

**VICTORIAN
INSPECTORATE**

SPECIAL REPORT

**A compliance case study on the use
and oversight of coercive powers**

MARCH 2024

About the Victorian Inspectorate

The Victorian Inspectorate, as the lead integrity body, oversees 14 other integrity bodies including IBAC and the Victorian Ombudsman. The VI provides independent assurance to Parliament and the people of Victoria that integrity bodies act lawfully and properly. Where the VI identifies non-compliance or other areas for improvement, it works with the relevant integrity body to strengthen and continuously improve Victoria's integrity system. For more information visit www.vicinspectorate.vic.gov.au

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Letter of transmittal

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 Special Report "A compliance case study on the use and oversight of coercive powers".

Yours sincerely



Eamonn Moran PSM KC
Inspector

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Foreword

Notifications to the Victorian Inspectorate about coercive powers

It is important to Victorians that public bodies and public officers do not engage in corrupt or other improper conduct and that maladministration of any kind by authorities is investigated, exposed and prevented.

To achieve this aim Parliament has established certain integrity/investigatory bodies and officers and conferred significant powers on them. One such officer is the Ombudsman. Under the *Ombudsman Act 1973* the Ombudsman has jurisdiction to enquire into or investigate administrative action taken by or in a broad range of public authorities. In conducting investigations the Ombudsman has significant powers. The Ombudsman can require people to attend an examination or produce documents or other things. A refusal or failure to comply may attract a criminal sanction. The Ombudsman can issue a notice prohibiting a person from disclosing specified matters, including the fact of being summonsed to an examination. The exercise of these powers engages many of the human rights protected by Victoria's Charter of Human Rights and Responsibilities.

Recognising the significant coercive powers conferred on the Ombudsman, Parliament considered it appropriate to give the Victorian Inspectorate (VI) the function to monitor the exercise by the Ombudsman of these powers. The VI has similar functions with respect to other agencies that can exercise coercive powers. To enable the VI to carry out these functions, Parliament put in place a requirement for agencies to notify the VI about any exercise of a coercive power.

Background to report

The need for this report at this time was triggered by evidence given by the Ombudsman, on 14 August 2023, at a public hearing of the Integrity and Oversight Committee (IOC) of the Victorian Parliament. Her evidence was highly critical of the value her office (VO) receives from the review of the material the VO is required by law to provide to the VI each time it exercises a coercive power in comparison to the impact meeting that requirement has on the VO.¹

In a response to a question on notice given to the VI by the IOC after the 14 August meeting, the VI stated:

A decision to exercise a coercive power, with the attendant human rights impacts and welfare risks ... is such a special kind of administrative decision that in a society governed by the rule of law it ought to be subject to oversight by an independent body. Unless there is a requirement to notify the VI about the exercise of such a power, the only way in which the VI will become aware of it is if the person who is the subject of the power makes a complaint to the VI or the VI becomes aware of it when conducting a monitoring project on particular actions of an agency. Those limited circumstances do not provide for proper accountability and would result in many, if not most, exercises of coercive power not being independently reviewed.²

In a report tabled in Parliament³ the IOC describes correspondence sent to it by the Ombudsman dated 21 August 2023 as having expressed the view that the current notification scheme was neither an effective nor an efficient way of overseeing its operations and that it does not consider the enquiries it receives from the VI as being 'targeted' or 'proportionate'.⁴

1 See para 4.7 of this report.

2 VI, Response to Integrity and Oversight Committee questions on notice, 8 September 2023, pp 6–7.

3 IOC Report Performance of the Victorian Integrity agencies 2021/22 (Nov 2023).

4 Ibid, p 116.

That correspondence further stated that the:

‘feedback and recommendations received from the VI in relation to its notifications [did not] result in meaningful or significant changes to its operational procedures and practices, noting that, in its view, the overwhelming majority are trivial or technical in nature ... which would likely have been picked up through ... [the VO’s] internal quality assurance and training programs ... [and] frequently relate to improving compliance with the VI’s own notification requirements rather than ... [the VO’s exercise] of coercive powers.’⁵

On reviewing data provided by the VO in response to a request from it, the IOC expressed concern in relation to *‘the VO’s claims that the VI’s coercive powers reviews might not always be proportionate or result in improvements to either the VO’s operation, or the integrity system more generally, that would justify the burden placed on the VO’*.⁶ Having regard to those concerns, the IOC concluded that a comprehensive review of the coercive powers notifications and review scheme was warranted.⁷ Accordingly it made the following recommendation to government⁸:

Recommendation 10: That, following consultation with the integrity agencies, the Victorian Government review the effectiveness and efficiency of the coercive powers notification scheme, including the requirement that all exercises of coercive powers be notified to the Victorian Inspectorate (VI).

