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# Special Report

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Welfare of witnesses in IBAC investigations



witness



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# Letter of transmission

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To

**The Honourable President of the Legislative Council**

and

**The Honourable Speaker of the Legislative Assembly**

Under section 87 of the *Victorian Inspectorate Act 2011* I present to each House of the Parliament the Victorian Inspectorate's report on the welfare of witnesses in IBAC investigations.

Sincerely,



Eamonn Moran PSM QC

**Inspector**

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# Foreword

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As with any investigative body, we recognise that our operations can (and do) place people under considerable pressure. The health and safety of witnesses is always our first priority.

*IBAC Annual Report 2015/2016*

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A Russian proverb teaches us that 'A man is judged by his deeds, not by his words.' So too must integrity agencies be judged.

In 2016, two incidents involving IBAC's coercive powers were brought to the Victorian Inspectorate's attention. In both incidents, the health and safety of witnesses was seriously compromised – in one case, with potentially tragic consequences.

This special report finds that at their core, the incidents – one involving attempted suicide, another involving the coercive examination of a witness while her mental state was significantly impaired – resulted from a failure of IBAC's policies and procedures. The physical layout of IBAC's premises, and what could reasonably be characterised as onerous security arrangements, contributed to the problem.

IBAC, in its response to a draft of this report, accepts that it has a duty to those who are subject to the exercise of its coercive powers, but has asserted that it does not accept some of the conclusions reached in relation to particular incidents. The Inspectorate has set out in the report their specific responses and explained why it disagrees.

The Inspectorate has, for the first time, decided to make a special report to Parliament, and done so during Victorian Mental Health Month, to shine a light on the welfare (including mental health) of witnesses subject to the exercise of coercive powers by integrity agencies.

No matter who the witness is, or why they are being investigated, integrity agencies must demonstrate a regard for their welfare.

The examinations discussed in this report involved police officers. Police officers are, by the nature of their work, more likely to be exposed to risks to their mental health. This is a contemporary issue of public concern, both within and outside police. Integrity agencies must ensure their policies and procedures take the particular circumstances of witnesses into account. Some integrity agencies already do this. In this case, IBAC did not.

IBAC has a legal duty to ensure, so far as is reasonably practicable, that witnesses are not exposed to risks to their health and safety arising from IBAC's conduct. While this special report deals with a failure on IBAC's part to take sufficient account of the mental health of witnesses, the Inspectorate is not suggesting that there has been wrongdoing by any individual IBAC officer. The reality is that IBAC's policies and procedures did not provide sufficient guidance to protect the mental and physical health of witnesses in real and foreseeable circumstances arising from the exercise of IBAC's coercive powers.

The Inspectorate is the key oversight body in Victoria's integrity system. It was established to provide oversight of other integrity agencies and their officers, including IBAC. The Inspectorate has a statutory duty to monitor IBAC's compliance with all laws and to assess the effectiveness and appropriateness of its policies and procedures.

This special report is presented in discharge of that duty. It makes 10 recommendations, which taken together, are designed to bring IBAC's policies and procedures into alignment with community standards and IBAC's obligations, particularly as these relate to mental health. The Inspectorate is fully aware of the important role IBAC plays in Victoria's integrity system. This special report, including its recommendations, has been made to ensure that IBAC and the integrity system as a whole is strengthened, and to ensure that IBAC prioritises the health and safety of witnesses. None of the observations or recommendations made in this report impinge on operational effectiveness.

Put simply, when a person is subject to an exercise of coercive power by any agency, steps must be taken to address the real and foreseeable impacts on their mental and physical health. These steps are not complicated, expensive or disruptive to operational objectives.

The Inspectorate acknowledges that IBAC has changed its policies and procedures, and made improvements to its hearing room precinct, since the incidents set out in this report. However, more can, and must, be done.



Eamonn Moran PSM QC

**Inspector**

# Methodology

## COMPLAINTS TO THE INSPECTORATE

In early 2016, the Victorian Inspectorate (**the Inspectorate**) received complaints from two police officers (referred to in this report as **Complainant 1** and **Complainant 2**) regarding their treatment by the Independent Broad-based Anti-corruption Commission (**IBAC**) during IBAC investigations into allegations of police misconduct.

The first complaint related to events at IBAC on 22 September 2015. Complainant 1, a police officer, was summonsed to immediately attend an examination at IBAC while her mental state was significantly impaired, and she was at risk of self-harm, as assessed by her psychologist. After her examination concluded at 10:27 pm, a search warrant was executed on her house and then on her car which was parked in a suburban car park, concluding at 2 am.

The other complaint related to events at IBAC on 7 April 2016. Complainant 2, also a police officer, having been summonsed to an examination at IBAC, attempted suicide twice while on IBAC's premises.

## DECISION TO INITIATE 'OWN MOTION' INVESTIGATION

As a result of the serious incident involving Complainant 2, concerns surrounding the treatment of Complainant 1, and other matters of which it was aware, the Inspectorate initiated an 'own motion' investigation into the conduct of IBAC, insofar as it affected the health and welfare of persons involved in IBAC investigations. This was done under s 46 of the *Victorian Inspectorate Act 2011 (VI Act)*.

Subsequently, the Inspectorate received further complaints from two other police officers (one of which is referred to in this report as **Complainant 4**) also regarding their treatment by IBAC during investigations. The Inspectorate determined to consider the matters raised by the four complaints as part of the own motion investigation.

In July 2016, the Inspectorate determined to hold an inquiry under s 49 of the VI Act for the purpose of conducting the own motion investigation.

While the Inspectorate understands IBAC's preference, expressed in its response, for a review and dialogue about these matters in the exercise of the Inspectorate's monitoring function rather than for the process described, the Inspectorate considers that an investigation and inquiry was appropriate to the subject matter.

## INVESTIGATION AND INQUIRY

The Inspectorate's own motion investigation and inquiry involved the collection and review of a substantial body of evidence. This included:

- Interviewing the complainants.
- Reviewing statutory notifications provided to the Inspectorate by IBAC as relevant to the four complainants, including summonses, confidentiality notices, recordings and transcripts of their examinations at IBAC.
- Reviewing CCTV footage from IBAC's hearing room precinct on 7 April 2016.
- Interviewing other persons involved in the events giving rise to the complaints, including Complainant 2's lawyer, Victoria Police Professional Standards Command (**PSC**) officers and a PSC representative.
- Interviewing a representative of Ambulance Victoria's Professional Standards team.
- Interviewing relevant IBAC officers.
- Reviewing IBAC's policies and procedures.
- Reviewing IBAC memoranda, file notes, diary notes and incident reports.
- Reviewing audio recordings, video recordings, working documents, correspondence, warrants and statements from IBAC's investigation files.
- Physically inspecting IBAC's hearing room precinct.

The Inspectorate considered this evidence in context. The investigation and inquiry was guided by the civil standard of proof, taking into account the nature and seriousness of the conduct, the quality of the evidence, and the significance of the consequences for the persons involved in the matters subject to the investigation and inquiry.

It was necessary in the course of the own motion investigation and inquiry to address IBAC's policies and procedures. The investigation and inquiry provided an opportunity to examine the policies and procedures in operation. The Inspectorate considers that the topics of these policies and procedures are relevant to the welfare of persons subject to the exercise of IBAC's coercive powers.

The Inspectorate has evaluated IBAC's conduct, not the conduct of any individual officer. There is no suggestion that the issues identified in this report involve individual fault or blame. The conduct that is described is consistent with IBAC's expectations. That is why the organisation's policies and procedures are the subject of criticism. The Inspectorate has not included in this report any statement as to a finding or opinion that a specified person is guilty of or committed a criminal or disciplinary offence.

This report refers to Victoria Police (Professional Standards Command) and Ambulance Victoria. In accordance with the Inspectorate's obligation under s 87(8)(c) of the VI Act, these entities are not the subject of any adverse comment or opinion.

## **PROCEDURAL FAIRNESS**

Having considered the evidence, the Inspectorate prepared a draft of this report, setting out its proposed findings and recommendations.

The Inspectorate provided the draft report to IBAC, including its officers, the complainants and a number of third parties for their review and response, in accordance with its obligation to accord procedural fairness.

The Inspectorate reviewed and considered carefully the substance of submissions made. Taking this into account, the Inspectorate prepared an amended

draft of its report. This was provided to IBAC for its review and response, and the Inspectorate agreed that IBAC could provide the amended draft to relevant officers to enable them to provide a response through IBAC. The Inspectorate has fairly set out each element of IBAC's response in the relevant parts of the report.

## **RECOMMENDATIONS**

The Inspectorate makes recommendations to IBAC under s 78(1) of the VI Act.

The Inspectorate may decide to seek reports from IBAC under s 78(5) of the VI Act to verify the implementation of these recommendations.

# Duty of care to Complainant 1

## SUMMARY

Complainant 1 was taken to IBAC and examined on 22 September 2015 at 9:50 pm. That day, Complainant 1 was in the care of a psychologist, her mental state was significantly impaired, and she was considered by her psychologist as at risk of self-harm. On the day of the service of her summons she was attending her general practitioner (GP) to discuss her voluntary admission for inpatient psychiatric services.

Organisationally, sufficient information about Complainant 1's health – including recent expressions by Complainant 1 of thoughts of suicide (**suicidal ideation**) – was held by IBAC. This information put it under an obligation to act to enquire and learn more about Complainant 1's welfare. IBAC did not discharge that obligation. IBAC's policies and procedures did not operate to ensure it met that obligation. That there was no adverse outcome – in contrast to Complainant 2 – was good fortune rather than good planning.

The Inspectorate does not suggest that there has been any wrongdoing by any individual. The issue is organisational, because IBAC's policies and procedures were not designed for the task.

In reaching conclusions with respect to Complainant 1, the Inspectorate has acted as far as possible on objective material, and material that has other corroborative support. To the limited extent that it is necessary to act on Complainant 1's account alone, the findings below explain how the Inspectorate has acted on Complainant 1's evidence. The Inspectorate is certain that Complainant 1's mental state was significantly impaired on 22 September 2015. Independent evidence bears that out. Findings with respect to IBAC's state of knowledge do not depend on any unsupported claim by Complainant 1, but on other material.

This is important because IBAC suggested there should be concerns about the credit of Complainant 1. The Inspectorate has seriously considered those issues. However, it considers that it can work from objective and independent material, to which such issues do not attach. This does not mean

the Inspectorate does not accept Complainant 1's account – rather to the extent that the Inspectorate has relied upon her account, it has objective material in support of it, or the Inspectorate has explained why it has been able to act upon it.

## COMPLAINANT 1'S CONDITION ON 22 SEPTEMBER 2015

Complainant 1 had been met by PSC officers at approximately 2:30 pm on 22 September 2015, and brought to the Victoria Police Centre (VPC), where she was served by IBAC with a witness summons at 5:30 pm, requiring her 'immediate attendance' at an IBAC examination. She attended IBAC that day in compliance with the summons. Complainant 1 was examined at 9:50 pm that night.

At all relevant times up until she was served with the 'immediate attendance' summons, IBAC was aware of the following facts:

- Complainant 1 was attending her GP that day.
- Complainant 1 had expressed suicidal ideation on at least two occasions.

While this information was known within IBAC, it does not appear to have been widely known. To the extent it was known, a view was formed within IBAC that Complainant 1 was attending her GP to obtain a medical certificate to avoid work (and drug testing). As will appear below, she had a genuine reason for attending the GP.

