigation found, a central feature of the compromised and failed procurement investigated in Operation Daintree was the perception of departmental staff that the Minister for Health's expectation was that HEF would be awarded the contract to deliver this training. That perception was the result of the way in which the ministerial advisor initially conveyed the HEF proposal to DHHS, and their subsequent interactions with staff during the funding and procurement phases.

Senior DHHS executives shared the same perception and considered the grant of the contract to HEF would fulfill a government commitment. They allowed the advisor to intrude and influence their staff. Further, the staff were aware of the access afforded to the Secretary of the HWU, who made her expectation known to the staff that the government wished HEF to be the approved provider.

These factors provided formidable challenges for the staff in the procurement process. Former Minister Hennessy, the Premier and Health Advisor A all acknowledged during examinations that advisors need to exercise considerable care in their communications with the department on procurement, to avoid creating any impression that the minister or government has a preferred outcome. Unfortunately, such care was not applied in this case.

DHHS's perception that the contract with HEF delivered on a government commitment continued into the contract management phase. Although there had been a change of minister and advisor following the 2018 state election, DHHS's perception was reinforced by the repeated entreaties from the minister's office for it to meet with the HWU and/or HEF to discuss HEF's performance and other issues that had arisen, rather than take a more formal approach, including action to terminate the contract.

Much of the influence of the ministerial advisors in these events arose from how departmental staff interpreted what the advisors were requesting, and from concerns of those departmental staff about the consequences if they did not comply with what the advisors were requesting. However, on occasions, the direction to act or desist from acting was explicit. One of the starkest examples of this conduct was the countermanding of DHHS's direction to HEF to cancel forthcoming training sessions. The Secretary of the HWU (and Director of HEF) complained to PPO Advisor A, who then requested an advisor to the Minister for Health to have DHHS withdraw their direction to HEF.

The influence of ministerial advisors in DHHS's procurement of the training program and subsequent contract management undermined the public interest in the delivery of effective, value-for-money occupational violence and aggression training to hospital security and patient transport staff.

A related convention to the protocol about giving instructions to public servants is that ministerial advisors should only interact with executive officers in a department. Again, the evidence demonstrated this convention was not always adhered to. The advisor's proximity to the minister creates a power imbalance with less senior public servants, and the application of pressure in these circumstances can represent an abuse of that power.

88 Coaldrake, op cit, n.24, *Interim Report*, p. 21.

As set out in Chapter 4: What IBAC's investigation found, IBAC found that ministerial advisors in the Minister for Health's Office regularly contacted non-executive staff about the procurement of the training program and management of the contract with HEF. Several witnesses testified that such communications were inappropriate, including the Premier, who commented that reaching down further into the department was not normal or wise.

IBAC has identified that these contraventions of the VPSC guidance and other conventions sometimes arose from ignorance, but more often because they were simply ignored. Coaldrake has made a similar finding in Queensland, noting 'awareness and observance of the [Ministerial Staff Code of Conduct] is uneven'.[89]

5.4.3 'Filtering' departmental advice

The Ministerial Staff Code of Conduct acknowledges that ministerial advisors play 'a key role in facilitating direct and effective communication between their Minister's department and the Minister'.[90] Yee-Fui Ng has characterised this role perhaps more accurately as 'filter[ing] advice that comes to the minister'.[91] As noted above, such filtering can lead to uncertainty for a department as to whether its advice has been conveyed to and considered by the minister, and whether any resultant directions from an advisor are given with the minister's authority.

One of the witnesses to a 2003 United Kingdom inquiry expressed the concern that 'the [ministerial] advisor may become a gatekeeper, and that civil servants do not have access to the Minister to provide advice, they merely become the recipient of instructions, one way or the other'.[92]

Operation Daintree has revealed a situation where the department was regularly briefing an advisor about the difficulties it was encountering with HEF's performance under the contract, on the probable assumption the advisor was keeping the minister appraised of the situation. However, former Minister Mikakos claimed she knew little about the issues, and insisted it was the department's responsibility rather than her advisor's to 'come and discuss [their serious concerns about the contract] with me'.

This view, however, is hard to reconcile with the important filtering function she saw her advisors playing:

> I think [Counsel Assisting is] not really understanding the time pressures that a minister is under. This is why my staff would've been very cautious about what got escalated to me.

In her response to the draft report, Ms Mikakos said she was referring to the fact that not all issues needed to be raised with her and gave as an example the membership of the advisory group that was to be formed to advise the HEF. However, IBAC believes that the limited information the advisor provided to the minister might also have been influenced by the PPO's insistence that DHHS work with HEF to try to salvage the training program. It is possible that PPO Advisor A's position deterred Health Advisor B from raising the option for termination more formally with the minister. PPO Advisor A in their response to the draft report strongly objected to such an inference being drawn.

Ms Mikakos implied that had the department formally raised the serious problems with HEF's performance with her, she would have supported some strong action. In support of that claim, Ms Mikakos pointed to her later decision to approve DHHS conducting an open tender for procurement of the election commitment to train an additional 1,000 health workers, based on the department's advice on HEF's less than 'stellar job to date' on the initial contract. She made the decision, despite her understanding of the 'clear commitment from the Premier's office' that HEF would be awarded the election commitment contract.

Since these events, and in response to the COVID-19 Hotel Quarantine Inquiry, the VPSC has developed and published its *Secretaries guide for informing and advising ministers: A guide for secretaries when working with ministers*. Included in that publication is the following guidance to secretaries (and other executives responsible for advising ministers):

> Providing information to an advisor does not equate to briefing the Minister. Where there is any uncertainty as to whether a Minister is aware of a particular matter that a Secretary thinks the Minister should be aware of, the Secretary should seek direct confirmation from the Minister as a matter of clarification.[93] …

89 Ibid., p. 21.
90 Ministerial Staff Code of Conduct, 2022, s.5.9. See also s.9 of the 2009 Code.
91 Yee-Fui Ng, op cit, n.80, p. 116.
92 [UK] Committee on Standards in Public Life, 2003 Defining the Boundaries within the Executive: Ministers, Special Advisers and the permanent Civil Service, Ninth report Cm5775, para 7.12.
93 VPSC, Secretaries guide for informing and advising ministers: A guide for secretaries when working with ministers, pp. 9–10.

> Secretaries should always remember that they work to support the Minister rather than their advisors. They should also bear in mind that [among other things …] a Secretary should confirm that information that the department is providing to an adviser for the purpose of briefing the Minister is in fact reaching the Minister and is not being filtered, including through the use of endorsed briefs where necessary.[94]

Had such a process been followed in the events examined in Operation Daintree, DHHS's management of the HEF contract would probably not have been so compromised.

The VPSC's two guides, *Secretaries guide for informing and advising ministers* and *Officer and executive guide for informing and advising ministers: How to work with ministers if you're a VPS executive or officer*, provide useful and valuable assistance for the public sector in its interactions with ministers and their offices. They emphasise the importance of a secretary developing protocols with a new minister (and their Chief of Staff), so the department can best support the minister.[95] Such protocols must include a provision for ensuring that important advice and briefings are not inappropriately 'filtered', but are conveyed to and responded to by the minister. In that regard, such guidance should be a feature of the proposed mandatory induction and ongoing professional development.

As previously noted, IBAC understands the VPSC is revising its existing *Guide for ministerial officers in the Victorian public sector*. In addition to explaining public sector organisation and processes, the guidance should provide more comprehensive assistance on the importance of advisors acting within the scope of their authority, and ensuring they are aware of their obligations in their relations with departments and agencies.

Operation Watts drew attention to the need for more active monitoring and identification of potential conflicts of interest by ministerial offices, a recommendation that has been reinforced by the findings of this investigation. The Queensland Government's *Protocols for communication between ministerial staff members and public service employees*[96] provides a useful comparative model.

5.4.4 Ministerial staff accountability

Under the Ministerial Staff Code of Conduct, advisors, 'in line with Westminster principles, are accountable to their Minister'.[97] The VPSC's guide for ministerial staff also makes clear that: 'Ministerial Staff are employed by the Premier and in line with Westminster principles, are accountable to their Minister.'[98]

Chapter 2 of this report referred to commentators' views that advisors are conveniently invisible to external scrutiny and are relatively unaccountable for their actions. Others have contested that view, suggesting that in the Commonwealth context, 'advisors are highly responsible because their minister can hire and fire them at will'.[99]

The same observation could be extended to Victorian ministerial advisors, although they are employed by the Premier, rather than individual ministers, under an enterprise agreement.[100] However, as Daley has pointed out, the counter-argument is that the apparent precariousness of their employment 'merely ensures that their primary focus is to protect their minister and their party rather than to serve the public interest'.[101]

94 Ibid., p. 16.
95 op cit n.31
96 Queensland Government, *Protocols for communication between ministerial staff members and public service employees* at https://www.forgov.qld.gov.au/employment-policy-career-and-wellbeing/directives-policies-circulars-and-guidelines/protocols-for-communication-between-ministerial-staff-members-and-public-service-employees.
97 At s.5.1.
98 op cit n.95
99 See, for example: Ashpole, L 2012, 'Ministerial Advisors: How Ministers Shape Their Conduct, A Study of Ministers and Advisors in the Rudd Government', (University of Sydney) cited in Daley, J 2021 *Gridlock*, op. cit., n.24, p. 48; and Mulgan, R 2012, 'Advisors are already held to account', The Ethics Centre.
100 The current agreement is the Ministerial Staff Collective Agreement (Vic) 2019, which came into effect on 23 September 2019. The previous agreement was the Ministerial Staff Collective Agreement (Vic) 2016.
101 Daley, *Gridlock*, op. cit., no.24 p. 48.

The 2009 Ministerial Staff Code of Conduct, which preceded the 2016 version that was applicable to the matters subject to this investigation, included a provision applying the VPS Code of Conduct to ministerial staff 'where applicable'. If it had still applied at the time of the events examined in Operation Daintree, a number of guidance notes in the 'Demonstrating Accountability' chapter of the VPS Code of Conduct would have been relevant. While such an analysis is hypothetical, it is a useful exercise in contrasting the different standards of accountability required of ministerial staff and public servants under their respective codes of conduct. In some instances, it is difficult to understand why a different standard should be applied, and such a comparative analysis, therefore, points to some potential areas for reform in the Ministerial Staff Code of Conduct.

For example, the VPS Code of Conduct requires public servants to 'ensure they are aware of and comply with all legislation relevant to the performance of their duties'.[102] As noted above, the guidance in this code, together with its integrity guidance, brings the financial management regime, including compliance with supply policy, squarely into this requirement. While advisors in this investigation showed an awareness of this requirement under examination, their conduct was less than rigorous in trying to adhere to it in practice. The 2016 and current Ministerial Staff Code of Conduct require ministerial staff to observe probity in tendering requirements, without further guidance as to the content of this requirement.

Based on recollections of the chiefs of staff and former ministers, advisors also on occasion neglected to advise or inform their minister or Chief of Staff on matters that should have been communicated to them. Former Minister Hennessy testified that she was unaware of her advisor's dealings with the HWU on the training proposal, its referral to DHHS and the department's procurement of HEF to deliver the training program.