This includes:

- what kinds of matters must or may be notified to the VI
- what kinds of matters must or may be reviewed by the VI

- an examination of the merits of complementary or alternative review measures (such as audits of coercive power notifications).

In making this recommendation, the Committee emphasises the importance of robust, independent oversight of integrity agencies’ use of coercive powers given their impact on the human rights of persons subject to them.

Purpose of Report

The Ombudsman’s comments that led to Recommendation 10 related to feedback received by the VO over the period 2021 to 2023. In tabling this special report, the VI seeks to bring to the attention of Parliament (including the IOC), the government and the wider community the kind of issues that the VI’s feedback addressed. It will be clear to readers that these issues are in the main far from trivial. Where technical, they relate to legal requirements. Further this report will show that the VI’s more recent feedback has influenced the making of (or commitments to make) a number of improvements to the VO’s processes, procedures and guidelines as well as the making of commitments to provide further training to staff on various issues.

But this report has a broader purpose. Through it the VI seeks to raise awareness across all integrity agencies of the standards expected by the VI in their exercise of coercive powers and to cause agencies, particularly the VO, to focus on the need to adequately resource an internal quality assurance function. The VI is of the view that the Ombudsman has failed to do that in her agency and that, as a result, the VI has had to raise an extensive number of issues with the VO, some repeatedly. Along the way this report will inform debate around the IOC’s Recommendation 10 to which the responsible Minister is required to respond by the end of May 2024, just 2 months away.

5 Ibid.

6 Ibid, p 117

7 Ibid, p 118.

8 Ibid.

The information included in this report could not be shared with government during a consultation process on Recommendation 10 or with the IOC at a hearing. It could only be included in a report to Parliament. The response timeline rendered the VI's annual report due in October 2024 too late for this purpose.

The work of drafting this report, including compiling the snapshots used in it and carrying out the accompanying statistical analysis, is that of the small but dedicated monitoring and inspection team of the VI. It was their work that was put under a spotlight by the Ombudsman. I am grateful to them for the quality work that they do throughout the year. It is their work, together with that of our investigation, complaint and legal teams, that ultimately can lead to bringing about improvements to our integrity system. And that, primarily, is why the Victorian Inspectorate exists.



Eamonn Moran PSM KC
Inspector

Executive Summary

- i. When certain Victorian bodies exercise ‘coercive powers’, such as compulsorily requiring a person to attend for interview, they are required to notify the Victorian Inspectorate (VI). In doing so, they provide us with documents such as the summons and interview recordings which we assess against legislative requirements and better practice. This is referred to as the ‘mandatory notifications scheme’. One of the bodies required to notify us is the Victorian Ombudsman (VO).
- ii. Throughout this report the VI has used the term ‘VO’ when referring to the organisation and ‘the Ombudsman’ when referring to the position of ‘Ombudsman’.
- iii. Victoria has a unique integrity system which, in recognition of the impact of certain powers on the public, has one of the most robust (and transparent) accountability and oversight frameworks of any State or Territory – a framework which promotes real time intervention in order to help reduce and prevent any harms arising from the exercise of these significant powers.
- iv. During 2023, the VI foreshadowed, and in June commenced, a new periodic reporting model for its notification reviews. The purpose of the model was to provide consolidated and thematic feedback to agencies about issues identified in its triage and reviews of these mandatory notifications.
- v. Despite the VO using its coercive powers less often than the Independent Broad-based Anti-corruption Commission (IBAC), we identified a broader range of issues at the VO with its exercise of these powers. Many of these were serious or systemic and some were previously raised in 2021. The VI sought responses about the issues and the VO committed to a range of training and process improvements in relation to summonses, confidentiality notices, interviews, delegations and privacy.
- vi. The VI also brought to the VO’s attention a serious issue about incomplete summonses notified to the VI, seeking information about the process that caused this issue.
- vii. Following public comments from the Ombudsman which characterised the feedback we were providing as trivial,⁹ the Victorian Parliament’s Integrity and Oversight Committee (IOC) recommended to Government that a review of the mandatory notifications scheme be undertaken.¹⁰ This recommendation was made in its November 2023 report on the performance of integrity agencies during 2021/22. The Committee’s recommendation also emphasised the importance of robust, independent oversight of integrity agencies’ use of coercive powers given their impact on the human rights of persons subject to them.
- viii. The Ombudsman’s comments did not acknowledge that the VO is facing challenges in its ability to comply with its legislative and procedural obligations when using coercive powers. The comments were also inconsistent with the VO’s private commitments to implement a range of changes that were not trivial.
- ix. Whilst the VI accepts that an unusually extensive amount of feedback was provided to the VO in three periodic reports during June and July 2023, the timeline shows that on 21 July and 9 August, the VO privately committed to significant actions to improve its compliance. Appendix A outlines the observations and improvements.