IBAC also knew other matters from the lawful interception of two mobile telephone calls. In those calls it was reported that Complainant 1 made statements about suicide. In the first call, occurring 17 days prior to attending her GP on 22 September, Complainant 1 had talked about suicidal ideation. On another occasion, prior to her examination on 22 September, Complainant 1 had again talked about suicidal ideation.

A view was apparently reached within IBAC – without the benefit of other information – that her expressions of suicidal ideation were 'in jest or joking, or in a context where [IBAC] knew she was lying about the surrounding things around [sic] it'. That view was unjustified in light of the objective material about her condition.

Regardless of this view, the Inspectorate finds that these matters put IBAC under an obligation to enquire regarding Complainant 1's welfare.

In its response, IBAC suggested that it did not have sufficient prior knowledge of matters that affected her health. It accepted that it knew about the GP appointment and the statements made in the telephone calls, but it maintained the insufficiency of its prior knowledge on the basis of its belief about the purpose of her attendance at the GP, and because it considered her discussion of suicide was not genuine. It also pointed to a personal arrangement Complainant 1 had allegedly made to meet other people after her GP appointment.

In the Inspectorate's view the maintenance of this position underscores the problem identified. The purpose of her GP visit was capable of being ascertained from third parties or the complainant. It is not for IBAC to come to a conclusion about the genuineness of discussions concerning suicide. Even if Complainant 1 had made personal arrangements, that fact is equivocal. The position is that IBAC had relevant knowledge – but its view of the complainant so affected its analysis that it did not learn the true position.

IBAC in its response have insisted that this report ought to contain information about the background as to why Complainant 1 was being investigated and about the outcome of that investigation. IBAC has suggested that the information is necessary 'context' for the report.

It is not included because it is not relevant. The Inspectorate has explained elsewhere how it has addressed credit, and does not dispute that it was appropriate for IBAC to conduct an investigation into Complainant 1. The Inspectorate's concerns about the treatment of Complainant 1 cannot be justified by why Complainant 1 was being investigated. The standard of care is independent of the reason for the person being investigated. That IBAC considers that this could be relevant is a concern in and of itself.

### **IBAC'S FAILURE TO MAKE ENQUIRIES**

There is no reason why, as a matter of standard practice and irrespective of prior knowledge, a basic enquiry cannot be made as to the welfare of persons who are being examined. Such a

basic enquiry can bear in mind the issue being investigated and the extent to which the witness is in fact a subject of the investigation. The more serious the issue the more important that enquiry will be.

Where a witness is summonsed immediately necessitates further enquiries being made at the time of service regarding their welfare, as the witness has limited opportunity to make arrangements for their own welfare.

However, the Inspectorate considers that what it knew about Complainant 1 placed IBAC in a different position from the outset. Some of the information was available from PSC, from Complainant 1 and from her GP and psychologist.

When she was served with the summons, Complainant 1 was at VPC having been brought there by PSC officers who met her outside her GP's office at approximately 2:30 pm that day. The Inspectorate accepts IBAC was not in fact aware that she had been met by PSC officers at her GP's office, or of the true reason she was attending her GP that day. It could easily have learned those matters.

Had IBAC made enquires of Complainant 1 it could have learned more that was relevant to Complainant 1's welfare, including that:

- Complainant 1 had been in the care of a psychologist since being referred by her GP in March 2015.
- She had not slept the night before.
- She had attended an appointment with her psychologist that morning.
- During that appointment, it became apparent that Complainant 1's condition had deteriorated. Complainant 1's mental state was assessed by her psychologist as significantly impaired. She was also assessed as at risk of self-harm.
- As a result, an appointment was made with her GP that day 'for further assessment and liaison with the Crisis Assessment Team for potential psychiatric inpatient admission.'

- Complainant 1 had made her way to her GP where she was met by PSC officers.

Each of those matters is supported by independent evidence, save for whether Complainant 1 had slept the night before. As to that, her account is consistent with the objective circumstances and the Inspectorate accepts it.

Whether or not Complainant 1 would have disclosed all of this information at the relevant time, IBAC still had a duty to enquire.

It might be that if her interaction with IBAC was short in duration the issues would not be of the same significance. However, after the completion of her examination at IBAC at 10:27 pm, IBAC then transported Complainant 1 to her home, where IBAC executed a search warrant. She was then taken to her car (still parked outside her GP's office) where IBAC executed another search warrant. After the search was concluded at 1:59 am, transport options were discussed, and Complainant 1 drove herself and another person home.

The result was that by 1:59 am, Complainant 1 had been served with an 'immediate attendance' summons eight hours earlier, and met by PSC nearly 12 hours earlier. IBAC had not during that time established the true position as to her welfare.

The Inspectorate further accepts that Complainant 1 might not have given outward expression of her mental state.

Nonetheless, it was not her role to complain – it was IBAC's to enquire, especially where IBAC was aware of 'red flags' suggesting Complainant 1 may have been suffering from a physical or mental illness (being her recent attendance at a GP and recent suicidal ideation).

That enquiries were not made reflects the absence of internal processes or procedures requiring the timely dissemination of appropriate information with regard to the welfare of witnesses, or indeed the gathering of such information. Ultimately, this meant IBAC could not properly assess Complainant 1's welfare that day.

At the relevant time, IBAC's policies and procedures simply did not take these matters into account, effectively preventing IBAC from properly assessing Complainant 1's welfare.

While Complainant 1 was represented during her examination, IBAC cannot rely on a witness's legal representative to discharge IBAC's obligation to act and enquire regarding the witness's welfare.

There was no adverse outcome from these deficiencies in the sense of an acute event – in contrast to Complainant 2. But the repetition of the same deficiencies suggests that the absence of such an adverse outcome resulted from good fortune rather than good planning. IBAC's response contests this conclusion on the basis it is 'speculative', but without showing the risk did not exist nor explaining how its planning avoided the risk eventuating.

There are some other matters that, in the Inspectorate's view, also need to be considered in the context of what the Inspectorate has already described. It is not appropriate that they be treated in isolation notwithstanding they touch on a separate topic. It is apparent they will bear on the welfare of the witness. The first relates to what might appear a simple matter – the ability to come and go from IBAC – the second is access to her lawyer.

### **FAILURE TO INFORM COMPLAINANT 1 THAT SHE COULD LEAVE IBAC WHILE WAITING FOR HER EXAMINATION TO COMMENCE**

Complainant 1 waited for her examination to commence in a waiting room in IBAC's hearing room precinct. Complainant 1 wished to wait elsewhere outside IBAC during this delay but formed a subjective belief that she could not do so.

The summons did not, as a matter of law, require Complainant 1 to remain at IBAC. However, the physical setup meant Complainant 1 could not leave the hearing room precinct without making a request of IBAC to facilitate her departure. Complainant 1 was not informed of her right to leave. A reasonable belief could be formed, from these circumstances, that Complainant 1 could not leave IBAC.

The Inspectorate accepts that Complainant 1 formed such a belief, as:

- IBAC transported Complainant 1 to its premises and identified the place at which she could wait.
- Complainant 1 then waited for her examination to commence in a waiting room in IBAC's hearing room precinct. The waiting room is a closed internal room, with no external windows.
- At the relevant time, swipe card access was required to leave the hearing room precinct, necessitating a request to IBAC to facilitate departure.
- At the relevant time, IBAC's procedures did not require witnesses to be informed that they could leave IBAC's premises while waiting for an examination to commence.

IBAC's security arrangements do not appear to have taken these matters into account until after the incident involving Complainant 2 some six months later. Had it done so, it could have taken steps to manage the impact of its premises and security arrangements on Complainant 1, for example, by telling her she could leave for a break while waiting for the examination to commence.

### **REQUEST FOR A LAWYER**

IBAC's conversation with Complainant 1 at the time of the service of her 'immediate attendance' summons is recorded.

The recording runs for approximately 11 minutes. At the commencement of the conversation Complainant 1 makes two specific requests to speak to her lawyer. While her requests are followed by assurances that she will ultimately be allowed to speak to a lawyer, she is over the ensuing minutes served with further documents, her phone is seized and she is asked substantive questions, including the PIN for her phone. At approximately eight minutes into the recording, IBAC calls her lawyer on her behalf but does not hand over the phone. At no stage during the recording is she permitted to speak to her lawyer. That occurred later. The entirety of the conversation is set out in a transcript at Appendix 1.

The Inspectorate accepts that other matters may need to be arranged (such as the provision of medical treatment) before attention can be given to contacting a lawyer. This will depend on the circumstances.

However, in this case, the Inspectorate finds that the repeated interruptions to Complainant 1's requests to speak to her lawyer, particularly the seizure of her phone, the request for her to provide her PIN and the service of further documents on her before she is permitted to speak to a lawyer, involve an unreasonable delay. Some of those matters at least could have waited.

The Inspectorate expects that when a person subject to the exercise of coercive powers makes a request to speak to a lawyer, the person's right to do so should be granted without unreasonable delay.

IBAC's response was that its officers had repeatedly explained they were prepared to facilitate access to a lawyer once they had completed formalities, and that they then did so without delay.

IBAC's response is a reason why it is important to set out the transcript. Not all of the questions asked were formalities, and the Inspectorate considers that there was an unreasonable delay in the circumstances.

### **IBAC'S POLICIES AND PROCEDURES**

The Inspectorate does not suggest that there has been any wrongdoing by any individual for what is described in relation to Complainant 1. The policies and procedures that IBAC had put in place were simply inadequate to the task.

That is a basis for the recommendations that at an organisational level those deficiencies be addressed by policies and procedures which provide meaningful and practical guidance to staff to ensure the duty IBAC has to those it is compulsorily examining (or are waiting for that process or are subject to subsequent processes such as searches) are satisfied.

# Duty of care to Complainant 2

## SUMMARY

Complainant 2 attended IBAC as a witness for an examination on 7 April 2016 at 10 am. During an adjournment, at approximately 11:50 am that day, Complainant 2 attempted suicide in the toilets at IBAC, and a short time later attempted suicide again in the waiting room.

Organisationally, information was held by individuals that put IBAC under a positive obligation to make enquiries of Complainant 2. Those enquiries ought to have included general questions about her welfare and as to her mental and physical health. Had any of those enquiries been made, IBAC would have likely learned relevant information, and arrangements could have been made in such a way as to diminish the risks posed by the environment IBAC had created. Further, she should have been told she could leave IBAC during the adjournment.

The Inspectorate does not suggest or find that any individual was responsible. That is so because the events of 7 April 2016 were the result of systemic failures of IBAC's processes, policies and procedures, including with respect to communication of relevant information.

In reaching conclusions with respect to Complainant 2, the Inspectorate has acted as far as possible on objective material, and material that has other corroborative support. To the limited extent that it is necessary to act on Complainant 2's account alone, the findings below explain how the Inspectorate has acted on Complainant 2's evidence. Findings with respect to IBAC's state of knowledge do not depend on any unsupported claim by Complainant 2, but on other material.

This is important because IBAC suggested there should be concerns about the credit of Complainant 2. The Inspectorate has seriously considered those issues. However, it considers that it can work from objective and independent material, to which such issues do not attach. This does not mean the Inspectorate does not accept Complainant 2's account – rather to the extent that the Inspectorate has relied upon her account it has objective material in support of it, or the Inspectorate has explained

why it has been able to act upon it.