It will always be difficult to determine when ministerial advisors, operating within a loose authorising environment, act beyond their ministerial authority, when the ambit of that authority has not been sufficiently defined. For departmental staff engaging with the advisor, however, the perception will invariably be that the advisor has the authority to act as they do. Here, the advisor had requested the staff to prepare a proposal for the minister that she approve HEF as the sole provider.

Staff in DHHS's WWt, acting on the understanding that the HEF proposal was the minister's preference for how the occupational violence and aggression training would be delivered, prepared a brief seeking the minister's approval of the proposal or, alternatively, a limited tender of identified suppliers, including HEF. That brief was never submitted to the minister and was overridden by the deputy secretary.

The intrusion of a ministerial advisor into departmental processes continued during the contract management phase of DHHS's agreement with HEF, notwithstanding the change of minister and advisor after the 2018 state election. The new advisor made repeated requests, sometimes at the PPO's urging, for DHHS to resolve issues with the HWU and/or HEF through discussion, rather than exercise its contractual rights, including to terminate the program. This again reinforced the impression that this was the minister's preferred path. DHHS's increasingly strained relationship with the Secretary of the HWU and her propensity to leverage the union's political connections buttressed this impression. The HWU's pressure on DHHS through its political connections is discussed further in Section 5.3: Ministerial responsibility for staff, above.

IBAC found that failure to adhere to the rules, where they are known, may be driven by political imperatives and a view that compliance is optional. Such conduct may also flourish where consequences rarely seem to arise from their breach. The most compelling example in Operation Daintree is ignoring the prohibition on interfering in procurement processes in the Ministerial Staff Code of Conduct.

102 op cit n.29.

Advisors testified under examination to their awareness of this rule, but their conduct belied any commitment to comply. Justifications for this conduct, in terms of wanting to ensure a timely process and that a stakeholder was afforded a fair hearing and simply assisting them to navigate bureaucratic processes, do not accord with the evidence before IBAC. The evidence showed that the advisors' interventions were also aimed at securing and maintaining the appointment of HEF as a training provider, through close engagement with the procurement and contract management processes undertaken by DHHS.

The absence of clear and 'safe' avenues to report misconduct and mechanisms to have it investigated and addressed creates a permissive environment where such conduct can grow. Further, to the extent that the required standard of conduct is known (as the Ministerial Staff Code of Conduct was not then publicly available), there appears to be a reticence to report the misconduct based on the belief that nothing will be done and the reporter will potentially suffer detrimental repercussions.

The Premier rejected the earlier version of this finding and its constituent parts in the draft report. He noted that in his private examination, he stated it was always open to the public service to provide frank and fearless advice, and that proposals to government had to 'stack up.' In addition, he maintained that consequences can arise from not following process, which may be because of complaints to ministers or their executive staff, public facing consequences, or review by a court or other agency.

IBAC's recommendations include measures to address ministerial advisors' relative ignorance of the rules they were bound to follow. However, implementation of those measures without a meaningful shift in attitude to adherence to the Ministerial Staff Code of Conduct will mean the rules continue to be ineffective.

The Australian Human Rights Commission's recent *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* suggests:

> An effective system of standards, reporting and accountability has the following elements:
>
> - clearly articulated standards
> - an effective mechanism for reporting and complaints
> - independent investigation and sanctions which provide accountability where misconduct occurs.[103]

The United Kingdom's Committee on Standards in Public Life has made a similar statement on what it saw as the five critical elements of an effective compliance system for codes of conduct, which are:

- induction – ensuring new office-holders understand the process
- advice – providing clarification and guidance to office-holders
- investigation – a process for examining any alleged breach of the code
- adjudication – a process for considering the findings from the investigation and reaching a judgement
- sanction – a process for deciding upon and imposing any penalties.[104]

Standards and induction are discussed above.

Drawing on these sources and the insights it has gained through Operations Daintree and Watts, IBAC proposes the problem of non-compliance with the Ministerial Staff Code of Conduct should be addressed through an independent complaints process, in which an investigator would have powers to receive and/or investigate complaints, and recommend actions that are proportionate to the investigation's findings to the employer. That complaints process should also provide for mediation, where appropriate and with the complainant's consent, to allow for a potential early resolution of the matter.

103 Australian Human Rights Commission, 2021 *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* p218.
104 Op cit, n.92 para 5.10.

IBAC notes that one of the five new policies for ministerial staff issued, along with the new Ministerial Staff Code of Conduct, on 15 July 2022 – the Ministerial Staff Misconduct Policy and Procedure[105] – provides for a detailed and graduated process for dealing with suspected misconduct. This includes contraventions of any policy or guideline applicable to a ministerial advisor. It also provides for procedural fairness, graduated responses and the appointment of an external investigator, if warranted by the seriousness or sensitivity of the allegation. An investigator, whether internal or external, makes findings about whether an allegation is substantiated or not, after which the Premier, as the employer,[106] decides whether to accept the findings and any recommendations, and imposes any sanctions as they may determine to be appropriate.[107]

The procedure in the new code would be undertaken behind the veil of secrecy that obscures the operation of ministerial offices. IBAC considers that such an approach is out of step with contemporary concerns about the power and size of ministerial offices, and the consequent expectation of greater transparency.

The investigation of misconduct allegations against ministerial advisors in Australian jurisdictions has largely been undertaken within or at the direction of the offices of first ministers such as the prime minister or premiers, and have usually remained secret, both as to process and outcomes.

Associate Professor Yee-Fui Ng, who has written extensively on the topic of ministerial advisors,[108] gave evidence at the public hearings conducted by IBAC in Operation Sandon, in which she drew attention to the existence and desirability of independent mechanisms used in some overseas jurisdictions:

Q: So what reforms do you think are necessary in relation to ministerial advisors?

A: First of all to have a code of conduct that is publicly available and for the code of conduct to be independently administered by an independent statutory officer or independent commissioner. So the model that we see in Canada is that the code of conduct is overseen by an independent commissioner and that gives better enforcement of breaches of the code. So in Australia at the Commonwealth level there is a statement of standards for ministerial staff that is administered within the co-executive, so within the Prime Minister's department. So breaches are never published. We don't know what really goes on. It all happens behind closed doors. So if we have an independent regulator that would go a long way towards enhancing accountability and transparency in this area.

…when you put things in the hands of an independent commissioner like in Canada they do prosecute for breaches. They have prosecuted for conflicts of interest, and all this is in the public domain, and sanctions were imposed as well. So you can see that when things are in the hands of an independent regulator they will take their role quite seriously and they will monitor and investigate and impose sanctions.

Q: Are the regulations and monitoring oversight of political – ministerial advisors rather more advanced in other states of Australia?

A: No, they are not very advanced anyway in Australia … when I looked overseas there was a lot more awareness about ministerial advisers, there was a lot more parliamentary scrutiny. So in the UK there have been a lot of investigations focusing on the special advisers there, which is the equivalent of ministerial advisers here. There are very few of them, but they are constantly under parliamentary scrutiny, media scrutiny, and there's a lot more knowledge about what they do and who they are.

105 Premier of Victoria, 2022 *Ministerial Staff Misconduct Policy and Procedure*, at https://www.Premier.vic.gov.au/policy.
106 Or possibly the General Counsel, under the delegation in the Ministerial Staff Code of Conduct.
107 Staff Misconduct Policy, ss.5–6, www.premier.vic.gov.au/policy.
108 For example, Yee-Fui Ng, 2018 n.80.

The Thodey review of the Australian Public Service in 2018 commented that:

> Given the significant role they play in the Australian political system, the review considers it appropriate that the roles and responsibilities of ministerial advisers be formally recognised in a legislated code of conduct, with effective mechanisms for accountability and compliance with the code.[109]

The review also noted that independent commissioners were used to enforce the relevant ministerial staff codes of conduct in Canada, New Zealand and the United Kingdom.

The Grattan Institute has also emphasised the need for codes of conduct for ministerial staff, among others, to be 'independently administered … [to] build public confidence that codes … are respected and adhered to'.[110]

In their report on Operation Watts, IBAC and the Ombudsman recommended the establishment of a Parliamentary Integrity Commissioner.[111] The government accepted all the recommendations in Operation Watts, including for the establishment of the Parliamentary Integrity Commissioner.

IBAC recommends that it is appropriate to extend the jurisdiction of the proposed commissioner to cover complaints of alleged misconduct by ministerial staff.

IBAC has considered the alternative of expanding the functions of the VPSC. On balance, IBAC considers the proposed Parliamentary Integrity Commissioner would be better placed, as ministerial officers, while employed by the Premier under the Public Administration Act, operate in the political realm of the public sector, and are not part of the impartial public sector where the VPSC's responsibilities are focused.

Not all allegations would raise misconduct issues of sufficient seriousness to justify investigation by the proposed Parliamentary Integrity Commissioner. The commissioner should have a discretion to refer less serious matters to the Premier. The Premier should also notify the commissioner of any complaints received from ministerial staff or about ministerial staff that have triggered an investigation. On receiving a notification, the commissioner should decide whether to investigate or ask the Premier to continue their investigation and report the outcome to the commissioner.

The commissioner would be expected to refer any complaints raising corruption or criminal issues to IBAC or Victoria Police (or other relevant law enforcement body), respectively. Conversely, IBAC would refer any complaints it receives that would be more appropriately dealt with by the proposed commissioner.

In developing the legislation to establish the Parliamentary Integrity Commissioner to include a ministerial staff complaints regime, the government should consider the safeguards necessary to prevent the misuse of information obtained through an investigation. It should also consider including a requirement for ministerial staff to cooperate with related investigations, with a failure to cooperate potentially constituting misconduct.

Along with the complaint management function, IBAC considers the Parliamentary Integrity Commissioner should also be responsible for promoting the Ministerial Staff Code of Conduct and providing regular education about it (such as at the induction program and other professional development activities for ministerial staff recommended in Recommendation 2).

109 Thodey review, op cit, n.18, p. 135.
110 Wood et al, op cit, n.54, p. 61.
111 Recommendation 2 in IBAC and the Victorian Ombudsman's joint report on Operation Watts is that: (a) the government and the parliament work together to establish a Parliamentary Integrity Commissioner as an independent officer of the parliament who would be responsible for:
- receiving and investigating complaints about possible, non-criminal breaches of the Members of Parliament Code of Conduct in the *Members of Parliament (Standards) Act 1978* and other standards and rules relevant to parliamentary integrity
- submitting reports on investigations to the Privileges Committee of the relevant House for consideration and action where required
- monitoring the effectiveness of the Statement of Values and Code of Conduct in the MP(S) Act and other ethical obligations imposed on MPs
- promoting and providing training and information about the Statement of Values and Code of Conduct within the parliament and the general community in collaboration with the [proposed] Parliamentary Ethics Committee
- assisting the [proposed] Parliamentary Ethics Committee to prepare guidance materials on the Statement of Values and Code of Conduct and reviewing the Values and Code of Conduct at least once every four years … (b) the Parliamentary Integrity Commissioner should be established by legislation and be appointed by or upon the recommendation of a cross-party parliamentary panel with members from both Houses selected for that purpose … In addition, recommendation 5 of the Operation Watts report was 'that whichever party or parties form government after the November 2022 State Election should commit to introducing and commencing the legislation to establish the [Parliamentary Integrity Commissioner …] by June 2024'.