9 Ibid, p 116.

10 Ibid, p 118.

- x. A week later, on 14 August 2023, the Ombudsman did not draw to the IOC's attention the range of improvements it had agreed to make. Instead, the Ombudsman criticised the real time notification scheme that had enabled the VI to produce comprehensive, thematic reports that identified the need for, and resulted in the VO's commitment to make systemic improvements. The Ombudsman's description of the VI's feedback as containing "*negligible useful suggestions for improvement*"¹¹ was inconsistent with the commitment to improvements given by the VO.
- xv. when incomplete and VO officers were to later add necessary information that should have been considered by the Ombudsman before approving and signing the summonses. That the VO had not disclosed this at the outset was concerning as such a practice, in the VI's view, risked any summonses issued in this manner being invalid.
- xvi. Despite this risk, the VO expressed the view that our enquiries on this matter were not a meaningful use of its resources.
- xvii. The VO initially stated that it did not consider that additional summonses were affected, however, it had no evidence to support this representation as it had not made any actual enquiries to confirm this.
- xviii. Following the VI's queries about the prevalence and consequence of this practice, in February 2024, the VO advised that it proposed a review to '*identify whether or not summonses had been signed by the Ombudsman and whether necessary information had been subsequently added or amended by [VO officers]*'.¹²
- xix. The VI acknowledges that the summonses were not served, that the VO made significant changes to its process and has commenced a review of summonses issued between 1 October 2022 and 30 September 2023. However the resistance to looking for and sharing with the VI the cause and extent of the problem is not what we would expect from an integrity agency. It also created significantly more work for both agencies.
- xi. This report provides an overview of recent issues at the VO and sets out seven thematic snapshots that demonstrate issues with professionalism during some interviews, inaction on previous feedback, quality assurance failures and issues that risked the validity of the exercise of some coercive powers. It also provides an overview of improvements that we have influenced.
- xii. These show a range of issues – rather than trivial, many of the issues are significant, with the breadth of problems indicating that the VO has not committed sufficient resources to prevent and effectively ensure compliance.
- xiii. There is also evidence of pushback, or resistance, to oversight. Section 5 of this report explains how the VI recently met resistance when engaging with the VO on a significant compliance problem related to two incomplete summonses. When we sought information about how they had been signed by the Ombudsman when incomplete, the VO did not provide that information. The VO's rationale was that it had changed its process and as the summonses had not, in the opinion of the VO, been issued, the concerns had been dealt with.
- xiv. It was only when we used our powers to formally require the VO to provide the information that the response revealed a potentially significant problem: the Ombudsman had signed the summonses
- xv. This issue is explained in Section 5 of this report.
- xvi. In a six-month period (November 2022 to May 2023), approximately 75% of the notifications received from the VO resulted in observations to the VO. Further, in this time we identified issues that the VI considers may have affected the validity of 36% of summonses issued or varied, or their

11 See Transcript – Integrity and Oversight Committee – Performance of the Victorian Integrity Agencies 2021/22 (14 August 2023).

12 VO letter to the VI of 12 February 2024.

service, and 31% of confidentiality notices. Overall, though the observations ranged in their degree of seriousness, the issues we identified through our reviews were often serious or systemic (or both). For detail on the observations made to the VO, and the VO's commitment to improvement, see Section 9 and Appendix A.