## COMPLAINANT 2 ARRIVES AT IBAC

Complainant 2 was served with a summons on 24 March 2016 requiring her attendance at an IBAC examination at 10 am on 7 April 2016. Complainant 2 attended IBAC with her lawyer in compliance with the summons.

IBAC was aware of the following facts by the time of her first suicide attempt:

- A close family member had passed away recently.
- Complainant 2 had had numerous recent interactions with IBAC. Her home had been searched on 24 March 2016, she had been summonsed by IBAC on three prior occasions, and she had been subject to two confidentiality notices since November 2015.

IBAC did not form a comprehensive and complete view of these matters, because IBAC's internal processes did not require a systematic evaluation of her welfare. This lack of concern is apparent in IBAC's 'hearing risk assessment' of Complainant 2, prepared in advance of her examination (but never finalised – it is still marked 'draft').

The hearing risk assessment focusses on the risks Complainant 2 may have posed to IBAC, rather than the risks IBAC exposed her to through the coercive process. IBAC identified just one risk: 'may present as abrasive in the hearing'. The 'overall assessment' section reads, 'Cooperative, but could be abrasive / 'short' in responses.' The risk rating is the lowest possible – E1 – which indicates a less than 1% probability that first aid may be required. Complainant 2 was examined by IBAC on two earlier occasions, and the information in her hearing risk assessment was unchanged.

Clearly, IBAC did not identify relevant risks in relation to Complainant 2 prior to her examination. There is a substantial gap between the negligible risks identified in advance of her examination and the severity of what actually occurred.<sup>1</sup>

Had IBAC enquired of Complainant 2 regarding her welfare that day, it would likely have become aware of the circumstances surrounding her attendance at IBAC, including that:

- She attended IBAC in a state of fatigue – she had worked night shifts until earlier that week, and had not slept the previous evening.
- She felt her recent interactions with IBAC had ‘turned [her] world upside down’ and ‘it [was] like it is not going to end’.
- She had attended the funeral of a close family member on the previous day.

Whether or not Complainant 2 would have disclosed all of this information at the relevant time, IBAC still had a duty to enquire.

The Inspectorate finds these matters bore on Complainant 2’s welfare that day, yet IBAC’s policies and procedures did not require any enquiries to be made to ascertain her state of mind or her welfare.

The Inspectorate is satisfied of the truth of these matters because objective circumstances support them, specifically:

- Inspectorate records show her home had been searched on 24 March, she had been summonsed by IBAC on three prior occasions, and she had been subject to two confidentiality notices since November 2015.
- Contemporaneous notes made by IBAC record that Complainant 2 had recently suffered the death of a close family member.
- The events later that day demonstrate her state of mind.

IBAC in its response have insisted that this report ought to contain information about the background as to why Complainant 2 was being investigated and about the outcome of that investigation. IBAC has suggested that this information is necessary ‘context’ for the report.

It is not included because it is not relevant. The Inspectorate has explained elsewhere how it has addressed credit, and does not dispute that it was appropriate for IBAC to conduct an investigation

into Complainant 2. Its concerns about the treatment of Complainant 2 cannot be justified by why Complainant 2 was being investigated. The standard of care is independent of the reason for the person being investigated. That IBAC considers that this could be relevant is a concern in and of itself.

### COMPLAINANT 2’S CONDITION DETERIORATES

During the hearing, but before the adjournment during which she attempted suicide in the bathroom, IBAC knew Complainant 2 had become upset. Complainant 2’s lawyer confirmed that Complainant 2 became distressed at this point in the hearing.

To the extent that Complainant 2’s distress was known, it appears IBAC assumed (it did not enquire) this was caused by the matters upon which Complainant 2 had been examined, and that Complainant 2 was distressed because she had incriminated herself. Had IBAC made positive enquiries of Complainant 2 at this stage, it would have uncovered a more complex yet informative picture, which could have allowed it to take steps to take precautions and monitor her welfare. The matters bearing on Complainant 2’s welfare (outlined above) could have been identified, along with other issues relating to custody of her children and her job.

As it was, no such enquiries were made.

Complainant 2’s distress was compounded by IBAC’s premises and security arrangements.

Complainant 2 formed a subjective belief that she could not leave IBAC’s premises during an adjournment of her examination. Though she was not prevented from leaving, the Inspectorate’s view is that from a welfare point of view that is irrelevant. A combination of circumstances led Complainant 2 and her lawyer to the reasonable subjective belief that they could not leave, and therefore they did not attempt to do so.

<sup>1</sup> The Inspectorate acknowledges that IBAC has since reviewed its risk assessment processes and documentation for witnesses attending IBAC examinations, showing IBAC has recognised the prior approach was inadequate, and proactively addressed some of the factors leading to the complaints. As a result of the review, hearing risk assessments for witnesses now include a section on the aims and objectives of the examination and any potential impacts regarding the welfare of the witness. IBAC’s Security and Facilities team also consult with the Investigation team in relation to the hearing risk assessment. IBAC also provided risk assessment training.

That was so because:

- During the adjournment Complainant 2 and her lawyer were shown by IBAC into a waiting room, and the door was closed behind them.
- Complainant 2 was not advised of the expected length of the adjournment.<sup>2</sup>
- Complainant 2 had not been excused or released from further attendance.
- At the relevant time, swipe card access was required to leave the hearing room precinct, necessitating a request to IBAC to facilitate departure.
- IBAC did not advise Complainant 2 that she could leave IBAC's premises.

Had IBAC made enquiries of Complainant 2, it could have taken steps to manage the impact of its premises and security arrangements on Complainant 2, for example at least by telling her and her lawyer they could leave for a break while the examination had been adjourned.

### **COMPLAINANT 2 ATTEMPTS SUICIDE IN BATHROOM**

At approximately 12:48 pm, Complainant 2 was escorted to the bathroom.

Complainant 2 was heard 'sobbing' within the bathroom. She remained in the bathroom for approximately 10 minutes. On her return to the waiting room, Complainant 2 was visibly distressed. She was holding her belt in her hand.

In her account to the Inspectorate, Complainant 2 indicated she had attempted suicide in the bathroom. She had put her feet up on the toilet, and used the belt on the toilet door. She blacked out but her 'feet fell' and she 'came to', and sat on the bathroom floor for some time. She said she 'didn't know what to do and I just walked out of the bathroom'.

While IBAC was not aware she had attempted suicide, IBAC was aware that:

- She had been heard 'sobbing' in the bathroom.

- She had spent an extended period of time in the bathroom.
- She returned from the bathroom in a distressed state and carrying her belt.
- Complainant 2's lawyer believed her client was not in a state to continue, and had informed IBAC to that effect.

The Inspectorate is satisfied of the matters outlined above because there is objective evidence, including CCTV in the hallway and accounts from others present, that:

- Complainant 2 was heard crying in the bathroom.
- She was in the bathroom for approximately 10 minutes.
- She was observed walking out of the bathroom in a distressed state with her belt in her hand.

In its response, IBAC sought to emphasise that the objective evidence was not sufficient to demonstrate that there was a self-harm incident let alone a suicide attempt in the bathroom. As this report explains, the Inspectorate has accepted Complainant 2's account on this issue because it is supported by objective circumstances, including no less than her being observed carrying her belt in her hand as she left the bathroom prior to committing what IBAC accepts was an attempt at self-harm.

The Inspectorate finds that by this time, IBAC had sufficient information to suggest making further enquiries of Complainant 2 and/or her lawyer, regarding Complainant 2's welfare. Had IBAC enquired, it would have learned that her welfare had deteriorated and decisions needed to be made by IBAC as to what it would do.

IBAC stated in its response that 'there was no evidence that enabled any IBAC officer to conclude that complainant 2' was suffering from any condition that warranted action by it. It suggested there was 'no basis for the suggestion that IBAC ought to

<sup>2</sup>Complainant 2's lawyer made requests for an estimate of the duration of the adjournment, but this estimate was not provided.

have made an inquiry so as to be in possession of those facts' and this reasoning was with the benefit of hindsight.

IBAC does not suggest it did not know the matters the Inspectorate has set out. Armed with that knowledge, it should have had the foresight to make further enquiries.

## COMPLAINANT 2 ATTEMPTS SUICIDE IN WAITING ROOM

At approximately 1:03 pm, Complainant 2 was found 'slumped' against the waiting room door, with her belt around her neck. CCTV footage shows she had been left alone in the waiting room for 2 minutes. She was discovered by her lawyer.

In her account to the Inspectorate, Complainant 2 indicated that when she went back into the waiting room, the door closed behind her and she was alone. She saw a 'high hanging point'. She 'battled with it a bit more the second time... it was just, so hard to do...but I slipped twice. The bathroom was the worst.'

After Complainant 2 attempted suicide in the waiting room, IBAC was aware:

- She was in a heightened state of distress.
- She had put a belt around her neck.
- She was distressed for a variety of reasons, including that she was worried about custody of her children, about her job, and that she had not been sleeping.
- Her lawyer had said words to the effect, 'She's tried to kill herself. Can you please get an ambulance I can't deal with this, I'm her barrister.'

The Inspectorate is satisfied that the credit of Complainant 2 does not bear on these matters, as objective circumstances corroborate Complainant 2's account. In particular:

- She was observed entering the waiting room in a distressed state with her belt in her hand.
- She was found 'slumped' against the waiting room door, with her belt around her neck.
- An audio recording made minutes after

Complainant 2 was found records her in a distressed state.

To the limited extent these matters rely on the account of Complainant 2 the Inspectorate wholly accepts them, in light of these objective circumstances.

In its response, IBAC sought to emphasise that the incident in the waiting room was an 'apparent attempt at self-harm' and that Complainant 2 did not sustain physical injuries. The Inspectorate has described it as a suicide, because to its mind that is what it was, given the description of the events including putting a belt around her neck.

IBAC's response emphasised that the fact Complainant 2's lawyer left the room for a brief period prior to Complainant 2's attempted suicide in the waiting room was indicative that Complainant 2 was not so distressed after all. That conclusion is not tenable in view of the other circumstances outlined above, objectively wrong, and irrelevant to the question of IBAC's duty of care.

## IBAC'S IMMEDIATE RESPONSE

At this point IBAC determined that Complainant 2 was not able to continue with the examination. CCTV footage shows numerous IBAC staff in the vicinity of the waiting room from 1:04 pm onwards. IBAC did not call an ambulance nor did it request a doctor to attend. Instead, IBAC contacted PSC to request their assistance. That occurred approximately 20 minutes after Complainant 2 was found in the waiting room.

CCTV footage shows PSC officers arriving at 2:27 pm. The attending PSC officers sought assistance from a police psychologist, who advised them to take Complainant 2 to hospital, which they did. Complainant 2 ultimately left IBAC at 2:51 pm and was taken to a nearby hospital, assessed without being admitted, and later discharged.

IBAC believed Complainant 2 was 'distressed but with no obvious physical injuries'. However, IBAC did not arrange for an appropriately qualified medical professional to assess Complainant 2 immediately. A view held within IBAC was that her suicide attempt was not 'genuine'. That conclusion is not tenable in view of the other circumstances outlined above, objectively wrong,

and demonstrates a complete lack of understanding of suicide and mental health.

IBAC's response sought to draw a distinction between a disbelief in a 'genuine' suicide, and a belief in a 'genuine' attempt of self-harm. That is not the context in which the statement on which the Inspectorate relies was made.