It will be important to monitor compliance with this code, ascertain how effective or otherwise it is, and determine what improvements to the code or the complaints regime may be required. For example, the proposed commissioner could conduct surveys to assess:

- the level of adherence to the code and under-reporting of breaches
- the nature of drivers of non-compliant behaviour and obstacles to reporting
- how such drivers and obstacles might be reduced or removed.

To ensure the government, parliament and community are aware of the commissioner's work, the commissioner should be required to report to parliament annually on their work in:

- complaints management (including the findings made and sanctions imposed in specific cases)
- their promotional and educational activities
- compliance monitoring
- measures to make the code or complaints regime more effective.

The annual report and specific reports should serve as a deterrent to misconduct (or conversely, an incentive for good conduct), be subject to appropriate privacy safeguards for complainants and, where necessary and appropriate, the person who is the subject of the allegations.

In Recommendation 4, IBAC recommends that the employment arrangements for ministerial staff be changed to promote clearer lines of accountability between ministers and their advisors. An option would be for ministers to become their staff's employer or, if the current employment regime is maintained, the minister should at least be assigned employer responsibilities, once an advisor was employed by the Premier.

Depending on whether the government accepts the recommendation, IBAC proposes that to strengthen the imperative for the Premier and/or ministers to ensure that ministerial staff comply with the Ministerial Staff Code of Conduct, the employer should either be obliged to accept any recommendations for action made by the Parliamentary Integrity Commissioner as a result of a complaint investigation or, if they do not accept the recommendation, be obliged to provide to the commissioner their reasons for not accepting the recommended action and state what, if any, alternate action they have taken or propose to take.

This proposed process is modelled in part on the Australian Human Rights Commission's recommended arrangements for Commonwealth parliamentarians dealing with misconduct of their own staff.[112] It recognises:

> The important role of effective enforcement and sanctions … including the role of sanctions in driving change in culture and practice; building confidence in making complaints and providing consequences for misconduct; and a response to people who may have been harmed by the misconduct.[113]

The presumption that the Premier or the minister to whom the relevant advisor is assigned will accept and act on the commissioner's recommended actions is intended to overcome the risk of the Premier or the minister ignoring the recommendation.

The presumption of acceptance should be rebuttable to allow some flexibility where, for example, the recommended action may be regarded as too harsh. The requirement for the Premier or minister to report to the commissioner on any reasons why they have decided not to accept one or more of the commissioner's recommendations and what alternate action they have taken or propose to take, together with the commissioner's ability to report to parliament on their response to those reasons and the alternate action taken (or proposed to be taken), is designed to make the decision-making more transparent and to ensure the availability of an exception to the general presumption is not abused.

112 Australian Human Rights Commission, op. cit, n.103, p. 246.
113 Ibid., p. 229.

The government could consider further buttressing this process by including a provision in the Code of Conduct for Ministers and Parliamentary Secretaries for the Premier, as the arbiter of conduct under this code, to determine if a minister's reasons or decision are unsatisfactory and to treat this as a breach of the code.

5.4.5 Strengthening the executive branch of government's accountability to parliament

As outlined in Section 5.3.4: Ministerial staff accountability, one of the problems caused by the growth in the number, role and influence of ministerial advisors is the lack of accountability for their conduct. While advisors are accountable to ministers for their conduct, the evidence from this operation shows that advisors might sometimes operate independently of their minister or in a loosely defined 'authorising environment', which can mean as little as them acting consistently with a general policy direction. Commentators have also observed such conduct.[114]

A primary role of advisors is to ensure that decision-making within that authorising environment aligns with the political or strategic objectives of their minister and government. The political or union background of the advisor may also make it difficult for the advisor to manage any relevant conflict of interest. The next section discusses relevant motivations and expertise of advisors. As this operation illustrates, there are integrity risks associated with the way an advisor discharges their role.

When a minister has no or limited knowledge of what their advisors are actually doing, it has become increasingly difficult for parliament to hold them to account for their advisors' actions. Such a situation is said to give the minister 'plausible deniability'. Whatever label is applied, this arrangement strikes at the convention of ministerial responsibility and renders government processes and decision-making more opaque.

IBAC proposes that to address this, the Victorian Parliament should legislate to remove any doubt that ministerial advisors can be compelled to appear before parliamentary committees. This proposal may be opposed on the grounds that advisors are:

- not members of parliament
- not public servants who, by convention, appear before parliamentary committees to support their ministers
- in constitutional theory, the 'alter ego' of their minister,[115] who is a member of parliament and should account for the conduct of their advisors to the parliament and its committees.

However, without such a requirement, advisors will continue to operate in a 'shadow zone' by not being held to account for their actions. Ministers will also continue to eschew responsibility for their advisors' actions, thus denying parliament and the public the ability to scrutinise a significant and growing area of executive government activity.

The possibility of being summoned to appear before a parliamentary committee in a public hearing should curtail, or at least reduce the temptation to engage in, some of the advisors' 'boundary violating' conduct that IBAC has identified in Operation Daintree. It should also cause ministers and their chiefs of staff to monitor more closely what the advisors in their office are doing. Some carefully crafted rules and guidance on advisors' appearances before such committees would need to be developed to guard against this proposed additional accountability measure being abused for political advantage.

Such legislation and guidance should deal with, among other things:

- which committees can summons an advisor
- the circumstances in which advisors can be called
- what questions advisors can or cannot be appropriately asked
- what an advisor's obligations are to answer questions and
- what the potential consequences are for an advisor failing to answer a legitimate question.

114 See, for example eg: Maddigan, op. cit, n.69, p. 161.
115 Yee-Fui Ng, op cit. n.80, p. 128.

Section 2.2 in the VPS Code of Conduct on the appearance of public servants before parliamentary committees, together with the Victorian Government's *Guidelines for appearing before and producing documents to Victorian inquiries*[116], may provide a useful starting point for developing such guidance.

5.4.6 Increased policy role, capability and motivation

Sandy Holloway, who was a senior Commonwealth public servant and Chief of Staff to former prime minister, Bob Hawke, has observed that:

> … ministerial offices are as important now in big policy, big program design — and big crisis management — as departments. More selectively to be sure, differently to be sure, but as important in their own way.[117]

While not as grand in scale, the conduct of ministerial advisors and public servants investigated in Operation Daintree is an example of the adverse consequences of advisors occupying a dominant position in influencing policy advice, implementation and outcomes. A number of commentators have suggested the rise of advisors in this area has been accompanied by a perceived decline in the public service's policy capability.

As an example, the PPO sought to transform the proposal to one under which the HWU partnered with a TAFE institute to deliver the training, and thus satisfy another government objective of revitalising the TAFE sector. When the HWU rejected that model, the proposal was referred to the Minister for Health's Office where Health Advisor A worked with the union to refine it to improve its prospects of being acceptable to the DHHS.

Part of the risk occasioned by the increased number, role and influence of ministerial advisors is attributable to their motivation for taking up the role and the capabilities they bring to it. The Grattan Institute has succinctly characterised the problems that can arise from advisors' backgrounds and ambitions noting:

> Ministerial advisors … [are] increasingly drawn from political backgrounds rather than the public service … tend to focus on keeping the minister out of political trouble rather than pursuing good policy … [and are] likely to gain their next step on the career ladder – often as a more senior advisor, preselection for parliament, or in government relations – if they have minimised political damage to their minister.[118]

The Grattan Institute's analysis also echoes some of the views expressed by Ms Hennessy under examination about the increasing 'short-termism' in policy development and a 'lack of policy ambition' for longer-term reforms, as consequences of the trend in modern government to centralise decision-making and media management allied to the growth in the number and roles of ministerial advisors.

Sourcing ministerial advisors from within the ranks of the governing party with little skill or experience in policy development, design or implementation, with an expectation that they will be able to perform these functions capably, also compounds the risk of failures to achieve the outcomes sought.[119]

Professor Coaldrake has observed a similar general profile in Queensland, where 'significant numbers of ministerial staffers are enthusiastic young loyalists with little other life experience aside from a university Labor or Liberal club or a trade union office'.[120] Operation Daintree is another case in point, as the advisors principally involved in the conduct IBAC has investigated had generally become members of the party as high school or university students, and worked as trade union research officers and/or organisers or electorate officers before becoming ministerial advisors.

116 https://www.vic.gov.au/guidelines-appearing-and-producing-documents-victorian-inquiries
117 Quoted in Dobell, op cit. n.22.
118 Daley, *Gridlock*, op. cit., n.24, p. 19. At p. 47, Daley expands on his critique, stating 'increasing numbers of ministerial staffers today have strong party affiliations, little if any experience in the public service, often little experience beyond student politics'.
119 Daley, *Gridlock* , op. cit, n.24, p. 47.
120 Coaldrake report, op. cit., n.24, p. 21.

The most recent review of the Australian Public Service also recognised this problem. It suggested that it could be remedied in part if more advisors were drawn from the public service on rotating secondments through ministers' offices, and recommended that half the advisors in ministers' offices should be sourced this way.[121] The previous Commonwealth Government, however, rejected those proposals as unnecessary, suggesting it 'maintained a high number of policy advisors with public service experience and … did not consider it necessary to set formal guidance about the number of advisors in each [ministerial] office who should have public service experience'.[122]

IBAC appreciates the Thodey review proposal was 'against trend', in an effort to improve both capability within the Australian Public Service, and the quality of policy development, implementation and outcomes in the Commonwealth sphere. The then Commonwealth Government's rejection of it is consistent with what one commentator has described as the 'relentless trend' 'to redistribute power between administrative and political systems' towards the latter.[123] Put more bluntly, Daley suggests 'for more than 30 years, governments have not shown any interest in restraining the growth and politicisation of ministerial advisors with little accountability'.[124] IBAC understands that the Commonwealth Government elected in May 2022 is revisiting the Thodey recommendations.

The Thodey review proposal warrants consideration for application in Victoria. For example, the VPSC could develop a program to rotate experienced public servants through ministerial offices as advisors. Potential benefits would include inserting subject-matter expertise into ministerial offices, providing secondees with invaluable developmental experience and insights into the inner workings of government, and forging a better understanding and trust between the administrative and political arms of government.

Such a program is, however, not without risks. These include secondees overstepping the boundary between the public service and political executive, as well as a possible reluctance to take up secondments, due to the perception that they might be regarded as diminishing a secondee's impartiality and consequently, their career prospects under future governments.

Measures to mitigate such risks might include issuing clear guidance on the appropriate use of a seconded public servant, declarations of understanding, establishing safe complaints pathways and resolution processes, and making secondments a desirable experience for senior positions.[125]

Departments already allocate public servants, known as departmental liaison officers (DLOs), to assist ministerial offices with liaison and administrative functions. The VPSC guide, *Serving Government*, stresses that DLOs 'must avoid assisting ministers in ways that are or could be perceived to be politically partisan'.[126] While the suggested program is intended to involve secondees in policy matters, the existing experience of DLOs would provide useful intelligence to inform such a program's development.