- xxi. Overall, for notifications received predominantly from November 2022 to August 2023, we have influenced a commitment to 8 improvements in relation to the training of VO staff and 26 improvements in relation to the VO's processes, procedures and guidelines. This includes the cancellation of 3 likely invalid confidentiality notices and a recipient being advised that a confidentiality notice was invalid. We also influenced two major improvements to reduce the risk of future serious non-compliance in relation to the incomplete summons issue discussed in Section 5: a comprehensive change to the VO's summons approval process and the VO proposing a review of 90 summonses issued in a 12-month period to identify the extent to which validity of summonses may have been impacted.
- xxii. Issues we raised in 2021–22 such as interstate service requirements and the standard of interviewing, were identified again during 2023. Sections 6 and 7 set out the compliance issues identified in 2021 and 2023.
- xxiii. Snapshots highlighting seven issues are set out in Section 8. They include a failure to consider interstate service requirements and issues with the level of professionalism during some interviews. This included an interviewer engaging in a political discussion with a voluntary interview witness during the politicisation of the public service investigation; and another interviewer, during the same investigation, making a passing comment to a witness after the interview had concluded that the conduct of a prominent Australian business could be described as 'soft-corruption' if they were engaging in the conduct attributed to them by an article the interviewer had read.
- xxiv. The VI acknowledges that VO officers have demonstrated a strong willingness to engage on compliance issues moving forward. An engagement and compliance plan/ memorandum of understanding (MOU) is under discussion between senior officers at the VO and the VI. The VO and VI have also agreed to conduct regular meetings between managers about the VI's monitoring of notifications to help foreshadow issues, provide context and improve our understanding of each other's viewpoints. A similar approach is taken in the VI's oversight of complaints about the VO and has resulted in a productive and collaborative working relationship.
- xxv. Relevant individual responses from VO officers during the procedural fairness process for this report express a strong commitment to compliance, continuous learning and continuous improvement. The VO was described as having a 'failing-forward' attitude which includes considering the VI's oversight comments and recommendations. There was acknowledgement that the VI's observations have assisted in identifying errors and making positive changes to practices. The VI's 'free oversight' was 'welcomed', whilst noting that we will not always agree with each other's points of view. Steps taken in response to VI concerns were described, including the review of past summonses, an improved summons drafting process, considering delegations, communicating with IBAC to compare coercive power processes and consideration of resources.
- xxvi. The VI considers that if the VO allocates sufficient resources to quality assurance, the VO can build an effective compliance framework with a view to consistently exercising its powers appropriately.

- xxvii. To ensure that the VO gives priority to its compliance obligations, we have made **one recommendation** – that the Victorian Ombudsman undertakes a review of its quality assurance framework and resources for supporting compliance when exercising coercive powers. See Section 11.
- xxviii. For procedural fairness, the Ombudsman was provided a draft copy of this report for comment. Relevant officers involved in examples have been provided procedural fairness by being given an opportunity to respond to the relevant extract in the draft report. All examples provided in the report were the subject of previous engagement with the VO. The inclusion of periodic report feedback in Annual Reports had been foreshadowed at this time. Relevant senior officers have also been given an opportunity to respond to the draft report. Changes have been made where appropriate, with responses otherwise fairly set out in the report.
- xxix. Some VO officers raised a concern in their procedural fairness response about the order in which individual staff were provided the opportunity to comment on the draft report. The VI provided procedural fairness concurrently due to the previous engagement with the VO on the issues which had involved, according to the VO, consultation with relevant VO officers.
- xxx. The VO's procedural fairness response stated: *"the matters in the VI's draft report and appendix include matters which are not yet resolved, matters which are currently being reviewed, and matters in dispute. It is not evident how publication of these ongoing and disputed matters in a tabled special report might fulfil the VI's stated purpose: 'to ensure that the government, Parliament and the wider community have access to complete information to enable informed debate.'"*¹³ The VI considers that matters it has raised with the VO that are not yet resolved, are currently being reviewed, or are in dispute fall within the scope of matters raised publicly by the Ombudsman. It is appropriate for the VI to ensure this information is considered in relation to the IOC's Recommendation 10.
- xxxii. The VO's procedural fairness response also stated that the *'requirement for the VO to correct the record (both in relation to incorrect factual matters, matters under consideration, and speculative adverse conclusions) is regrettably engaged'*.¹⁴ The VI has made minor factual changes to the report where accurately raised in the VO's procedural fairness response. The VI has explained in the paragraph above, the need to include matters under consideration; and the VI has amended or clarified any matters that the VO has described as speculative.
- xxxiii. The VO's procedural fairness response also stated that the VI's assertion that many issues were serious and systemic and appeared to have arisen from the VO's limited allocation of resources to support internal legal and compliance oversight is speculative, unsupported and refuted. The VO refers to the resources it has allocated to compliance and quality assurance – see paragraph 7.4 below. The VO stated that leaving aside the issue of excessive or unnecessary monitoring, it would need further funding to allocate resources to respond to the further work required by the VI's increased monitoring activity.
- xxxiiii. The VI considers that the evidence of the number of observations made and improvements agreed to demonstrate that compliance needs a greater focus. Sections 5-9 and Appendix A explain the issues identified by the VI and the observations and improvements made. The report contains evidence of the VO's correspondence expressing the difficulty it is finding in responding to the VI. The VO describes

13 Cover letter – procedural fairness response from the Ombudsman of 12 March 2024 which references the VI's earlier letter of 20 February 2024.