IBAC's belief was not informed by relevant facts that it could have learned (but did not) about Complainant 2 – because IBAC's processes and procedures did not require such enquiries to be made. Further, IBAC's processes and procedures did not take the decision out of the hands of the attending officers (which it should have done, given the severity of what had occurred and their lack of medical training). Instead, IBAC left its officers to rely on their (non-medical) experience, and on PSC.

Complainant 2 was present at IBAC's offices on 7 April 2016 to comply with a summons requiring her to attend and answer questions in the course of an IBAC investigation. Accordingly, IBAC was responsible for Complainant 2's care. IBAC has a duty to ensure that all witnesses summonsed to their premises are cared for and safe.

There is no suggestion that Complainant 2's lawyer was asked about her client's welfare by IBAC prior to the incident. If it is suggested that it was reasonable to rely on her lawyer to complain – and the Inspectorate does not consider this would be reasonable in the context – the Inspectorate observes that, notwithstanding her lawyer's insistence that Complainant 2 had attempted suicide in the waiting room, a view was nonetheless formed that Complainant 2's attempt was not 'genuine'.

Evidence provided by Ambulance Victoria to the Inspectorate confirmed that where a person attempts self-harm in the workplace, the best course of action is to contact triple zero immediately and seek assistance. Paramedics are trained to assess, treat and transport the patient to the most appropriate health service. There are of course other options – any medical professional with relevant training would have been able to provide advice. The Inspectorate's view is it is not for those not qualified in providing treatment to make

assessments without enlisting the assistance of those that are qualified. If it was necessary to take Complainant 2 to a hospital at 2:51 pm then it must have been necessary to seek that assistance much sooner.

In its response, IBAC suggested that given the objective circumstances (which included its view about the nature of the attempt) the decision not to call an ambulance was a matter about which 'reasonable minds might differ'. It was said that decision was one supported by 'IBAC procedures that provided for active and prompt consideration of medical assistance'. For reasons explained elsewhere in this report, the Inspectorate considers that IBAC's policies and procedures did not provide the correct advice. IBAC's policies and procedures ought have taken that decision out of the hands of those attending and required them to seek medical assistance, by calling an ambulance or a doctor.

Further, IBAC noted that it had performed an internal review after the incident, including a review of the adequacy of its policies and procedures, identifying areas in which procedures and training could be improved. However, for the reasons set out below, the Inspectorate continues to have concerns regarding IBAC's policies and procedures.

The Inspectorate does not suggest that any individual was responsible or ought to have done more, because the events of 7 April 2016 were the result of systemic failures, including with respect to communication of relevant information.

Regardless of IBAC's operational objectives that day, and like other organisations that have coercive powers, IBAC has a responsibility to take positive steps to ensure the health and welfare of persons summonsed to give evidence before it.

# IBAC's systems and processes

## SUMMARY

Policies and procedures addressing the exercise of coercive powers ought to disclose a consideration of the welfare of persons subject to those powers in addition to addressing operational requirements. Those matters are complementary. IBAC's policies and procedures reviewed by the Inspectorate do not meet that standard.

An analysis of IBAC's policies and procedures<sup>3</sup> disclosed:

- A lack of a reference to an overarching value that addressed the welfare of persons subject to coercive powers – in addition to what else they properly addressed. The focus on welfare (to the extent it appeared) was haphazard and ad hoc.
- Arising from the failure to consider that general issue, specific guidance was either absent or incomplete. For example, IBAC's Hearing Room Security Procedure as at the time of the incident involving Complainant 2, did not provide any relevant guidance to IBAC officers in the event of attempted suicide or self-harm incidents. This explains events giving rise to the complaints as a failure of systems and process not designed to address realistic and foreseeable circumstances.
- The Inspectorate considers that some of the identified methods for dealing with witness welfare, particularly in relation to critical incidents, did not meet community expectations of a modern integrity agency in addressing welfare issues where coercive powers are being exercised.
- They were not being regularly updated and reviewed – even in accordance with the self-imposed requirements of IBAC.

There is a need to review these policies and procedures in a systematic way with the input of those expert in handling mental health and who are external to, and independent from, IBAC.

IBAC's response emphasised that this report is directed to policies and procedures as they applied in 2016 and some of these have changed. Where the Inspectorate is aware that the substance of a policy or procedure has changed, that is discussed in the report. However, most of the policies and procedures that are the subject of analysis are not identified in IBAC's response to have changed, nor has IBAC provided the Inspectorate in the course of responding to this report with any relevant modified procedures.

## IBAC POLICIES AND PROCEDURES TOUCH UPON WITNESS WELFARE

At the relevant time, IBAC had many policies and procedures. These included the Physical Security Policy, Occupational Health & Safety Strategy, Occupational Health & Safety Policy, IBAC Incident Management and Response Plan (**Incident Management Plan**), Hearing Room Security Procedures (**Hearing Room Security Procedure**), Hearing Security Procedures (**Revised Hearing Security Procedure**), Summons and Request for Information Procedure (**Summons Procedure**), Examinations Procedure (**Examination Procedure**) and the Confidentiality Notice Procedure (**Confidentiality Notice Procedure**). These policies and procedures might have been expected to reflect an overall theme concerned with the welfare of individuals the subject of its coercive powers, for three reasons.

First, it is IBAC's legal duty. Like all other employers, IBAC has a duty to ensure, so far as is reasonably practicable, that persons other than its employees are not exposed to risks to their health or safety arising from IBAC's conduct.<sup>4</sup> This is acknowledged in IBAC's Physical Security Policy. Accordingly, IBAC must implement processes to minimise the risk of harm to persons on their premises or under their care (such as contractors, witnesses, lawyers

<sup>3</sup> IBAC's relevant policies and procedures were produced to the Inspectorate in July 2016. The Inspectorate acknowledges that IBAC may have subsequently updated its policies and procedures, addressing some of the recommendations outlined in this report.

<sup>4</sup> *Occupational Health and Safety Act 2004 (Vic)*, s 23.

representing witnesses, support persons or other members of the public), and must respond quickly and effectively where an incident or near miss occurs. IBAC, in its response, accepted that it had such a duty.

Secondly, IBAC is exercising coercive power with the result that individuals do not have a choice as to the time, circumstances and place of their participation in its processes. Compelling witnesses to attend examinations, where rights including the right to silence are abrogated, and in circumstances where the witness may be required to immediately attend, clearly has the potential to significantly impact the mental health and welfare of the witness. That much is reflected in those policies and procedures which grapple, albeit in a limited and incidental way, with the implication of coercion on welfare.

Thirdly, the community is entitled to expect that the policies and procedures of public integrity agencies show regard to the welfare, particularly the mental health, of persons subject to coercive powers. IBAC must be responsive to the expectations of the community, by balancing its operational imperatives with simple yet effective steps to minimise the impact of coercive processes on witnesses.

However, despite IBAC's organisational intention, and its duty to address witness welfare in its policies and procedures, its policies and procedures failed to do so. Witness welfare is simply not an overarching topic, theme or value that manifests in each policy or procedure.

While IBAC had a framework that addressed operational risk management, based on or informed by relevant Australian and international standards, this framework principally focusses on risks to IBAC. The limited reference to impact on witnesses has not resulted in witness welfare being systematically addressed in IBAC's policies or procedures.

By way of example, the IBAC Physical Security Policy acknowledges that IBAC needs to protect contractors, consultants and the public from injury arising from IBAC activities, but the policy does not address witnesses – despite the fact that IBAC's activities must necessarily expose witnesses to particular risks.

This shows that IBAC has not thought through the topic of witness welfare in developing its policies or procedures.

## SPECIFIC GUIDANCE

The Inspectorate reviewed IBAC's policies and procedures relating to witness welfare in an attempt to discover how IBAC had prepared itself for the circumstances giving rise to the complaints.

What it found was an absence of guidance – or where guidance did exist, it was inaccurate (as discussed elsewhere in this report) or ambiguous. This explains the failure to address the particular circumstances of Complainants 1 and 2 as a failure of systems and process not designed to address those circumstances.

IBAC effectively left its staff without necessary tools to assist in the exercise of discretionary judgment. The task is not to be prescriptive or rigid. It is to offer meaningful guidance in a range of foreseeable circumstances. By way of example:

- IBAC's Hearing Room Security Procedure, at the time of the incident involving Complainant 2, did not provide any relevant guidance to IBAC officers in the event of attempted suicide or self-harm incidents.
- Even IBAC's Revised Hearing Security Procedure, prepared after the incident involving Complainant 2, did not instruct IBAC's officers to seek medical assistance from appropriately qualified medical professionals where a medical incident (whether mental or physical) involving a witness occurs in the hearing room precinct.
- The Incident Management Plan instructs IBAC staff to call an Ambulance as well as Police in the event of 'threatened self-harm' if 'the individual cannot be calmed'. This policy uses as a criteria for intervention, whether the person appears to be 'calm', to a person who has no expertise. It is not evident to the Inspectorate what constitutes 'calmed'. It is not clear that this plan was of assistance in the case of Complainant 2. Complainant 2 had in fact attempted suicide,

and for a sustained period thereafter, she was hysterical. Reports from those present indicate she could ultimately be calmed, but no ambulance was ever called, and the decision to take Complainant 2 to hospital for medical attention was left to PSC. She received no medical intervention while at IBAC.

It is critical that people with no expertise not be placed in positions of making assessments beyond their expertise. Only an appropriately qualified medical professional can and ought to make a judgment about those matters, and it is IBAC's responsibility to ensure that a person suffering a physical or mental health episode while under IBAC's care receives medical attention from an appropriately qualified medical professional. To reiterate, in the case of Complainant 2 the Inspectorate is not critical of the decision-making of any individual officer, but is critical of IBAC because its policy did not take the decision out of the individual officers' hands.

- The Examination Procedure states, in relation to 'mental impairment', that 'if IBAC believes a person has a mental impairment...IBAC must (in effect) provide for an independent person to be present.' This statement reproduces IBAC's legislative obligation under s 129(4) of the Independent Broad-based Anti-corruption Commission Act 2011 (**IBAC Act**), but adds an expression 'in effect'. This builds (rather than clarifies) on the ambiguity as to what steps must be taken where a witness has a 'mental impairment'. It would seem to have the potential to mean the provision would not be complied with in some circumstances. This illustrates a point which the Inspectorate considers arises generally. By doing little more than reproducing the provision, it offers no guidance to IBAC officers as to how to comply with the legal obligation. The procedure should set out a process that ensures the obligation is complied with

in a range of foreseeable circumstances. That includes identifying what is a mental impairment, and who are the kinds of independent persons that a witness is entitled to have present, and what their role may be.

That procedure must contain a process that allows the right to be meaningfully enjoyed. It is a hollow right if the individual is not provided with that opportunity prior to the examination to allow them to arrange for such a person to be present. This may necessitate an explanation early in the process. Such a process must arm the examiner with what IBAC knows about those matters such that the right under s 129(4) can be accorded by the examiner.

- The Examination Procedure is also silent in relation to how to assess whether the witness is fit to be examined, and in relation to adjournments.
- The Summons Procedure does not provide any relevant guidance to IBAC's staff in relation to welfare issues that might arise from serving an 'immediate attendance' summons, such as the appropriateness of serving an 'immediate attendance' summons late in the day (necessitating a late or after-hours examination), 'transporting' witnesses to IBAC, or making enquiries of witnesses with respect to their welfare.
- The Confidentiality Notice Procedure refers to witnesses with a 'relevant impairment'<sup>5</sup> – this term is not defined, and does not match the language of the IBAC Act, potentially leaving IBAC officers unclear as to their obligations with respect to witnesses suffering a 'mental impairment'. While the Confidentiality Notice Procedure mentions directions or authorisations given by IBAC,<sup>6</sup> it does not provide guidance to staff regarding the process for issuing such directions or authorisations. It also does not provide guidance for IBAC officers when serving

<sup>5</sup> At section 4.2.