IBAC also suggests the government may wish to examine its recruitment processes for ministerial advisors. While ministerial advisors are employed by the Premier under the Public Administration Act, their employment is not subject to the Act's public sector employment principles,[127] nor the standards issued by the VPSC to 'guide the development of employment processes' applying these principles.[128] IBAC recognises that loyalty and trust are key selection criteria for advisors. However, IBAC suggests that the adoption and adaptation of the public sector employment values and standards for ministerial staff is worthy of consideration, to improve the capability of advisors to perform their important and influential roles.

121 Thodey review, op. cit., n.18, pp. 136–137 (including Recommendation 11).
122 Department of Prime Minister and Cabinet, 2019 *Delivering for Australians: A world-class Australian Public Service*, the government's APS reform agenda, viewed at www.apsacademy.gov.au/delivering-australians-world-class-australian-public-service on 9 February 2022.
123 Halligan, op. cit., n.7, pp. 1 and 13.
124 Daley, *Gridlock*, op. cit., n.24.
125 See Thodey review, op. cit., n.18, p. 137.
126 op cit, n.98, at p. 13.
127 See Public Administration Act 2004, s.8.
128 VPSC, 2017 *Standards for application of the Victorian Public Sector Employment Principles* at https://vpsc.vic.gov.au/ethics-behaviours-culture/employment-principles-and-standards/standards-for-application-of-the-principles.

By way of example, the VPSC Standards guide contains a useful table mapping the values against the employment 'lifecycle'. Against the 'Merit' value in that table are the following entries at some selected stages of the employment process:

- *Attract* – Advertisements attract a competitive field of candidates
- *Select* – The best available candidates are selected
- *Manage* – Work is assigned based on interests and capability
- *Develop* – Development opportunities are fairly contested
- *Reward* – Good performance is recognised.[129]

Applying each of these standards to the recruitment and development of ministerial advisors would, in IBAC's view, pay dividends in elevating their capability.

5.4.7 Expansion in size and power of the PPO

In parallel with the growth in the number, role and influence of ministerial advisors, the last decade has seen significant growth in both the size and power of the PPO. Former Minister Hennessy felt there had been a 'significant expansion' in the PPO since she entered the Victorian Parliament in 2010. The numbers bear her perception out. Ms Hennessy testified that when she was the senior legal advisor to former Premier Bracks, there were seven to eight policy advisors. A paper published in 2011 suggested that, at that time, the PPO was comprised of '10 policy advisors, 5 strategy advisors, two communications advisors and two community engagement advisors [together with] a Chief of Staff, personal assistant and so on'.[130] By contrast, the Premier suggested there were 70-80 advisors in his office performing a variety of roles.

In terms of the power and influence of the PPO, former deputy Premier John Thwaites commented in 2014:

> Often the ministerial advisors you find in the … Premier's office are as powerful, or more powerful, than some ministers.
>
> The head of the media unit, the Chief of Staff and maybe one or two advisors in the … Premier's office are more powerful, have more influence on the decision-making in most cases than certainly junior ministers and more than most ministers.[131]

Former Minister Hennessy observed that the growth in the PPO reflected 'a greater centralisation that has occurred in government … across many Westminster systems … a centralisation of decision-making and media management'. She saw this shift as driven by an expansion in 'the complexity of government … and the nature of … 24/7 media cycles, the [more intense] speed with which decision making and politics occurs'. Ms Hennessy expressed concern that this change has 'promoted short term … policy development and … underestimat[ion of] the complexity of the implementation of policy … [and] lack of policy ambition' for longer-term benefits compounded to a degree by the electoral cycle.

Former Minister Mikakos indicated during her examination that the relationship with the PPO and its level of intervention in the health portfolio was 'the principal focus' of her handover discussion with Ms Hennessy. Echoing Ms Hennessy's testimony, she also commented:

> … the current Victorian Government is a very centralised government where the PPO has its tentacles everywhere. … There is constant tension between ministers' offices and the [PPO].

In her submission on the draft report, Ms Mikakos referred to the interventions of the PPO in relation to the management of the HEF contract as being 'inappropriate'. She also cited two other examples of the PPO's intervention in her portfolio during her examination. The first was in relation to the election commitment to train 1,000 more frontline health workers:

> Now, if the Premier's office's clear expectation is [$] 2.2 million is going to the HEF, then that was communicated to us and that would have been the working understanding we had about what this election commitment was about.

129 Ibid., p. 9.
130 Maddigan, op. cit., n.69.
131 Cited in Ng, op. cit., n.80, p. 116.

The second concerned the delay in the announcement of the new Frankston Hospital:

> I had been pushing the Premier's office for some time to make the announcement to get the project going even in the midst of the pandemic. … they essentially are the gatekeepers for any announcements, the PPO. I was being prevented from making that announcement and then I was told that they were insisting that I brief [Ms Diana Asmar, Secretary, HWU] before any announcement could be made.

Ms Mikakos recalls being directed by a PPO advisor to arrange a telephone briefing with the HWU before the announcement, with that advisor and possibly PPO Advisor A, sitting in on the teleconference. Ms Mikakos in her submission on the draft report described the request for a PPO advisor to sit in on the conversation as outrageous. In an open letter on 23 September 2020 to the Premier calling for Ms Mikakos's resignation as Minister for Health, Ms Asmar observed that 'It took the good work of your personal staff to finally bring Ms Mikakos to [this] 30 minute meeting.'.

Both these examples illustrate the power the PPO wields over ministers and their office in the current government. In that regard, Ms Hennessy also noted '[t]here is a power differential between [advisors in a minister's office and the PPO], so if a PPO advisor told a ministerial office advisor … that something had to happen … they would usually win the day …'.

Ms Mikakos in her submission in response to the draft report said that the Westminster tradition of Ministerial responsibility was meaningless when Minsters and their staff could be directed by others in government as to how to oversee their departments.

By contrast, PPO Advisor A asserted, at least in relation to their own practice, that 'I've always conducted myself incredibly respectfully with my colleagues in the ministerial offices and I see chiefs of staff, I always would defer – … ultimately the Chief of Staff in consultation with their minister will make a decision about whether something happens or doesn't happen'. PPO Advisor A reiterated this position in their response to the draft report, stressing that although they had a deep understanding of unions and how to work with them, they did not seek to exert influence over ministerial advisors and did not have any authority over them. They noted the lack of standards governing the relationship between advisors in the PPO and ministerial advisors.

An example of the operation of Ms Hennessy's perceived hierarchical structure emerged in Operation Daintree. At the HWU's urging, PPO Advisor A requested Minister Mikakos' office to have the DHHS withdraw its email to the HEF cancelling training sessions, with the result that the training was not cancelled. This pattern of communication was repeated throughout the contract management phase.

The Premier in his response to the draft report disputed the accuracy of the assertion of centralisation of power in the PPO and the related assertion regarding employment arrangements in the report. He said that the employment relationship of the Premier to advisors was not relied on to exercise control over portfolio matters and pointed to the Ministerial Staff Code of Conduct that provides for advisors to be employed by the Premier and to be accountable to their minister in accordance with Westminster principles.

Nevertheless, IBAC considers the finding of centralisation is justified on the basis of the testimonies of the two former Ministers for Health Hennessy and Mikakos, together with the evidence of PPO Advisor A and Health Advisor B. This trend appears to have been occurring in Victoria (as illustrated by former Deputy Premier Thwaites's remarks cited above) and elsewhere for some time.

As noted by the Premier, ministerial staff are employed by the Premier under the Public Administration Act and then assigned to specific ministers to whom they are accountable under the Ministerial Staff Code of Conduct. This arrangement creates tension for individual advisors that both former Ministers for Health referred to during their examinations. The 2019 code illustrated this dilemma in directing a ministerial staff member to seek guidance or approval from either their own Chief of Staff or the Premier's Chief of Staff or both, in relation to different matters covered by the code.[132] Similar tensions were replicated in the most recently revised code.[133]

132 For example, the 2019 Ministerial Staff Code of Conduct required a staff member to:
(a) obtain the Premier's Chief of Staff's approval to make a written submission to a publication, accept an invitation to speak publicly (3.8) or undertake outside employment (3.12)
(b) discuss a management plan for a conflict with (p. 6), and declare a gift valued at more than $500 received from the same source within 12 months to, their Chief of Staff (4.4) and
(c) raise any doubts about the appropriate course of action with their own or the Premier's Chief of Staff (6.2).

133 For example, 2022 Ministerial Staff Code of Conduct, s.3.11.

This tension could be mitigated to a degree by:

- ministerial staff being employed by the relevant minister, as occurs in the Commonwealth Government under the *Members of Parliament (Staff) Act 1984* (Cth); or
- vesting employer responsibility once an advisor is employed by the minister to whom the advisor is assigned.

IBAC does not have a firm view as to which option should be preferred, but considers that either of these options would be beneficial in clarifying the arrangements for ministerial advisors' employment and be one step towards reducing the level of influence of the PPO. The amendments IBAC has suggested are aimed at reducing the potential divided loyalty tension for advisors, between an advisor's employer and accountability to the minister to whom they are allocated under the current arrangements.

The recommendations in this report to make it a statutory requirement to publish the Ministerial Staff Code of Conduct, together with those on the induction and professional development of advisors, promotion and compliance monitoring of the code, complaint handling, investigation, enforcement and public reporting, should assist to curtail the PPO's improper intervention into matters that should be managed by other ministers' offices and/or departments.

IBAC recognises the prerogative of the Premier as the head of the executive branch of government to structure their personal office as they see fit. However, the relationship between advisors in the PPO and ministers' offices must not undermine the Westminster convention of ministerial responsibility.

PPO advisors have a dual responsibility under the Ministerial Staff Code of Conduct to ensure that they comply with its requirements, in relation to management of the Premier's ministerial portfolio and in their interactions with other portfolios. In that context, specific consideration must be given by the Premier to managing the conduct of his advisors, in relation to future procurement and management of services from trade unions, related entities or organisations that have or may be perceived to have, a special relationship with the ALP.

IBAC notes that the three most recent revisions of the Ministerial Staff Code of Conduct expressly prohibit advisors from directing public servants and provide further guidance on relations with departments. The additional guidance, which largely captures and clarifies the previously understood conventions, should facilitate compliance with the Ministerial Staff Code of Conduct.

In strengthening the education regime for ministerial advisors, the government should ensure ministerial staff are appropriately informed about their lines of accountability, especially in light of any changes following the implementation of the recommended changes to the advisors' employer or the exercise of employment powers over them, as well as on what constitutes proper and improper communication between staff from the PPO and other minister's offices.

IBAC makes the following recommendations to address the issues discussed in this section:

Recommendation 4:

That, in line with other Australian jurisdictions, the Victorian Government develops and introduces legislation to clarify and formalise the employment arrangements for ministerial staff, in order to strengthen transparency and accountability.

Options to consider include:

(a) clarifying employment responsibilities, such as:
   - designating the minister to whom the staff are assigned to be their employer, or alternatively, vesting employer responsibilities in the minister to whom staff are assigned, once they have been employed by the Premier
   - providing for the accountability and supervisory arrangements for ministerial staff

(b) articulating the values and employment principles that apply to ministerial staff

(c) providing for the making of codes of conduct by the Premier to be observed by staff in performing their functions, including:
   - providing that a breach of the Ministerial Staff Code of Conduct may constitute misconduct
   - requiring the Ministerial Staff Code of Conduct to be published and reviewed at regular intervals

(d) articulating the principles for ministerial staff to follow when dealing with portfolio departments and agencies, including a specific prohibition on directing public sector employees.