14 Cover letter – procedural fairness response from the Ombudsman of 12 March 2024, p 3.

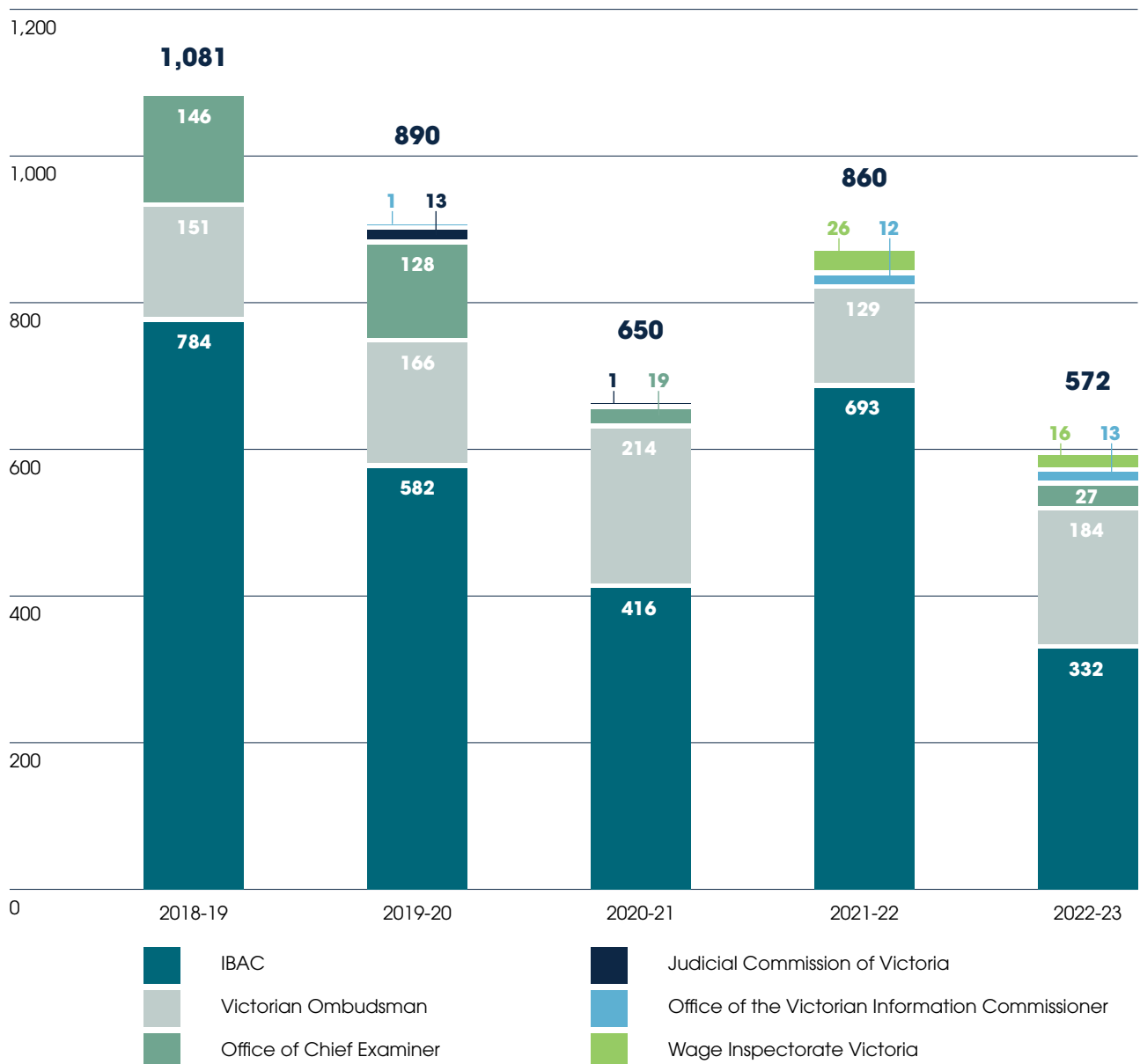
as a diversion from core work allocating resources to responses to the VI. Addressing compliance should be a priority and be considered part of the VO's core work. This should over time result in a diminishing number of issues raised by the VI. The VI does not accept that all of the resources described in the VO's procedural fairness response (see paragraph 7.4) are relevant to the VO's compliant exercise of coercive powers.¹⁵ The VI's recommendation is to review the quality assurance framework and consider the internal allocation of resources to support staff to improve quality assurance and compliance.