<sup>6</sup> At page 9.

confidentiality notices, or set out the matters that IBAC officers should explain to the recipient on service.

The point of policies and procedures is not to be prescriptive. A policy does not become prescriptive by simply addressing foreseeable circumstances or identifying what relevant staff should consider or do in the event of those circumstances arising. Nor does it impinge upon the exercise of judgment and discretion by officers executing those processes.

Indeed, some of IBAC's policies and procedures are arguably over-prescriptive – for example, IBAC's Revised Hearing Security Procedure sets out measures imposing a blanket control on a witness's access to medication, despite the absence of a lawful basis for doing so (discussed elsewhere in this report).

The policies and procedures appear to acknowledge the need for guidance, yet in some respects they are narrower and more prescriptive than would seem advisable, and in other respects impose obligations on IBAC staff to make decisions they should not be asked to make.

It is not for the Inspectorate to rewrite IBAC's policies or procedures. This is the reason for the Inspectorate's recommendation that IBAC do so.

IBAC's response suggested that it would have been desirable for the Inspectorate to participate in IBAC's internal review. The Inspectorate considers it would have been inappropriate in the circumstances of the serious issues raised to attempt to address these issues in the exercise of its monitoring function.

The Inspectorate considers that, first, it is IBAC's duty to ensure that its policies and procedures

are fit for purpose. That is because it knows the circumstances in which it operates. While the Inspectorate can offer meaningful guidance in its monitoring function it cannot know all the circumstances in which such policies and procedures will be applied. The opportunity arose to undertake a complete background review of the circumstances in which these policies and procedures operated in practice in this investigation. This was likely to provide greater insight than would be possible from a 'desktop review'. That is why this investigation and inquiry was important.

### **SPECIFIC GUIDANCE SHOULD BE INFORMED BY EXPERTISE**

Specific guidance is only as useful as the expertise it reflects. Having reviewed IBAC's policies and procedures, the Inspectorate considers that the deficiencies it has identified call for some external expertise.

For example, IBAC's Hearing Room Security Procedure was internally reviewed after the incident involving Complainant 2. The new steps set out in the Revised Hearing Security Procedure (including in relation to line of sight, hazard identification and escorts) show IBAC has recognised the prior approach was inadequate, and proactively addressed some of the factors leading to the complaints. However, the failure in IBAC's Incident Management Plan to specify that an appropriately qualified medical professional should assess the condition of a person who is threatening self-harm is indicative of lack of expertise in relation to mental health incidents.

The absence of medical (particularly mental health) expertise is also evident from some of the language used, particularly in relation to the mental health of witnesses. The Incident Management Plan, for example, refers to 'mental faculty issues' in the context of a threatened self-harm incident, which is unfortunate. That does not appear to the Inspectorate to reflect the underlying concerns.

IBAC's policies and procedures with respect to witness welfare clearly require some level of expert input, including from qualified medical (particularly mental health) professionals.

## **MEASURES TO ENSURE SPECIFIC GUIDANCE REMAINS RELEVANT – PERIODIC REVIEW**

Even where a policy or procedure provides specific guidance on relevant topics, it will always be necessary to ensure that policy or procedure is subject to periodic (meaning proactive, rather than reactive) review, to reflect new circumstances, evolving community expectations and changing operational requirements.

IBAC has clearly recognised this necessity, by including document control information in its policies and procedures, yet the policies and procedures IBAC provided to the Inspectorate in July 2016 did not show evidence of periodic review. The Examination Procedure and Confidentiality Procedure were last updated in 2013, despite both expressing that they were to be reviewed every 12 months from the date of authorisation. At the time of the incident involving Complainant 2 (in April 2016), IBAC had not updated its Summons Procedure or Hearing Room Security Procedure since 2013 – and its Hearing Room Security Procedure had not even been approved. The Revised Hearing Security Procedure, at the time of provision to the Inspectorate, had also not been authorised or approved. The Summons Procedure expressed that it was to be reviewed every 12 months from the date of authorisation.

Had IBAC done as it appears to have intended, and subjected its own policies and procedures to timely and rigorous internal review, the Inspectorate may not have had cause to comment on the deficiencies outlined in this report.

# Compelling immediate production of phones

## SUMMARY

IBAC is empowered to require the production of mobile telephones from a witness at the time they attend IBAC's premises in accordance with an 'immediate attendance' summons. By its written policy IBAC has provided incorrect guidance to its staff regarding the seizure of phones at the point of service of an 'immediate attendance' summons on a witness. If followed, the resulting conduct would be unlawful.

Complainant 4 had been served with a summons which required her to immediately attend IBAC to produce her phone at IBAC's premises. IBAC checked a message she received and took physical possession of her phone, at the time of the service of the summons – at Complainant 4's home. It appears to the Inspectorate that it is 'usual' for IBAC to tell the person being served that they can provide their phone at the point of service if they want to (that is, voluntarily).

It is not possible to resolve, in the case of Complainant 4, whether her phone was produced 'voluntarily' at the point of service.

While no doubt a person can willingly provide an item to an investigator, it is not clear to the Inspectorate that Complainant 4 did provide her phone voluntarily, as that would be ordinarily understood. Certainly it would seem her subjective understanding was that IBAC had a legitimate interest in reading a message she received and then taking possession of her phone.

The Inspectorate finds that it is not meaningful to speak of volunteering a phone in circumstances where an 'immediate attendance' summons is being served. Given the need to comprehend fine legal distinctions at the point of service if the provision is to be truly voluntary, the Inspectorate considers IBAC should not request, or tell the person they can, provide their phone 'voluntarily' at the point of service.

If IBAC proposes to continue the practice of telling witnesses they can provide their phone 'voluntarily', which must include a statement that the witness need not do so now, it should record the interaction by audio together with the explanation provided, and ensure the unlawful instruction in its procedures is updated to reflect practice.

## POWER TO REQUIRE PRODUCTION OF PHONES

IBAC may issue a witness summons to compel a person to immediately attend IBAC and produce documents or other things, if it considers on reasonable grounds that a delay in the attendance of the person is likely to result in certain outcomes, such as prejudice to IBAC's investigation.

The power to compel production of items is limited to compelling production at a 'time and place'. Prior to a person being required to produce documents or other things, IBAC must inform the witness orally and in writing of the person's rights and obligations.<sup>7</sup>

Accordingly, IBAC does not have the power to require production of summonsed items, including phones, at the point of service of an 'immediate attendance' summons.

## IBAC'S PROCEDURES

In contrast, IBAC's Summons Procedure, as provided in July 2016, explains the power and provides guidance regarding production of a particular item, being phones, as follows:

*Where a person is served with an immediate summons to attend IBAC...to produce mobile phone/s or other device/s, the summoned [sic] person is to hand over the mobile phone/s or device/s immediately in compliance with the summons. However, IBAC is not to access the summoned [sic] mobile phone/s or other device/s... until the summoned [sic] person has been given an opportunity to obtain legal advice. This is consistent with s 121(4)(d)...*

<sup>7</sup> S 130 of the IBAC Act.

That instruction is inconsistent with a proper interpretation of IBAC's power. That is so because it provides an instruction which suggests that the summonsed person must hand over the item 'immediately in compliance with the summons' at the time of service. The instruction endorses IBAC exceeding its powers.

By its response, IBAC said that it did not accept that the guidance in the Summons Procedure would result in unlawful conduct. To that end, it drew attention to s 120(4) of the IBAC Act which permits IBAC to dispense with the need for a summonsed person to attend if the person produces the required documents or things to IBAC before the time and date for production.

First, that is not what the guidance in the Summons Procedure says. It states that there is an obligation to produce immediately. Second, the power to excuse is of no relevance to the type of summons served on Complainant 4 (issued under s 120(1)(c) to which the power to excuse in s 120(4) expressly does not apply). Third, the person serving the summons will not ordinarily have the power to excuse the witness from attending IBAC in accordance with the summons.

Given the terms of the response, the Inspectorate is more concerned now than it was when it prepared the draft report that distinctions between the kinds of summonses under the IBAC Act, and the powers which attach to them, are not being drawn by IBAC.

#### COMPLAINANT 4

On 18 April 2016, Complainant 4 was served at her home with a summons requiring her 'immediate attendance' at IBAC. The summons also required her to immediately produce her phone at IBAC's premises.

IBAC took physical possession of Complainant 4's phone at time of service of the 'immediate attendance' summons.

The circumstances surrounding IBAC obtaining physical possession of Complainant 4's phone at time of service are contested. In broad terms, Complainant 4 indicated she showed IBAC her phone and surrendered it to IBAC there and then because she believed she had to. It was indicated to the Inspectorate that IBAC's usual practice at

the time of serving the summons was to inform the witness that the witness could provide their phone on a voluntary basis, and Complainant 4 'offered' her phone 'voluntarily'. This was expressed in terms of IBAC's usual practice. No guidance as to such an explanation is provided in IBAC's Summons Procedure, which instructs that phones are to be handed over at the point of service.

The Inspectorate does not consider it necessary to resolve these conflicting accounts. It would appear, in circumstances where Complainant 4 considered she needed to show IBAC a message on her phone at the time of service, and in circumstances where IBAC took an interest in that message, that there was not a meeting of the minds.

The Inspectorate's view is that it is not in practical terms meaningful to speak of a witness volunteering their phone in circumstances where an 'immediate attendance' summons had been served. Given the fine legal distinctions involved (where a witness is under an immediate requirement to attend and a subsequent requirement to produce the phone which is sought to be distinguished from an immediate and voluntary provision of the phone) and the need for the witness to comprehend them in the unusual circumstances of being immediately compelled to attend, the Inspectorate considers IBAC should not request, or tell the person they can, provide their phone 'voluntarily' at the point of service.

Further, to continue to request phones 'voluntarily' gives rise to practical difficulties, such as how the witness will make their way to IBAC if they are also summonsed to attend an examination, contact family members or seek legal advice.

At a minimum, if IBAC does propose to continue the practice of telling witnesses they can provide their phone 'voluntarily', this must include a clear instruction that they are under no obligation to do so. This interaction should be audio recorded together with the explanation that the person is not required to hand over their phone immediately, and IBAC's procedures should be updated to align with its practices.

# Transport to IBAC

## SUMMARY

In the case of Complainant 1 and Complainant 4, IBAC transported them to its premises after the service of 'immediate attendance' summonses.

Transporting witnesses to its premises should only occur if the witness has had explained to them their entitlement to travel independently at the expense of IBAC.

While there is nothing to prevent IBAC from offering to transport witnesses to its premises on a voluntary basis, a number of issues associated with such a practice need to be addressed by IBAC's procedures.

## IBAC'S POWERS TO ENSURE ATTENDANCE

IBAC does not have a power of arrest upon service so as to ensure attendance at an examination.

When serving an 'immediate attendance' summons, the purpose of interaction with the witness is simply to effect service of the summons, not to take the person into custody.

IBAC is required to meet a witness's reasonable travel expenses in attending IBAC.