Recommendation 5:

That the Victorian Government introduces legislation to require the Secretary to the Department of Premier and Cabinet (DPC) or the Victorian Public Sector Commission (VPSC) to include information in their annual report about the number of ministerial advisors and other staff who were employed in each ministerial office as of 30 June each year, and the total cost of employing ministerial advisors and staff during each financial year.

Recommendation 6:

That, subject to any legislation drafted pursuant to Recommendation 4, the Premier, the DPC and the VPSC collaborate to ensure that the Ministerial Code of Conduct, the Ministerial Staff Code of Conduct, and the VPSC guidance to ministerial staff, departmental secretaries, executive officers and non-executive officers are consistent, comprehensive and emphasise:

(a) role clarity and the need for ministerial staff and public servants to understand and act within the scope of their roles

(b) mutual respect in relations between ministerial offices and public servants

(c) greater awareness of potential conflicts of interest and the need for additional caution to be exercised in managing conflicts of interest, and

(d) the operation of the conventions on ministerial responsibility.

Recommendation 7:

That:

(a) the Victorian Government, in consultation with the VPSC, provides a mandatory induction program for new ministerial staff that covers their obligations under the Ministerial Staff Code of Conduct and other guidance

(b) all ministerial staff members and public service employees who regularly engage with ministerial offices undertake training in the relevant guidance governing relations between ministers, their offices and public sector departments and agencies, and the principles underpinning the guidance, at least once every two years

(c) the DPC or VPSC publish annual statements that detail the number of staff and advisors who attended training sessions in the previous financial year, broken down by individual portfolios.

Recommendation 8:

That the Parliamentary Integrity Commissioner be responsible for:

(a) receiving and investigating complaints about possible, non-criminal breaches of the Ministerial Staff Code of Conduct and other misconduct

(b) referring prima facie allegations of criminal or corrupt conduct to Victoria Police or IBAC

(c) referring minor breaches to the Premier for investigation and resolution, in the commissioner's discretion, and subject to the Premier advising the commissioner of the outcome of the investigation

(d) recommending further action to the employer of the ministerial staff member, including on potential sanctions, where the Parliamentary Integrity Commissioner is satisfied a ministerial staff member engaged in conduct that is in breach of the Ministerial Staff Code of Conduct

(e) promoting the revised Ministerial Staff Code of Conduct and providing regular education on it

(f) monitoring and reporting on compliance with the Ministerial Staff Code of Conduct and potential measures to improve it

(g) revising the Ministerial Staff Misconduct Policy and Procedure to align with this report's recommendations

(h) reporting annually on the performance of their functions with respect to ministerial staff (or on specific cases if warranted) to the parliament.

Recommendation 9:

That in developing the legislation to establish the ministerial staff complaints regime, the Victorian Government ensures that the legislation includes a requirement for ministerial staff to cooperate with an investigation of a complaint against them (or another ministerial staff member) with:

(a) safeguards against the use of such information in other criminal or civil proceedings (other than for unfair dismissal or providing false or misleading information); and

(b) a failure to cooperate with the Parliamentary Integrity Commissioner constituting misconduct enabling the commissioner to recommend appropriate action to the employer of the ministerial staff member for that misconduct.

Recommendation 10:

That in developing the proposed complaints regime in relation to ministerial staff, the Victorian Government:

(a) requires the Premier (or minister to whom a ministerial staff member is assigned if they have employment responsibilities) to:

- accept the recommendations of the proposed Parliamentary Integrity Commissioner from an investigation into the conduct of a ministerial staff member; or
- report to the commissioner on their reasons for not accepting the recommendations and any alternative action they have taken or have determined should be taken

(b) requires the commissioner to publish a report each year on the nature and number of recommendations made, accepted and not accepted.

Recommendation 11:

That:

(a) the Victorian Government develops and introduces amendments to the *Parliamentary Committees Act 2003* to empower relevant committees to compel ministerial staff members to appear before them and answer questions in limited and defined circumstances, such as where a minister claims to be unaware of the staff member's conduct in a matter relevant to the minister's portfolio into which the committee is inquiring; and

(b) the Standing Orders Committee of each House (or any other committee as may be appropriate) develops guidance material for parliamentary committees and ministerial advisors called before such committees on, among other things:

- what does or does not constitute permissible questions to put to an advisor
- what an advisor's obligations are to answer questions
- the consequences of an advisor failing to answer a legitimate question.

Recommendation 12:

That the Victorian Government and parliament develop and introduce amendments to all relevant codes of conduct to provide that a breach of the relevant code includes conduct that directly or indirectly either:

(a) intimidates or victimises a person who has reported conduct (or proposes to report conduct) of a ministerial staff member or made a complaint (or proposes to complain) about a ministerial staff member

(b) interferes with any investigation or inquiry into the conduct of a ministerial staff member that is the subject of a complaint or a report, for the purpose of influencing the outcome or findings.

Recommendation 13:

That the Victorian Government ensures persons making legitimate or reasonable allegations of misconduct about a ministerial staff member are protected from detrimental action by:

(a) consulting with IBAC on the expansion of the Parliamentary Integrity Commissioner's remit to ensure that the office holder is able to engage effectively with the provisions of the *Public Interest Disclosures Act 2012*

(b) establishing procedures to provide protection for persons who are not otherwise eligible for protection under the *Public Interest Disclosures Act 2012*, such as by developing and introducing amendments to the *Public Administration Act 2004*.

Recommendation 14:

That the VPSC amends the Code of Conduct for Victorian Public Sector Employees and the Victorian Government amends the Ministerial Staff Code of Conduct to provide that the making of a frivolous, vexatious or malicious allegation to the independent complaints process may constitute a breach of the relevant code, with appropriate sanctions available to respond to such conduct.

5.5 Public servants

The evidence from Operation Daintree provides a powerful example of the apparent increase in the pliability of the public service.

Laura Tingle gave this assessment of Commonwealth public service reforms over the past three decades:

> Public service sackings, the tendency to run policy from ministerial offices and just get departments to implement it, and an increased willingness to make public servants the subject of 'show trials' in parliamentary committee hearings, gradually cowed much of the public service and helped build a toadying culture.[134]

Halligan has described this shift in the following terms:

> … the clear message from dismissals, high turnover and fixed contracts has been that standing up to ministers is damaging to the career of public servants. The pathology was expressed in all Westminster countries by self-censoring civil servants; failure to challenge the minister about the feasibility or value for money of policies; ministers enforcing compliance by instructing officials not to question or test proposals.[135]

Operation Daintree and other matters in the public domain point to a serious diminution in the willingness of some VPS staff to provide impartial, frank and fearless advice to their ministers on matters for which they are responsible.

5.5.1 Failure to give frank and fearless advice

Halligan has suggested that the loss of public service independence manifests in politicians 'seeking to influence the public service by asserting their authority, often with the assistance of agents', such as ministerial advisors. It has led to the emergence of public servants who Halligan labels 'responsive bureaucrats'. Their defining characteristic is a 'response … to pressure to ignore professional judgements in order to comply with a determined minister'.[136] While not as overt as, for example, political appointments to senior roles,[137] these more subtle procedural interventions by ministers and their advisors still constitute a form of politicisation of what should be an impartial public service.[138]

'Responsiveness' is the first public sector value in Victoria's Public Administration Act. The Act provides guidance as to what behaviour will demonstrate this value, including 'providing frank, impartial and timely advice to the Government'.[139]

134 Tingle, L 2015 'Political Amnesia: How We Forgot How to Govern', *Quarterly Essay, Issue* 60, p. 22.
135 Halligan, op cit., n.7, p. 14.
136 Halligan, op cit., n.7, p. 10.
137 Earlier this year the Legislative Council of the Victorian Parliament referred the issue of the politicisation of the Victorian Public Service to the Ombudsman for investigation. See Victorian Ombudsman, *Politicisation of the Public Service: Issues Paper and Request for Submissions*, p. 2 at https://asets.ombudsman.vic.gov.au/assets/FINAL_06.05.22_VO-ISSUES-PAPER_May-2022.pdf
138 Halligan, op cit., n.7, pp. 2–3.
139 Public Administration Act 2004, s.7(1).

The VPS Code of Conduct expands on the Public Administration Act's guidance, indicating that:

> Public sector employees serve the Government of the day and provide the same high standard of advice regardless of the party in power. Advice is provided in a frank, impartial and timely manner, and with an understanding of its implications on the broader policy direction of the Government. Public sector employees do not withhold relevant information from the Government.[140]

In addition to the VPS Code of Conduct obligations, the VPSC published a guidance document for secretaries and senior executives in advising their ministers in October 2021. Although not available at the time of the events investigated by Operation Daintree, it provides a useful and extensive guide for secretaries and senior departmental officials for managing their relationships with ministers' offices.

Among other matters, it includes guidance on:

- reporting lines and role responsibilities
- the need under the VPS Code of Conduct for frank, impartial and timely advice
- an apolitical approach, while facilitating implementation of government policies
- providing difficult advice
- working with ministerial advisors.

More recently, in October 2022, the VPSC published complementary guidance for VPS executives and officers for informing and advising ministers. It addresses similar issues to the secretaries' guidance, but is calibrated to the executive and officer levels.

Among other matters, it advises that:

- executives handle interactions with the minister's office, except in limited circumstances and with the executive's knowledge
- officers and executives should speak to their manager if they feel they will be held responsible or suffer repercussions for speaking up
- when briefing, executives and officers should ensure their minister and the ministerial office have a good understanding of a matter
- executive officers should create and protect a culture where people feel safe to speak up.

The additional guidance prepared by the VPSC is a useful resource for the VPS, although the guidance for secretaries omits a message that advisors cannot direct public servants. Both sets of guidance could more explicitly acknowledge that ministerial offices sometimes overstep their role and could provide clearer advice about how to respond to improper political interference.

Operation Daintree provides a case study of multiple occasions on which some officers in the department did not make impartial, frank and fearless decisions. One such occasion was the decision not to provide the minister with what might have been unwelcome advice on the options to progress the procurement of the occupational violence and aggression training. Executive Officer B informed Executive Officer A that Chief of Staff A's response to a draft brief to the minister on the procurement options was that they were 'unhappy to be in this position'.

While the Chief of Staff's intended meaning was unable to be clarified through examinations of either party to that text message, it is likely they were referring to the choice being offered to their minister between the minister authorising a competitive process that HEF might not win, resulting in animosity and possible retaliatory action from a 'volatile' stakeholder, or approving a sole sourcing arrangement with a union's related entity, without conducting a competitive process for a contract of significant value. After consulting the Chief of Staff, Executive Officer A determined that they would make the decision to directly procure the training from HEF.

Under examination, Executive Officer A indicated their decision was based on their view that it was appropriate to their level of authority and more efficient than submitting it to the minister. Both Executive Officers A and B conceded they may have been subconsciously influenced in their decision-making by an understanding of the outcome the minister or her office wanted. Regardless of the degree of influence such an understanding had on the decision, one consequence of it, whether or not it was consciously sought, was to shield the minister from having to make it and, based on Ms Hennessy's testimony, having any knowledge of it. Instead, Executive Officer A made the decision that was in accordance with their understanding of the minister's preference.