The IBAC Act does not prohibit IBAC offering transport. In practice, IBAC makes that offer.

Given that the summons requires immediate attendance, it can be seen that for some people transport with IBAC will be seen to be the only practical option. That may be compounded by a witness's own lack of means – at that point in time – to make their own way, by lack of knowledge of IBAC's whereabouts, and in any event by surprise of the unusual circumstance of being compelled to immediately attend to answer questions.

By those practical circumstances, and particularly, the requirement in the summons for immediate attendance, there is a risk that decision is not one made in the full awareness of the alternatives.

## SERVICE OF 'IMMEDIATE ATTENDANCE' SUMMONSES ON COMPLAINANTS 1 AND 4

Complainants 1 and 4 were served with 'immediate attendance' summonses. They were transported by IBAC to its premises.

There are disputed accounts as to the extent to which Complainants 1 and 4 understood they had a choice as to whether they needed to travel with IBAC officers to attend an examination to occur immediately. It is not possible, nor necessary, for the Inspectorate to resolve that dispute. The more general concern that the Inspectorate has, which arises from those circumstances and which may be the point of the complainants generally in any event, is that they had no practical choice.

When served with an 'immediate attendance' summons, the witness receives an information sheet setting out their rights and obligations (including extracts of legislation). An interested recipient of an 'immediate attendance' summons may discover on page 8 of 9 of the information sheet that they can be reimbursed for travel expenses (on the unrealistic assumption that they read so far at the point of service). It has not been suggested that the other alternative (of the witness catching a taxi and being refunded their costs) is explained. In the Inspectorate's view, that is necessary if the choice of the witness is to be a real choice.

## IBAC'S PROCEDURES

The transportation of witnesses to IBAC presents other issues which ought, in the circumstances, be addressed by policy, including:

- There will inevitably be interactions between IBAC officers and witnesses during voluntary transport to IBAC. However, there is no requirement to deliver at that time a caution to the witness, and IBAC's written procedures do not require a caution to be delivered.
- The process for transport ought not be structured in a way akin to the process when a person is transported while under arrest.

As at July 2016, IBAC had no policy or procedure for transporting witnesses, notwithstanding that those obvious issues require management, given its own practices.

It may be that given those issues, the preferable course is that witnesses are given a Cabcharge and the address, and asked to make their own way.

IBAC's response did not address the substance of this section, but instead said that IBAC's practices were 'not inconsistent' with its 'legislated obligations'.

# Prohibited items

## SUMMARY

IBAC applied hearing room security measures, as at July 2016, inconsistent with a proper interpretation of the *Court Security Act 1980* (**Court Security Act**), more onerous than permitted by Parliament, and with a potential to adversely impact witness welfare.

## HEARING ROOM SECURITY MEASURES

IBAC has the same power as a court to control what is brought by a person into its hearing rooms.<sup>8</sup> IBAC's Authorised Officers may request the surrender (or seizure) of 'prohibited items' as described under the Court Security Act.

'Prohibited items' are defined<sup>9</sup> as:

- (a) a firearm; or
- (b) an explosive substance; or
- (c) an offensive weapon; or
- (d) an item that is likely to adversely affect the security, good order or management of the court premises;

Clearly, prohibited items include items which may pose a threat to the safety of those who attend court, but extends to items that are likely to interfere with 'good order or management of the court premises'.

It is apparent that common items likely to be in a person's possession on attending court, such as phones, handbags, loose change, wallets and medication, cannot ordinarily be characterised as 'an item that is likely to adversely affect the security, good order or management of the court premises'.

Indeed, court premises within Victoria do not routinely require these items to be surrendered on entry. The position at IBAC, as at July 2016, was different.

## IBAC'S PROCEDURES

Even after the events relating to Complainant 2, IBAC's Revised Hearing Security Procedure instructed IBAC's Authorised Officers to seize and secure 'phones', 'non-essential' items, and 'other items which are not required in the hearing room'. This exceeds the measures routinely used to ensure security in Victoria's courts (including its criminal courts).

The Revised Hearing Security Procedure addresses the specific circumstance of witnesses requiring medication, instructing IBAC's personnel to seize and secure a witness's medication, unless the witness requests to retain it. Witnesses:

*...are to be asked if they need to take the medication as a single dose and then re-secure it [sic], or retain the medication / devices (i.e. asthma inhaler) [sic] for the remainder of the hearing. If their requirement is to retain medication on their person, additional vigilance in monitoring the witness during breaks is to occur. If the witness then requests to go to the bathroom, then they are to be informed that medication (less insulin dose or asthma inhaler) is to remain in the waiting room or be [sic] re-secured in the lockable containers.*

The practical effect of IBAC's procedure is that on arrival at the hearing room precinct, IBAC requires witnesses and lawyers to lock away all their belongings in a cabinet, with the exception of the witness's lawyer who is permitted to bring in a notebook and a pen. Witnesses and their lawyers must make a request of IBAC to access their belongings while in the hearing room precinct. CCTV footage from 7 April 2016 shows witnesses and lawyers locking away their belongings in a cabinet, and being supervised while accessing the cabinet during hearings.

IBAC's procedure exceeds what is a permissible request under the Court Security Act. That is so because the required removal of those items exceeds the power to remove items which might

<sup>8</sup> IBAC is a prescribed court under r 5 of the *Court Security Regulations 2015*.

<sup>9</sup> See s 2 of the Court Security Act.

have a bearing on the 'good order and management' of the examination. The onus is not on a person to demonstrate whether an item is 'essential' but is on IBAC to demonstrate that the item would have a bearing on 'good order and management'.

It is not apparent to the Inspectorate how prescription medication (no doubt, with the exception of needles) could ever be characterised as an item adversely affecting the 'security, good order or management' of a court. Court premises around Victoria do not routinely restrict witness access to medication in the manner IBAC has seen fit to do.

These measures are not commensurate with community expectations.

Unless this matter is raised by the Inspectorate in this report, it is unlikely that in the circumstances an individual who is attending will raise the issue. That is because they may perceive that it is not sufficiently important to raise or would not do so, so as to avoid being perceived as confrontational.

It is appropriate to specifically address the availability of phones. The Inspectorate has in mind the phones that are not subject of a summons. The Inspectorate does not consider that a phone would routinely 'adversely affect the security, good order or management' of an IBAC examination. It appreciates that IBAC would seek to manage the risk of a person communicating before or during an examination, or making a secret recording, or the risk that a person under examination could 'tip off' a third party regarding the content of the examination by a phone call from a waiting room. These risks can be managed within the scope of other powers at IBAC's disposal.

These risks do not justify the removal of phones from lawyers or indeed many other people while at the examination. As distinct from removing phones, there is no reason why IBAC could not instead require a witness (should they have a phone that has not been the subject of a summons) to turn off their phone. IBAC can issue confidentiality notices preventing witnesses (and their lawyers) from disclosing matters discussed during examination.

It is not for the Inspectorate to now specify how that is to be done. Instead, these matters need to be considered, and the Inspectorate recommends a policy be produced that specifies its procedures, that complies with the Court Security Act, and which

appropriately balances IBAC's legitimate concerns and the liberty and welfare of individuals. This policy should make a realistic evaluation of risks, and provide practical guidance as to how IBAC's power will be exercised and what factors will inform the exercise of discretion.

IBAC's response did not address the substance of this part of the report, other than to say that it is 'inaccurate' because 'it is expressly left open to IBAC ... to determine whether any item is likely to adversely affect the security, good order or management of IBAC's premises.'

In fact, IBAC's powers, like those of any other agency, extend only so far as the legislation provides. The provision empowers the making of an assessment. The point remains that it is necessary in a given case to demonstrate that the removal of items would likely have a bearing on 'security', 'good order' or 'management'. Many of the items sought to be restricted by IBAC plainly do not.

Further, it is said by IBAC that the Inspectorate exercises its discretion in this way. That is not its policy or practice.

### **IMPACT ON WITNESS WELFARE**

IBAC's instruction to its staff to seize and secure 'phones', 'non-essential' items, and 'other items which are not required in the hearing room' from witnesses and their lawyers could be expected to have an adverse impact on witness welfare.

The comments the Inspectorate makes about welfare need to be understood in light of the circumstances at IBAC. These include, as explained elsewhere, an environment in which witnesses did not readily understand they could leave, and in which witnesses might readily be understood to be apprehensive.

While no doubt IBAC's personnel conscientiously handle requests to access items including medication if such a request is made, one can readily expect that the need to make such a request would be a disincentive to doing so.

There can be no doubt that an inability to make ordinary and incidental contact entirely unrelated to the subject matter of the hearing will contribute to isolation and the sorts of risks discussed elsewhere in this report.

# Leaving IBAC premises

## SUMMARY

As at the time of events giving rise to the complaints, entry and exit from the hearing room precinct, and between rooms in the hearing room precinct, required swipe card access. Those physical restrictions, and a failure to inform witnesses they could leave at their discretion (other than during the examination itself), led some witnesses to subjectively (and reasonably) believe they could not leave IBAC's premises.

Poorly drafted policies and procedures in place at the time did not provide any guidance to staff – or require them to inform witnesses they could leave at any time of their choosing. Those policies and procedures ought to have reflected the true position that witnesses were free to leave as they chose and without needing the permission of IBAC.

The problem has since been compounded. IBAC changed its policy since the incident involving Complainant 2, yet IBAC's procedures still imply that witnesses and their lawyers cannot leave during an adjournment without permission, and do not provide relevant guidance in the event of a delay to the commencement of the examination.

## IBAC'S POWERS TO COMPEL ATTENDANCE

IBAC has the power to summon witnesses for examination, and a broad power to regulate the conduct of examinations 'as it considers appropriate',<sup>10</sup> including by adjourning the examination.

In practice, IBAC may adjourn a hearing for any period from a few minutes to several months, and the person summonsed for examination must attend as required until excused.

However, IBAC's powers to regulate the conduct of an examination does not extend to conduct outside the examination (i.e. prior to the commencement of, or during an adjournment to, the examination).

It follows that IBAC does not have the power to detain witnesses, or prevent them from leaving

IBAC's premises, prior to the commencement of an examination or while the examination is adjourned.

Other provisions make it an offence to fail to appear when summonsed<sup>11</sup> or from day to day until excused.<sup>12</sup>

## IBAC'S PREMISES

IBAC's hearing room precinct is located on level 1, and includes a security booth/screening area, waiting rooms and hearing room.

At the relevant time, a swipe card was required to enter and exit the hearing room precinct, to reach the bathrooms, and to access the lifts (to exit the building). Swipe cards were also required to enter and exit the hearing room.

## IBAC'S SECURITY PROCEDURES

At the time of the events involving Complainants 1 and 2, there was no written procedure regarding witnesses and their lawyers leaving IBAC premises prior to the examination commencing or during adjournments, let alone specifically addressing how and when to inform witnesses and their lawyers of their right to leave (or the manner in which they could leave, given IBAC's physical environment). IBAC's Hearing Room Security Procedures and the Examination Procedure (which had last been updated in 2013) were silent on this matter.

Oral evidence obtained by the Inspectorate confirms it was not standard practice to tell witnesses they could leave:

*Inspectorate: Ok. But even just the conversation, do you recall whether or not you would have advised people verbally, that if they wish to leave they could?*

*IBAC: No we didn't, we didn't verbally explain that previously [being prior to the incident involving Complainant 2]*

The practical effect of the failure to advise about leaving is compounded if the commencement time of the examination (or its resumption) is not specified.