140 VPS Code of Conduct, p. 5.

The VPSC's new guidance for departmental secretaries on relations with ministers and their offices was not available to Executive Officer A at the time they made the decision to approve the sole sourcing procurement. However, while a welcome 'codification', the requirements should have already been familiar to an experienced senior administrator. Applying it objectively to the circumstances facing Executive Officer A may well have resulted in them deciding to submit the brief, notwithstanding the Chief of Staff's 'unhappiness'.

Informing and advising Ministers suggests that when:

> … deciding whether to advise the Minister of … matters [other than those on which a Minister should typically be briefed, the Secretary or other senior executive should] consider the matter's significance and importance in terms of:
>
> - the impact it may have on the implementation of a government program or service, for example, transport services
> - the impact it may have on the Victorian community or a community group, for example, people with a disability
> - its sensitivity and public interest in the matter, for example, an issue that is likely to become a matter for public debate in the media or the Parliament
> - any material and significant risks associated with the matter, for example, a financial, legal, social, environmental or reputational risk or the potential for a government policy, program or service to be negatively impacted or delayed.[141]

The proposed direct procurement of training services from HEF brought the matter within the last two of these considerations. Executive Officer A's decision to approve the sole source procurement meant, on the basis of Ms Hennessey's evidence as to her state of knowledge, that the minister was unaware of the financial, legal and reputational risk of entering into a contract with HEF.

While made in relation to the Queensland public sector, Coaldrake's following observation is apposite here:

> … it appears in many instances it can be senior public servants who take it upon themselves to anticipate what the Minister wishes to be told or to assume that the Minister would want to be 'protected' from exposure in an inconvenient matter. The effect is to have a public service whose motivations are partly informed by a self-imposed obligation to 'protect' the Minister, which is at variance with its proper practice.[142]

The related and inevitable consequence of not involving a minister in any decisions is that the blame for any errors that may subsequently occur will be directed at the department. For example, Ms Mikakos, in her submission on the draft report, pointed to the departmental decisions that allocated the funding for the initial contract, to approach a single provider, to sign off the Procurement Evaluation Report, and to sign off the contract with HEF. She also referred to the acknowledgement in evidence by senior public servants that public servants were prone to bias on the basis of what they thought the government would want. Ms Mikakos also referred to her expectation that she would have been briefed on important issues.

The questions that have been raised about the independence and capability of the VPS are very similar to concerns that have been expressed in other jurisdictions, and that have been the subject of external reviews and recommendations. Most notable have been the Thodey review into the Australian Public Service, released in 2019[143] and the Coaldrake review of culture and accountability in the Queensland Public Service, released in 2022.[144] Even more recently, reports have been released in New South Wales that examined possible ministerial interference in the appointment process for an international trade position[145] and reviewed grants administration processes,[146] and by the Grattan Institute into ministerial decision-making in relation to grants processes for purposes of political gain.[147]

The Victorian Ombudsman is presently investigating a referral from parliament concerning 'Politicisation of the Public Service' and her report is likely to also explore issues about the boundaries between ministers, their offices and the public service.

141 VPSC, Informing and advising Ministers, Circular 2021–24, pp. 8-9.
142 Coaldrake, *Interim Report,* n.24, p. 22.
143 Thodey, op. cit., n.18.
144 Coaldrake, op. cit., n.9.
145 Department of Premier and Cabinet NSW, 2022 DPC Inquiry: Appointment of Senior Trade and Investment Commissioner to the Americas.
146 State of NSW (NSW Treasury), 2022 Review of grants administration in NSW.
147 Wood, D Griffiths, K Stobart, A 2022 *New politics: Preventing pork-barrelling*, Grattan Institute.

The number of reports being produced regarding questions of ministerial control and the relationship between different jurisdictions' public services and their ministers is remarkable. They highlight the extent of concern about the decline in standards of public governance in Australia.

Operation Daintree has exposed similar issues of culture, political interference and public service integrity that reflect deeper problems in the VPS and its relationship to its ministers.

IBAC's role includes examining systems and practices in the public sector, and making recommendations to assist the public sector to increase its capacity to prevent corrupt conduct,[148] but it is unable to examine all of the causes of the more general decline in standards of governance. The outcome of the Ombudsman's investigation into politicisation of the public service will be highly relevant to the consideration of cultural and structural reform.

5.5.2 Failure to resist inappropriate interference

The Victorian Ombudsman and IBAC's investigation of this matter have identified clear examples of what one witness, drawing on their mental health practitioner background, called 'boundary violations'. In the context of Operation Daintree, this expression was a reference to a propensity for ministerial advisors to engage with matters that fall exclusively within the jurisdiction of the department (or in some cases, public servants inviting such a trespass in a misguided attempt to keep an advisor informed and satisfied that matters were progressing to a desired outcome).

These boundaries have been developed under the law or by convention over many years and are designed to protect government decision-making processes from compromise, both real and perceived, and through it, the integrity of government decisions.

As Executive Officer B observed, what can start as a minor incursion can grow over time, almost without the participants realising it, to a point where the boundaries become so porous, they are difficult to detect and observe. They suggested the 'responsiveness' dilemma facing the modern public servant of 'both having to work in collaborative relationships [with ministerial offices], deliver on policy and the requirements of the minister, while also holding to public service values is a challenge in the public sector'. In Operation Daintree, to the extent that senior staff were aware of the advisors' intrusions into their staff's work, no step was taken to curtail that intrusion or 'manipulation' of the staff.

The DHHS preparation of a brief to the minister setting out the two options to procure the occupational violence and aggression training through a limited competitive tender or sole source negotiation with HEF can be seen as an attempt to 'assure themselves that that direction [to contract HEF] was coming from the minister and for that to be clear and transparent in the process'. However, the interaction of Executive Officers A and B, and Chief of Staff A on the draft brief resulted in a brief not being submitted to the minister and Executive Officer A authorising the training to be sourced from HEF.

In their response to the draft report of this investigation, Executive Officer A conceded they should have done more to ensure there was no political interference in departmental decision-making by ministerial advisors, especially when they were aware that Health Advisor A was communicating directly with them.

Executive Officer A said they regretted 'that those individuals (in the DHHS team) felt unable to express to me, either directly or through a manager or other mechanism, the nature of their concern and distress. For members of the public service to meet their obligations of responsiveness, integrity and impartiality, there needs to be a culture that encourages speaking up in relation to reservations about decisions'.

They welcomed the introduction of the guidelines issued by the VPSC, *Informing and advising Ministers*, which includes guidance in relation to the role of ministerial advisors in preparing briefs.

148 IBAC Act s.15(6)

5.5.3 Interference with procurement processes and contract management

At its core, government procurement processes are designed to protect the public interest and ensure:

- the acquired goods and services represent value for money, both in terms of price and quality, and also the provider's capacity and capability to deliver
- the integrity of process so that potential suppliers can compete fairly to win the contract.

The VGPB's supply policies allow for some necessary flexibility to adjust to the circumstances facing the procuring agency. For example, the product or service sought may be unique to one supplier and running an open-market procurement program would constitute a waste of resources; or the procurement may be urgent and therefore, the competitive process restricted to a few established suppliers.

However, such flexibility (or exceptions to the general rule) creates the risk that the process can be steered to deliver a predetermined outcome that is not in the public interest. As Daley has remarked: '[i]t is difficult to ensure such decisions are not merely rewarding friends and supporters because they usually have public policy justifications that are at least plausible.'[149]

Operation Daintree has exposed an instance where this 'cloak of plausibility' was drawn over an objectively erroneous procurement decision. Having determined that they would approve the sole sourcing of HEF to deliver the training, Executive Officer A then issued instructions on the justification for the decision they wanted recorded in the brief.

None of the justifications that Executive Officer A required be included in the brief had merit; they lacked any evidentiary foundation. They were:

- first, that it would be **quicker** than a limited competitive tender, notwithstanding the WWt's previous advice that both options would take six weeks. It also ignored the longer-term view that HEF's inexperience would probably result in it taking more time to develop and deliver the training than more experienced suppliers
- second, that HEF's program would likely be **comparable in cost** to programs from other suppliers. The relevant witnesses were unable to adduce any evidence to IBAC on this point, other than some vague and unsubstantiated references to other recent training procurement exercises being of similar cost. The chosen approach also ignored the value-for-money selection criterion that required evaluation of HEF's capability and capacity to deliver the project. This risk seemed to disappear from consideration when the draft ministerial brief was recast for Executive Officer A's approval, and then manifested itself almost immediately on DHHS entering into the contract with HEF
- third, that supply of the training by a union-related entity would **increase workforce engagement** in the training. Other unions in the health sector have run successful training programs, but, in the context of the HEF program, that claim did not stand up to scrutiny. The poor quality of the initial pilot courses and the negative feedback on them (notwithstanding the union affiliation of the provider) was more likely to repel than attract workers and their health services employers.

Another example of interference with the process to deliver a preferred outcome can be seen in the development of a Procurement Plan for the sole sourcing of the training program from HEF. In the earlier Procurement Plan for the WWt's preferred option of a limited competitive process, the market was 'expected to be strong'.

The subsequent Procurement and Contract Risk Management Plan, prepared by DHHS later, noted that view by assessing one of the two high risks of the procurement as the 'Direction to go to a single supplier where market competition is strong'. By contrast, once Executive Officer A approved the sole source procurement, the new Procurement Plan indicated that the competition was expected to be 'weak (i.e.: monopolistic/unique)'.

These examples point to the need for greater rigour in the application of procurement policy, particularly in terms of evidence required to justify a departure from the usual process, to ensure it is not contrary to the public interest.

149 Daley, *Gridlock*, op. cit., n.24, p. 55.

5.5.4 Motivation for public servants' lack of adherence to the rules

The evidence in Operation Daintree showed that fear is a significant factor motivating public servants to engage in conduct in response to pressure from ministerial advisors, which is contrary to the VPS Code of Conduct. Such fears can relate to the denial of development opportunities, such as higher duties assignments, secondments or training, or loss of chances to be promoted through to 'get(ting) your marching orders' as one DHHS witness put it.

Comments gathered by Professor Coaldrake from interviews and submissions, as part of his review, have shown similar reasons for what he describes as the current 'unsteadiness … of the Queensland public sector':

> … fear of unwanted career impacts and a loss of employment status for unwelcome advice; pressure from ministerial staffers for responses that minimise problems; and discouragement from providing written advice on difficult topics. Unpleasant human interactions … also contribute … bullying and belittling … isolation of difficult people in the workplace …[150]

This fear of detrimental action or consequences seems to outweigh any concerns the staff had about the consequences of breaching the code in the events investigated in Operation Daintree.

Coaldrake characterised the serious governance problems these fears can create in the following terms:

> If a pattern of compliant, or worse, fear-based behaviour becomes entrenched as the culture of an organisation, it puts the organisation at risk. In the case of government, it reduces the views available in decision-making, excludes the opportunity to truly engage the community being served and can leave government with a false sense of its own performance.
>
> … addressing [this problem] is essential to rebuilding both trust and confidence in the public sector … And neither trust nor confidence are built if there is trepidation, even fear, in providing advice which may differ from the party line[151].

Another fear that can motivate such behaviour is of irrelevance, that is, where a person's advice on issues is simply not sought or ignored. The Grattan Institute has remarked on the increased 'sidelining' of the public service in the Commonwealth sphere, where the previous government had shown a growing preference to seek advice elsewhere.[152] That observation is relevant in Victoria, where the government has, for example (and as is its prerogative), increasingly used consultants, independent experts or panels to undertake significant reviews.

The positive consequences of non-compliance with the VPS Code of Conduct can also be a motivating factor: that is, engaging in conduct that contravenes the code where it leads to positive personal outcomes. As Executive Officer B testified: 'at an unconscious level you're looking to deliver what you're expected to deliver because you're rewarded for that'.

Both these factors – avoiding detriment (including irrelevance) and seeking reward – may also inform the apparent reluctance to call out or report inappropriate behaviour by ministerial or departmental staff, which can encourage such rule bending and breaking among public servants. Again, those fears or rewards appear to outweigh the following obligation under the code to report such conduct (and the risk of sanctions for breaching it):

> Public sector employees [should] report to an appropriate authority workplace behaviour that violates any law, rule or regulation, or represents corrupt conduct, mismanagement of public resources, or is a danger to public health or safety, or to the environment. Public sector employers [must] inform their employees of their rights and responsibilities regarding the making of such reports.[153]

This problem is not unique to Victoria. The Australian Human Rights Commission's recent *Set the Standard* report observed:

> The lack of clarity about processes, concerns about confidentiality and a sense that nothing would come of any report or complaint – *or worse, that it would be detrimental to the person making the report* – were key barriers [to reporting together with] … concerns about the lack of consequences for parliamentarians and their staff.[154] [Emphasis added]

150 Coaldrake Final Report, op. cit., n.9, p. 8.
151 Ibid.
152 Daley, *Gridlock*, op. cit., n.24, p. 3; Wood et al, *Who's in the room?* Op. cit., n.54, p. 8.
153 VPSC, Code of Conduct for Public Sector Employees, s.3.6.
154 Australian Human Rights Commission, op. cit., n.103, p. 221.

Similarly, Baroness Prasher, the United Kingdom's then First Civil Service Commissioner, diagnosed the low reporting rate in her jurisdiction in the following terms:

> I think that lack of complaints does not mean that there is not a problem, but I do feel that the arrangements are not adequate to give confidence. It is in the genes of civil servants not to raise their heads above the parapet.[155]

The resultant silence can also embolden ministers and their advisors in their propensity to unduly influence or direct public servants in performance of their duties, and exacerbate the risk of public servants engaging in misconduct and of policy outcomes that are not in the public interest.

Breaking this code of silence or, more positively, encouraging reporting to expose misconduct and deter it in the future, will be aided by making 'any attempt to intimidate or victimise a reporter or complainant or to lobby, influence or intimidate the [proposed complaint investigator] … a serious and aggravated breach of the [perpetrator's relevant] Code of Conduct'.[156]

For these reasons, IBAC recommends that complainants be protected from detrimental action. In expanding the remit of the Parliamentary Integrity Commissioner, it is important the government engages with IBAC on the design to ensure that safe and efficient reporting pathways are established under the Public Interest Disclosures Act. For instance, complaints about serious professional misconduct, such as a serious breach of a code of conduct, may be eligible for legal protections as a Public Interest Disclosure under the Public Interest Disclosures Act, while low-level misconduct, such as minor code breaches, may not meet the required definition of 'improper conduct'.

To be effective, these protections and deterrence measures should be widely known and understood. To that end, IBAC proposes that relevant codes of conduct, especially for public sector employees and ministerial advisors, be amended to explain reporting processes and protections.

There is also a risk that the establishment of an effective complaints regime, with protection from detrimental action, may encourage abuse of the regime through making frivolous, vexatious or malicious complaints. Such complaints can have serious adverse consequences on the career and wellbeing of the person about whom the complaint is made and those close to them. Consequently, IBAC also proposes that such abuse of the complaints regime by a public sector employee or ministerial staff member should be made a breach of their respective codes of conduct, capable of attracting sanctions proportionate to the conduct.

It is unlikely that the improper conduct exposed by Operation Daintree is an isolated example of such behaviour. It is more likely that the advisors' actions and the apparent ignorance of their ministers are symptomatic of the wider trends in public administration discussed in this report. IBAC has considered the measures that could be taken by the VPSC, and the secretaries of departments and CEOs of agencies, to bolster the public service's commitment to providing frank, impartial and timely advice. Such trends are difficult to reverse.

As mentioned in relation to ministerial advisors, while the guidance materials could be improved, there is now much clearer and more comprehensive advice available to public servants about their relations with ministerial offices than previously. However, while the guidance is necessary and useful, it only articulates well-known conventions that have always been the lodestar of public service ethics. The challenge is to improve the guidance's visibility and acceptance through communication, training and leadership.

IBAC is aware of the efforts made by the VPSC and Victorian Secretaries' Board of the VPS to promote leadership and training programs. It is reluctant to prescribe further activities and instead, recommends that the VPSC and Victorian Secretaries Board review their current programs and initiatives, with a view to strengthening and supplementing them with specific training and materials directed to the challenges of ensuring a greater commitment to responding effectively to improper political interference. It is possible to do this without compromising the public service's willingness to implement a government's policies effectively and responsively.

155 Committee for Standards in Public Life, op. cit., n.92, para 6.59.
156 Australian Human Rights Commission, op. cit., n.103, pp. 224 and 246.

A culture that permits improper political interference to occur magnifies the risk that it will lead to corrupt political behaviour. IBAC has become concerned that the apparent increase in the level of improper conduct in Victoria, which might be characterised as 'grey corruption', is increasing the risk that such behaviour will lead to more serious abuses of power.

5.5.5 Leaders' obligations to ensure the safety and wellbeing of their staff

Under the *Occupational Health and Safety Act 2004*, an employer 'must, so far as is reasonably practicable, provide and maintain for [their] employees … a working environment that is safe and without risks to health'.[157] That Act also imposes a similar responsibility on any 'person who … has, to any extent, the management and control of a workplace'.[158]

In the context of Operation Daintree, the employer obligation extends to the Premier, in relation to ministerial advisors and the Secretary of DHHS for the public servants in the WWt. Executive Officers A, B and C also had subsidiary responsibility for the management of the public servants in the WWt.

The evidence established that some staff in DHHS's WWt experienced considerable distress due to the pressure applied by the minister's office to deliver an outcome through a process, which they regarded as inappropriate, without adequate understanding or support from their senior executives. Executive Officer B conceded under examination that the team had been let down and 'were in quite a deal of distress over the circumstances'.

The team's distress was compounded by the instruction to, in effect, redirect the draft ministerial brief on the procurement process to Executive Officer A, and amend it to include advice that was contrary both to their view and the advice originally given by the procurement team on appropriate process.

Coaldrake has drawn attention to similar conduct in the Queensland public sector, where he has been informed of:

> … instances of senior public servants directing employees to sanitise advice and alter recommendations to align with what was presumed to be the Minister's position. … [and another case of] a Director-General taking steps to prevent a report from 'reaching the Minister's ears' so as to ensure the Minister could continue to plausibly deny any knowledge of the matter.[159]

As the public service is organised hierarchically, there is a management prerogative for more senior officers in the chain of command to edit briefings before they are formally submitted. However, the reasons for refining the brief in this investigation were not justifiable, as outlined above. It is also a misuse of that executive authority to require subordinate staff to amend or create a brief that misrepresents their position. The evidence of senior staff acknowledged there was a culture within the department that permitted such a requirement to be imposed on staff and that it was 'indefensible'.

As part of their leadership responsibilities, public service executives are expected to model the public sector values. Had Executive Officers A and B done so during the matters investigated as part of Operation Daintree, they would have resisted the inappropriate influence and directions from the minister's office on this procurement exercise through, for example, briefing the minister and requesting the Chief of Staff to direct advisors in the minister's office to respect their staff's role and independence.

Demonstrating such leadership would have not only served the public interest by delivering a better outcome, but also would have had a positive flow on effect on workplace culture and the health and wellbeing of staff.

157 Section 21(1).
158 Section 26(1).
159 Coaldrake, op. cit., n.24, p. 21.

As part of its response to the Royal Commission into Victoria's Mental Health System,[160] the Victorian Government has committed to introducing new regulations to strengthen the occupational health and safety framework, as it relates to psychosocial hazards in the workplace.

Consultation of the draft regulations was continuing at the time of preparation of this report. The proposed regulations signal the government's commitment to mentally healthy workplaces.

This section has considered the important role of leaders in creating mentally healthy workplaces in the context of the VPS and its interaction with ministerial offices. IBAC suggests that similar consideration is warranted in relation to ministerial staff and their psychological health in their workplace, and the leadership roles of ministers and chiefs of staff.

Following the release of the Australian Human Rights Commission's *Set the Standard* report, the Commonwealth Government's 2018 *Statement of Ministerial Standards* was amended to include the following new requirement:

> As employers of staff, Ministers have obligations to comply with all applicable Australian laws. Importantly, this includes understanding workplace health and safety duties and the steps to take to satisfy those duties, under the *Work Health and Safety Act 2011* [Cth] and other workplace laws.[161]

IBAC notes the introduction of a formal Ministerial Staff Workplace Bullying and Occupational Violence Prevention Policy and a Ministerial Staff Prevention of Sexual Harassment in the Workplace Policy, which were released as part of the package of new codes and policies in July 2022.[162]

Recommendation 15:

That the VPSC and Victorian Secretaries' Board review their current programs and initiatives, with a view to strengthening and supplementing them with specific training and materials directed to the challenges of ensuring a greater commitment in the VPS to preventing and responding effectively to improper political interference.

160 Recommendation 16 of the Royal Commission into Victoria's Mental Health System (2021) recommended the Victorian Government, among other things:
a. foster the commitment of employers to create mentally healthy workplaces
b. advise on, develop and provide resources to assist employers and employees across Victorian businesses to:
• promote good mental health in workplaces
• address workplace barriers to good mental health
• promote inclusive workplaces that are free from stigma and discrimination
• support people experiencing mental illness at work: viewed at https://finalreport.rcvmhs.vic.gov.au/, p. 56 on 30 March 2022.
161 Section 2.23.
162 See https://www.Premier.vic.gov.au/policy.

Recommendation 16:

That the Department of Health reviews and, where necessary, strengthens its procurement policies, systems and practices to address the corruption vulnerabilities identified by IBAC in this report, including:

(a) the assessment and management of unsolicited proposals to supply goods or services, regardless of how a proposal is conveyed to it

(b) its conflicts of interest framework so employees and contractors understand their obligations to identify, declare and manage such conflicts and avoid them where possible

(c) that suppliers are sourced in a way that complies with competition requirements in legislation and/or procurement policy and procedures.

5.5.6 Leadership and culture

This report has recommended measures to strengthen standards of conduct and improve compliance with those standards, with the aim of enhancing the integrity, accountability and transparency of government processes and decision-making.