<sup>10</sup> Under s 116 of the IBAC Act.

<sup>11</sup> See s 121 of the IBAC Act.

<sup>12</sup> See ss 120(5) and 135 of the IBAC Act

An internal IBAC memorandum dated 6 June 2016 states:

*The physical and security review [after the incident involving Complainant 2] also highlighted whether the finger print and swipe card reader for exit from the hearing room precinct into the first floor lift foyer is required. The fact that IBAC cannot legally prevent a witness from leaving an examination, except in the exercise of a duty of care, also needs to be borne in mind.*

There is no reason that what was done after the incident could not have been done prior to it.

In its response, IBAC accepted that aspects of its policies, procedures and practices at the time of the complaints to the Inspectorate in 2016 left witnesses with the possible perception that it was not open for them to leave IBAC's premises, or that it would be difficult to do so. IBAC emphasised that its processes had since changed, resolving the issue.

After the incident involving Complainant 2, IBAC changed its Hearing Room Security Procedures, issuing the Revised Hearing Security Procedure in June 2016, which directly addresses witnesses and their lawyers leaving during 'routine breaks'.

However, there continue to be deficiencies in that procedure. It states that responsibilities during the hearing include:

*Be prepared to escort non IBAC personnel down to the ground floor during any routine breaks in the hearing that are extended, and permission has been given for the witness and legal representative to depart the immediate area.*

The reference to permission is misplaced. No permission is required. In all but the most extraordinary circumstances, an individual is free to go at their discretion (subject to compliance with the requirement to be present during the examination itself).

Further, the procedure is silent as to requiring IBAC's staff to positively inform witnesses and their lawyers of their right to leave prior to the commencement of the examination and during adjournments.

For these reasons, the Inspectorate has recommended further changes to IBAC's policies and procedures, to address the conclusions of this report.

It is no answer to say that some lawyers and witnesses do leave by having figured it out for themselves. The duty is on IBAC to make sure that witnesses understand what they are required to do. It is apparent that many witnesses will act out of an abundance of caution and avoid, in the face of uncertainty, acting in a way that may be perceived to be uncooperative.

### **IMPACT OF INADEQUATE AND INACCURATE PROCEDURES: COMPLAINANTS 1 AND 2**

As discussed elsewhere in this report, the Inspectorate finds Complainants 1 and 2 formed a subjective belief they could not leave IBAC's premises – in Complainant 1's case, prior to her examination, and in Complainant 2's case, during an adjournment of her examination.

The Inspectorate accepts Complainant 1 and 2 were not actually prevented from leaving IBAC, but from a practical point of view, that is beside the point as the combination of circumstances led them to the reasonable subjective belief that they could not leave, and therefore they did not attempt to do so.

The Inspectorate finds it was reasonable for Complainants 1 and 2 to form that view, as:

- During the adjournment Complainant 2 and her lawyer were escorted by IBAC into a waiting room, and the door was closed behind them.
- Neither Complainant 1 nor Complainant 2 were advised of the expected length of the delay or adjournment.<sup>13</sup>

<sup>13</sup>In Complainant 2's case, her lawyer made requests for an estimate of the duration of the adjournment, but this estimate was not provided.

- Complainants 1 and 2 had not been excused or released from further attendance.
- At the relevant time, swipe card access was required to leave the hearing room precinct, necessitating a request to IBAC to facilitate departure.
- IBAC did not advise Complainant 1 or 2 that they could leave IBAC's premises.

The Inspectorate is satisfied that their credit does not bear on these matters. In relation to Complainant 1:

- That Complainant 1 waited for her examination to commence in a waiting room in IBAC's hearing room precinct is not in dispute.
- The prevailing circumstances that informed that belief have been established objectively by reference to other evidence, including an Inspectorate site visit to IBAC's hearing room precinct, and information given to the Inspectorate by an IBAC employee.

In relation to Complainant 2:

- The subjective belief that she had expressed was corroborated by her lawyer.
- The prevailing circumstances that informed that belief have been established objectively by reference to other evidence, including an Inspectorate site visit to IBAC's hearing room precinct, and information given to the Inspectorate by an IBAC employee.

The Inspectorate finds these circumstances arose not because of the actions of individual IBAC officers, but arose directly from IBAC's physical environment and security measures.

# Recommendations

## RECOMMENDATION 1 – DUTY OF CARE

The Inspectorate recommends that IBAC redraft its policies, procedures and templates to address the findings of this report with respect to duty of care. This redrafting must ensure that:

- Responsibility is conferred on a position within IBAC for ensuring the welfare of witnesses while the witness is subject to the exercise of IBAC’s coercive powers and immediately thereafter, and that the person assigned that responsibility is supported and trained to perform that role, and provided with all relevant information.
- Prior to every examination, the welfare of the witness has been appropriately evaluated, according to an assessment process, by suitably trained or qualified staff. The assessment must be provided to the person assigned responsibility for the welfare of witnesses.
- The evaluation has been documented and is actioned, including (in the event of a medical incident involving the witness, whether physical or mental health related) ensuring the witness receives medical attention from an appropriately qualified medical professional, without unreasonable delay.
- The evaluation of witness welfare is reviewed periodically while the witness is subject to the exercise of IBAC’s coercive powers and immediately thereafter.

## RECOMMENDATION 2 – SYSTEMS AND PROCESSES

The Inspectorate recommends that IBAC redraft its policies, procedures and templates to address the findings of this report with respect to IBAC’s systems and processes, and with reference (where required) to expert input, including from qualified medical (particularly mental health) professionals. This must include amending its policies, procedures and templates to ensure that:

- Guidance is provided for the purposes of an examination as to what is meant by ‘mental impairment’ and ‘independent person’, and as to the process for arranging the attendance of an independent person.

- Guidance is provided to the effect that if a witness suffers a physical or mental health incident (including an attempt of self-harm or suicide) while the witness is subject to the exercise of IBAC’s coercive powers, IBAC must ensure the witness receives medical attention from an appropriately qualified medical professional without unreasonable delay.

## RECOMMENDATION 3 – COMPELLING IMMEDIATE PRODUCTION OF PHONES

The Inspectorate recommends that IBAC change the Summons Procedure so that it is consistent with the IBAC Act, and provide this document to the Inspectorate for review prior to implementation, by no later than 15 November 2018.

The Inspectorate recommends that IBAC redraft its policies, procedures and templates to address the findings of this report with respect to compelling immediate production of phones.

## RECOMMENDATION 4 – TRANSPORT TO IBAC

The Inspectorate recommends that IBAC redraft its policies, procedures and templates to address the findings of this report with respect to transport to IBAC.

## RECOMMENDATION 5 – PROHIBITED ITEMS

The Inspectorate recommends that IBAC change the Revised Hearing Security Procedure so that it is consistent with the Court Security Act, and provide this document to the Inspectorate for review prior to implementation, by no later than 15 November 2018.

The Inspectorate recommends that IBAC redraft its policies, procedures and templates to address the findings of this report with respect to prohibited items. This redrafting must ensure (but is not limited to):

- That IBAC takes appropriate account of witness welfare.
- That medication is not to be seized or access to medication restricted, with the exception of needles.

## **RECOMMENDATION 6 – LEAVING IBAC PREMISES**

The Inspectorate recommends that IBAC change the Revised Hearing Security Procedure so that it is consistent with the IBAC Act, and provide this document to the Inspectorate for review prior to implementation, by no later than 15 November 2018.

The Inspectorate recommends that IBAC redraft its policies, procedures and templates to address the findings of this report with respect to leaving IBAC premises. This redrafting must:

- Ensure that witnesses are advised that they can leave during adjournments to the examination, or during a delay to the commencement of the examination.
- Ensure that witnesses are advised of the estimated length of any adjournments or delays.
- Ensure that swipe card points in the hearing room precinct are deactivated prior to the witness's arrival, and that the witness is advised they can leave without the assistance of an IBAC officer.

## **RECOMMENDATION 7 – INSPECTORATE REVIEW**

IBAC must provide any policies, procedures or templates that have been changed as a result of an Inspectorate recommendation, to the Inspectorate for review by no later than 15 April 2019 (unless another time is specified in this report).

## **RECOMMENDATION 8 – TRAINING**

The Inspectorate recommends that, as soon as practicable but by no later than 15 July 2019, IBAC must provide training and guidance to its operational staff, covering the changed policies, procedures and templates, as well as IBAC's powers and obligations under the IBAC Act, the Court Security Act and the Occupational Health and Safety Act as relevant to witnesses and witness welfare.

## **RECOMMENDATION 9 – MENTAL HEALTH AWARENESS**

The Inspectorate recommends that, as soon as practicable but by no later than 15 April 2019, IBAC must:

- Provide mental health awareness training to relevant teams to ensure operational staff are sufficiently informed, with a general understanding and awareness of relevant mental health issues. This must ensure IBAC's staff contextualise and appreciate relevant mental health issues in relation to witness welfare.
- Engage with its operational staff to ensure they have a sufficient appreciation of the impact of coercive powers on the welfare of witnesses, including witness mental health.

## **RECOMMENDATION 10 – GOVERNANCE**

The Inspectorate recommends that IBAC implement an appropriate and documented policy development process for policies and procedures, covering ownership, approval and authorisation.

The Inspectorate recommends that IBAC implement and document an appropriate review and evaluation mechanism to ensure policies and procedures are fit for purpose and that staff are trained to implement IBAC's policies and procedures.

IBAC must provide its policy development process, and review and evaluation mechanism, to the Inspectorate by no later than 15 October 2019.

## **IBAC'S RESPONSE TO THE INSPECTORATE'S RECOMMENDATIONS**

IBAC by its response indicated that it would not accept the recommendations while they were linked to factual conclusions it could not accept. It did, however, indicate that it would consider the issues underlying each of the recommendations made, and that it would secure the services of independent experts to assist in its review.

The Inspectorate's view is that the factual conclusions are sound. Whatever the case, the recommendations are not dependent on the factual conclusions reached about Complainants 1 and 2.

The Inspectorate may, under s 78(1) of the VI Act, make recommendations to IBAC at any time. It may in due course review whether what has been recommended has been done.

# Appendix 1

(5:49pm) IBAC: Could you please have a seat for us please. [Complainant 1], my name is [name removed] I am from the anti-corruption commission. Have you heard of the anti-corruption commission before?

Complainant 1: Yes.

IBAC: [Complainant 1] I know you have you just gone through a targeted drug test and we have actually got some more paperwork to serve you alright and to explain a few things to you as we go. Alright?

Complainant 1: Ah ha

IBAC: Ok, firstly, this is what's called a Confidentiality Notice ok? This Confidentiality Notice makes it a criminal matter for you to disclose essentially anything about IBAC and anything that is going to occur for the remainder of tonight.

Complainant 1: Are we doing something now?

IBAC: Yes.

Complainant 1: Oh ok.

IBAC: So we are going to go through that process, so obviously, I'll explain it to you and explain it to you slowly, alright, alright, but you're not allowed to disclose any of these things here, alright, anything about the IBAC, documents, the IBAC subject matter of what you discussed, the fact that you've got a Confidentiality Notice, and any paperwork or property we are about to seize off you.

Complainant 1: Mm hmm

IBAC: Ok, so firstly under section 86 of the IBAC we have the power to seize ah - property within a Police Station. We are going to seize your mobile phone now, ok?

Complainant 1: Can I make a call? Cos... I don't want to call someone?

IBAC: Yep so just so you know hindering obstructing an IBAC officer –

Complainant 1: Yeah

IBAC: - is a criminal offence, ok? And who did you wanna...

## [First request to call her lawyer]

Complainant 1: um, can I call a solicitor?

IBAC: Yep exactly, let me explain everything what's going on to you first...

IBAC: ...we are happy to allow you to make that call, on one of our phones.

Complainant 1: Yep that will be the umm... the TPA guy.

IBAC: Ok we have got possession of that phone, ok, and we are going to keep possession of that phone, ok? And I'll explain what is going on shortly.

Complainant 1: Ok

## [Request for PIN]

IBAC: Ummm... What's the PIN number for the phone?

Complainant 1: Do I have to say this?

IBAC: Yep, so you're going to have to provide it to us either now or later it's up to you.

Complainant 1: What... what's the difference?

IBAC: There's probably no real difference

## [Second request to call her lawyer]

Complainant 1: I feel like I should be talking to someone before---

IBAC: ---Yep, let me explain what else is going on---

Complainant 1: ---before I answer this stuff.

IBAC: Yep, this is what's called a Statement of Rights and Obligations, ok, alright, there is a letter to explain everything, and what we do have is search warrants for your home address as well. OK. So what we are going to do here is finish up here with the paperwork---

Complainant 1: ---Mm hmm---

IBAC: ---then we are going to do go back to your home address, execute search warrants there, and we're also going to execute search warrants on your car.

Complainant 1: ---Mm hmm---

IBAC: Now, obviously, the reason why, and I'll serve this paperwork there, we are actually searching for [subject matter of search].

Complainant 1: ---Mm hmm---

IBAC: Also any items, documents, records or anything like that.

Complainant 1: Yep

IBAC: OK, umm... that's to do with your job as a Police Officer, for your home address [address removed], alright, for the purpose of an investigation by police personnel misconduct.

Complainant 1: Yep.

IBAC: OK. Conduct that is also likely to bring the police force into disrepute and disgraceful and improper conduct, alright, so that's what we are investigating at the moment.

Complainant 1: ---Mm hmm---

IBAC: And now before continuing I must inform you that you are not obliged to say or do anything, but anything you say or do may be given in evidence understand that?

Complainant 1: Yep.

IBAC: Ok I must also inform you of the following rights. You may communicate with or attempt to communicate with a legal practitioner, alright, to inform that person of your whereabouts.

Complainant 1: ---Mm hmm---

IBAC: Ok, so that in regards to that, alright is a letter, with some Legal Advice numbers on it.

Complainant 1: ---Mm hmm---

IBAC: OK that you can seek that's free.

Complainant 1: Yeah, um I've got a guy to call.

IBAC: Ok, so you've got a lawyer, an actual lawyer, to call?

Complainant 1: Yeah.

IBAC: Or is it somebody...

Complainant 1: Yeah, yeah, but I got to get it through the TPA guy

IBAC: Ok.

Complainant 1: So I don't know... like... it's pretty much him.

IBAC: At the conclusion of the search warrant.

Complainant 1: ---Mm hmm---

IBAC: Ok. You are directed, to a... this is what is called a witness summons, to immediately attend the IBAC tonight for the purpose of an examination.

Complainant 1: It's going to be a long night, isn't it?

IBAC: It is, ok? So do you understand all that?

Complainant 1: ---Mm hmm---

IBAC: Alright, so what we are going to have to do, if you want to call a lawyer, we can ring someone on one of our phones. Alright?

Complainant 1: ---Mm hmm---

IBAC: if you don't want to provide your PIN number to us now, you will be asked later on under oath to give us the PIN number as well, ok.

Complainant 1: ---Mm hmm---

IBAC: So what's the PIN number?

Complainant 1: I'll wait till the oath.

IBAC: You'll wait? No worries.

Complainant 1: Umm...

IBAC: So what I am going to do, just so in your presence, I'm going to flip that up, and I am going to put that on airplane mode.

Complainant 1: Yeah.

IBAC: Ok, I'll turn that.

Complainant 1: It's just on the side. That little button.

IBAC: This one here.

Complainant 1: Yep

IBAC: OK, alright, so did you have a number for the lawyer did you, or did you wish...

Complainant 1: Yeah it's through the TPA, I don't...

IBAC: Ok. Now obviously once differently once

become- IBAC become involved – [inaudible] Professional Standards Command, alright, because you're obviously not allowed to disclose to the Police Association the subject matter of what IBAC are actually investigating.

Complainant 1: Yep.

IBAC: You can only speak to an actual qualified lawyer.

Complainant 1: Yep his name is [name removed]... um, I don't know, I... I can't remember the details...

IBAC: Do you have a contact number for him [Complainant 1]?

Complainant 1: Um in my phone.

IBAC: Well OK, right, might have to open that up to get out and [indistinct] we will need to get your PIN number otherwise we might have to go through the whole process again.

Complainant 1: Yes.

IBAC: So what was your PIN number?

Complainant 1: It's my fingerprint.

IBAC: It's your fingerprint, beautiful. We will go back to you again.

Complainant 1: I'll have to, it's not saved, it's just [indistinct]

IBAC: OK. And the other, just so you know going through your phone, it's a warning, that hindering or obstructing the IBAC is a criminal offence, also the destruction of evidence in regards to an investigation, is a criminal offence as well, punishable by imprisonment. Right. So you got your confidentiality notice, you've had all that explained to you.

Complainant 1: Yeah, so is this in here include one of those sections 84s or whatever it is.

IBAC: A what sorry?

Complainant 1: Section 84

IBAC: Section 86 is that what you are referring to?

IBAC: Section 84, you're talking about the power to ask questions for a discipline matter.

Complainant 1: Um, they said...

IBAC: Sorry, who's they?

Complainant 1: Umm... the lawyer guy...

IBAC: Yep, are you talking about IBAC now, or are you talking about PSC?

Complainant 1: I don't know (laughs)

IBAC: Was it 86Q? Cos that is...

Complainant 1: It was just a thing to say, if whatever I said I can't be criminally liable...

IBAC: No that's a discipline investigation and this is separate again.

Complainant 1: What's this, a criminal investigation?

IBAC: So this is, at the moment right, you're under caution and rights, so the same as you'd be understanding as you read from, I don't know what colour card you read from in your 464 interview, at the moment you are being cautioned.

Complainant 1: ---Mm hmm---

IBAC: We are going back to do the search warrant, ok, up until the point of the examination, alright, you have the... er... [inaudible] you've got the right to remain silent, and anything you say can be given in evidence, we are going to do the search warrant...

Complainant 1: ---Mm hmm---

IBAC: Which is separate again cos its part of the criminal interview, criminal investigation sorry or investigation into police personnel misconduct.

Complainant 1: Yep.

IBAC: And then once we get back to IBAC tonight

Complainant 1: Yep.

IBAC: That will be separate again and you will be given a different set of warnings about then, so basically you won't have the right then.

Complainant 1: What do you mean?

IBAC: So then you will be examined and you will get a different set of rights essentially then, but you will have that explained to you.

Complainant 1: And that's more like the 86Q.

IBAC: Similar to - yes.

Complainant 1: OK cool.

IBAC: ok alright, so have you got your fingerprint there?

Complainant 1: Yep, its [number removed].

IBAC: OK.

Complainant 1: It's all going to be closed now, this time of the night.

IBAC: The, the... number they gave you, or...

IBAC: They should have an after-hours number.

Complainant 1: Oh will they?

IBAC: This number, otherwise... have you - if you have rang that one at all or otherwise we can arrange lawyers for you.

Complainant 1: Oh here [name removed].

IBAC: (indistinct), do you want to ring him?

IBAC: Actually I'll just take the number. Thank you.

IBAC: There you go, ok, so this is [name removed] from the Anti-corruption Commission ok and he is going to accompany you back to your house to execute the search warrant there. Do you actually live with anyone at your home address?

Complainant 1: Yeah, my housemate.

IBAC: Who is your housemate?

Complainant 1: Um, [name removed].

IBAC: [Name removed]. Is she is a Police Officer?

Complainant 1: She... no we are high school friends.

IBAC: High school friends ok, um and at the conclusion of that we'll also have a warrant to search your car, which is where?

Complainant 1: At the doctors.

IBAC: At the doctors.

Complainant 1: Ummm... at [suburb].

IBAC: Do you have your keys for that I take it?

Complainant 1: Yep.

IBAC: Ok, excellent alright.

IBAC: I'll make the call and then are you happy for [Complainant 1] to consult with [lawyer's name removed] in private, yep?

IBAC: Yeah.

Complainant 1: Sorry?

IBAC: Yeah, yeah... Well you can obviously consult with your lawyer in private if you wish.

Complainant 1: Oh yeah, yeah.

IBAC: But we explained everything to you, alright. Do you have any questions at the moment?

[inaudible]

**[IBAC calls her solicitor]**

IBAC: Hi [lawyer's name removed] my name is [name removed] calling from the anti-corruption commission how are you? Yeah good thanks, ummm listen I am with [Complainant 1] at the moment...

Lawyer: [inaduble]

IBAC: ...Um I am with [Complainant 1] at the moment and I understand that you have been speaking with her in regards to several matters.

Complainant 1: Oh not really.

IBAC: No.

IBAC: Yes, no.

Lawyer: Yes, yes.

IBAC: Yes ok.

Lawyer: Yes sorry. We have lots of phone calls.

IBAC: No I appreciate that.

Lawyer: And I just need to refresh my memory and all our staff have gone home.

IBAC: Did the association ring him did they?

Complainant 1: Yep.

IBAC: OK

[Inaudible]

Lawyer: Does she need [indistinct]...

IBAC: Yeah, she does, so just in a few moments time I am going to hand over the phone ahhh to her and you and obviously her can have a private discussion in that regard.

Lawyer: Has she has she been directed um to give evidence?

IBAC: I'll, I'll... she has been served in relation to an IBAC examination.

Lawyer: Yep.

IBAC: Um - and I'll let her discuss whatever she needs to discuss with you further to that.

Lawyer: And has she been given a Notice?

IBAC: Yes.

Lawyer: Served a notice and your name again?

IBAC: First name is [name removed] Surname is [name removed].

Lawyer: Yep.

IBAC: And sorry can I grab your details as well [lawyer's name removed].

Lawyer: [indistinct]

[inaudible]

Lawyer: [indistinct]

IBAC: [personal details removed]

[inaudible]

IBAC: I'll... I'll... I'll let her explain that all to you, so she has been summoned to an examination, but like I said you can have that discussion with her and then you can glean whatever details you need to from her. So I am just going to put you on mute for a second that then hand you over to [Complainant 1].

Lawyer: Does she have her own mobile phone there?

IBAC: She does but that phone has been seized and um I'm not going to let her make a call in relation to that.

Lawyer: [indistinct] I may have to give her a call back.

[inaudible]

IBAC: Did this number come up in your phone?

Lawyer: No.

IBAC: Ok. Well if you give me a minute, what I'll do I'll call this number back in a minute's time and I'll provide you with the number to call back on.

Lawyer: Ok.

IBAC: Ok.

Lawyer: OK so do you want me to speak to [Complainant 1] now or.

IBAC: I'll give you a call you back in one minute.

Lawyer: Ok. Thank you.

(6:00pm) IBAC: Thank you. Err the time is 6pm. Recording is suspended.



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