As with IBAC's joint report with the Ombudsman on Operation Watts,[163] IBAC recognises that strong leadership is vital to fostering a more ethical culture, in this case, in the executive, rather than the legislative branch of government. IBAC also considers that both leadership and cultural change are equally important to achieving the integrity reform objectives to which IBAC's recommendations in this report are directed.

The importance of leadership to these objectives was captured in Professor Eva Tsahuridu's insightful submission to a recent inquiry:

> They are the ones whose influence on culture is greater, which then cascades on to influence people's behaviour throughout organisations. Leaders need to understand how they influence culture and people and how they can support and encourage ethical conduct. Focus on creating ethical leaders, who will then create ethical cultures, rather than compliance. Leaders need to understand how to be ethical leaders, not only good people; how they can be trustworthy, how to ensure bad news is reaching them and how they can listen to bad news without shooting the messenger, how to appreciate the interconnected nature of ethical conduct at work etc.[164]

Adapting the famous Drucker quotation, Professor Tsahuridu also commented on the profound impact of culture on ethical behaviour within organisations:

> It is often said that culture eats strategy for breakfast. I would add that culture eats personal ethical values for breakfast too. The informal and formal systems of a workplace can better explain misconduct than individual characteristics … [165]

163 IBAC and Victorian Ombudsman, op. cit., n.3, ch. 8.4, paras 149–159 and Recommendation 6.
164 Tsahuridu, E 2022 Submission to Integrity and Oversight Committee of the Victorian Parliament *Inquiry into Education and Prevention Functions of Victoria's Integrity Agencies*, Submission No. 29, p. 5.
165 Ibid., p. 2.

5.6 Responding to IBAC's recommendations

In order to give parliament and the community some insight into the government's response to this report, IBAC recommends that the government reports to parliament on the actions it has taken, or proposes to take, to implement the recommendations in this report.

IBAC recognises that the timelines and sequencing of implementation of the recommendations in this report will differ. For that reason, IBAC proposes two reporting dates – one in the near term, to generate and sustain momentum for the proposed reform measures, and the other in the longer term, taking into account the interdependence of some recommendations on other actions (including in response to other special reports already tabled).

Recommendation 17:

That the Victorian Government:

(a) consults with IBAC on the preparation of legislative changes arising from the implementation of recommendations in this report

(b) provides to parliament:

- a progress report on the action taken in response to the recommendations in this report by 31 October 2023
- a further report on those actions (with a focus on the recommended complaints regime) by 30 June 2024.

IBAC may publicly report on the adequacy or otherwise of those responses.

List of abbreviations

Term	Expanded abbreviation/Explanation
ALP	Australian Labor Party
ANMF	Australian Nursing and Midwifery Federation (Victorian Branch)
Coaldrake Final Report	*Let the sun shine in: Review of culture and accountability in the Queensland public sector*
DET	Department of Education and Training
DHHS	Department of Health and Human Services
DLO	Departmental Liaison Officers
DPC	Department of Premier and Cabinet
EBA	Enterprise Bargaining Agreement
HEF	Health Education Federation
HWU	Health Workers Union
IBAC	Independent Broad-based Anti-corruption Commission
IBAC Act	*Independent Broad-based Anti-Corruption Commission Act 2011*
Ministerial Code of Conduct	Code of Conduct for Ministers and Parliamentary Secretaries
PPO	Premier's Private Office
RFQ	Request for Quote
RTO	Registered Training Organisation
TAFE	Technical and Further Education
VAGO	Victorian Auditor-General's Office
VGPB	Victorian Government Purchasing Board
VPS	Victorian Public Service
VPS Code of Conduct	Code of Conduct for Victorian Public Sector Employees
VPSC	Victorian Public Sector Commission
WWt	Worker Wellbeing team

Appendix

A

People named or referred to in the report and responses to the draft report

The IBAC Act[166] provides a process for people and entities who have been involved in an investigation to have the opportunity to view relevant parts of a draft of the report. Where IBAC is intending to make an adverse comment or opinion about any person or public body, that person or public body must be given a reasonable opportunity to respond to those comments or opinions.

IBAC must fairly set out each element of a response in its report.

If IBAC includes a comment or an opinion about any person which is not adverse to the person, it must still provide that person with the relevant material in relation to which it intends to name the person, although it is not required to set out the elements of any response in the report.

IBAC must not name a person who is not the subject of adverse comment or opinion unless:

- it is satisfied that it is necessary or desirable to do so in the public interest;
- it is satisfied that it will not cause unreasonable damage to the person's reputation, safety or wellbeing; and
- it states in the report that the person is not the subject of any adverse comment or opinion

IBAC's approach

IBAC sent a draft version of the report to 22 people and entities and received 18 responses in reply. Regardless of whether or not the witnesses were subject to adverse comment, IBAC has carefully considered each response and amended the report where it considers it appropriate to do so.

IBAC has decided not to name most of the people who provided evidence to the investigation, including all the people who were not subject to adverse comment. IBAC has decided to name the following people who are subject to some degree of adverse comment, primarily because of their senior positions in the government or, in Ms Asmar's case, the organisation which she led. They had the ability to put in place systems and influence behavioural norms that could have prevented the improper behaviour that occurred:

- Mr Daniel Andrews, Premier of Victoria
- Ms Jill Hennessy, former Minister for Health
- Ms Jenny Mikakos, former Minister for Health and
- Ms Diana Asmar, Secretary HWU.

IBAC has also named the Department of Health and Human Services (as it then was), Health Workers Union and Health Education Federation because of the adverse comments directed against them and their employees and their similar ability to have put in place systems and norms that could have prevented the improper behaviour that occurred.

The witnesses and entities who have been named have been named because of their responsibilities, not because of any findings of corrupt conduct.

IBAC decided that the other witnesses subject to adverse comment (and for whom no findings of corrupt conduct were made) should not be named because of a variety of concerns about health and welfare, reputational harm and/or the level of the witness' involvement in the events under investigation.

IBAC has used or adapted position titles for those persons not named in the report to assist the reader's understanding of the report.

People named or referred to in the draft report but are not subject of adverse comments or opinions

The following Individuals were referred to in the draft report but not the subject of any adverse comment or opinion. They were given the opportunity to inspect parts of the report and to comment on those parts if they wished. Those people were:

- Deputy Secretary, Corporate Services, DHHS
- Executive Officer C
- Assistant Director, Worker Well-being team, DHHS
- Manager, Worker Well-being Team, DHHS
- Principal Policy Officer A, Worker Well-being team, DHHS
- Principal Policy Officer B, Worker Well-being team, DHHS
- Chief Procurement Officer, DHHS
- Director, Policy & Strategy, Procurement Services, DHHS
- Procurement Services Officer
- HEF Director A
- HEF Director B

166 At s.162

Responses provided by people referred to in the draft report (by name or pseudonym) who are the subject of adverse comments or opinions

Where IBAC has made an adverse comment or opinion, or a comment or opinion that may be considered to be adverse, about any person or body referred to in this report (by name or pseudonym), that person or body has been given a reasonable opportunity to respond to those comments or opinions by being shown a draft version of the report.

The following persons (identified in the report only by pseudonyms) are the subject of comments or opinions that are, or may be considered to be, adverse and either did not provide a response to the draft report or advised they did not have any comments to make about it:

- Chief of Staff A (Minister for Health's Office)
- Chief of Staff B (Minister for Health's Office)
- Executive Officer B (DHHS).

A number of persons and bodies who are the subject of adverse comments or opinions responded to the draft report and changes were made or incorporated into the report on the basis of those responses where considered appropriate. Those responses or parts of responses that have been addressed in the report are not set out in any further detail in this appendix.

A number of respondents objected to the inclusion of some matters in the report that had not been raised in their examination. However, IBAC's view is that the inclusion of adverse comments and the contextual material that forms the basis of such comments provides a sufficient opportunity for an affected person to be able to respond when replying to a draft report. The Court of Appeal has recently endorsed this approach.[167]

The only submissions or parts of submissions that have not been identified and addressed in the report are summarised below, together with IBAC's response:

	Person or Body's Response to draft report
Daniel Andrews MP	The Premier was concerned that the draft report implied that the PPO was fully abreast of the issues that DHHS was raising with the Health Minister's Office (prior to the election) and proceeded to develop the 2018 election commitment regardless. He argued that there was no basis for such a finding. IBAC does not accept that the report contains the implication identified by the Premier. Section 4.6 shows that the PPO were aware that the process of selecting HEF to be the provider was ongoing at the time that the election commitment was finalised, reinforcing the proposition that the process had a predetermined outcome. The report does not suggest that the earlier concerns raised by DHHS about the procurement process and HEF's suitability to deliver the training were communicated to the PPO. IBAC notes that the report does refer to the PPO's knowledge of, and involvement in, the subsequent contract management difficulties experienced by DHHS during the implementation phase, but those difficulties occurred after the formulation of the 2018 election commitment.
Jill Hennessy MP	Ms Hennessy submitted that IBAC could not make any findings about possible breaches of the Ministerial Code of Conduct because they fell within the statutory prohibition in s.162(6)(a) of the IBAC Act on findings that a disciplinary offence had been committed. IBAC does not accept that breaches of the Ministerial Code of Conduct amount to disciplinary offences, but in any event: (a) no such findings have been made by IBAC, and (b) any such findings in this investigation would be a matter for Parliament or the Premier.

167 AB v IBAC [2022] VSCA 283

Person or Body's Response to draft report (continued)

Diana Asmar, Secretary, Health Workers Union	Ms Asmar's submission in response to the draft report was also made on behalf of the HWU and HEF (collectively, 'union stakeholders'). Ms Asmar challenged the following proposed findings which she suggested are indirectly adverse to the union stakeholders:
Health Workers Union	(a) That referring to the HEF training proposal as unsolicited is misleading. IBAC rejects that assessment but acknowledges the union stakeholders in submitting the HEF proposal were legitimately pursuing the union's interests, did not ask DHHS to relax its processes and were unaware the department was not following its regular practices.
Health Education Federation	(b) She did not approach Health Advisor B with the intent of compromising DHHS's management of the contract. While accepting this submission, IBAC notes that that was the effect of her conduct in her frequent communications with and complaints to both PPO Advisor A and Health Advisor B. Her motivation in making such approaches was to change or override the department's approach. That motivation was sufficient to create the risk of compromising departmental processes in the mind of an objective observer.
	(c) At all times, the union stakeholders believed that they were entitled to seek the assistance of ministerial advisors and did not receive any advice from the ministerial advisers concerned to the contrary. IBAC accepts this submission in part. However, as noted in the report, IBAC does not consider the union stakeholders can credibly claim ignorance of the restrictions on their conduct after they received the department's RFQ and signed the letter of commitment to the Suppliers' Code of Conduct. IBAC agrees that the advisors should have responded differently to union stakeholders' approaches and notes that Section 5.2.1 of the report provides examples of what the advisors should have done.
	(d) the union stakeholders were not aware that they were the beneficiary of favourable procurement treatment. IBAC has not stated that the union stakeholders were aware that they were beneficiaries of favourable procurement treatment. IBAC's report focuses on DHHS' perception of the wishes of the minister and her office and consequent actions.

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