15 For example, resources that ensure the organisation is acting consistently with whole-of-government compliance frameworks and those dedicated to quality assurance in its Complaints Unit are unlikely to be ensuring the compliant use of coercive powers.

1. Introduction

1.1 The VI oversees the exercise of coercive powers by seven bodies in Victoria. Two of those bodies, IBAC and the VO are the largest users of these powers. In 2022–23, IBAC notified us that it had exercised these powers 332 times and VO notified us that it had exercised its powers 184 times. The Chief Examiner also uses coercive powers frequently. For example, in 2018–19, the Chief Examiner notified us that it had exercised powers 146 times.

Figure 1: Coercive power notifications received 2018–19 to 2022–23



- 1.2 These powers, which limit the freedom and rights of individuals, include:
- issuing a summons or notice to a person requiring them to give evidence or to produce documents or other things
 - issuing a confidentiality notice prohibiting a person from disclosing information about a matter being investigated, or that a summons or notice has been issued
 - compulsorily examining or questioning a person.
- 1.3 Unlike search warrants or other powers that interfere with personal freedoms, these types of coercive powers are not subject to external judicial oversight: the body itself decides when and where to exercise these powers.
- 1.4 However, the legislation provides an important safeguard — the review of the exercise of these powers by the VI. Following a risk-based model, the VI assesses whether the exercise of these powers complies with certain legislative requirements, identifies practices that create compliance risks and suggests mitigating strategies. We do this when an agency notifies us that they have exercised the powers, when we receive a complaint, or through a monitoring project.
- 1.5 Due to our role in relation to coercive powers, we have significant insights into how these powers should be exercised and we use the learnings from our oversight and our experience to influence improvements across the integrity system and within the VI.
- 1.6 In comments to the IOC, the Ombudsman advised that the issues we raised through our reviews of its exercise of coercive powers were overwhelmingly trivial or technical in nature and would likely have been picked up through the VO's own quality assurance processes and training programs.¹⁶ The evidence in this report does not support this statement. To describe a compliance issue as 'technical' understates the importance of legislative requirements.
- 1.7 Following this comment from the Ombudsman, the IOC expressed concerns about the Ombudsman's claims that our oversight was not proportionate, does not result in improvements to the VO's processes or the integrity system and diverts resources from the VO's core functions.
- 1.8 In line with that, the IOC recommended that a comprehensive review of the scheme be undertaken to 'ensure that the integrity agencies' exercise of coercive powers is effectively oversighted.' This includes a review of the following areas:
- what kinds of matters must or may be notified to the VI
 - what kinds of matters must or may be reviewed by the VI
 - an examination of the merits of complementary or alternative review measures (such as audits of coercive power notifications).
- 1.9 However, the Ombudsman's comments which informed the IOC's decision to make this recommendation minimised the significant and sometimes systemic nature of issues at the VO, the extensive improvements it had recently agreed to make and the challenges it is facing in achieving compliance.
- 1.10 Whilst the VI acknowledges recent commitments for change and recognises that it can take time to implement changes, the Ombudsman's public narrative dismissing feedback from the VI as trivial does not give the VI confidence that compliance will be achieved until there are sufficient resources to support an effective quality assurance framework and recognition that the compliant use of powers is core work.
- 1.11 Although the requirement to notify us does create some additional work for the VO, much of the documentation or information it is required to provide should already have been documented when it decided to exercise these powers. It is also important to note that of the bodies with notifications

16 See Transcript – Integrity and Oversight Committee – Performance of the Victorian Integrity Agencies 2021/22 (14 August 2023).

requirements, the VO provides the least information in its reports to the VI when it exercises these powers. For example, after issuing a summons, to outline the reasons for an appearance and the relevance of an appearance, IBAC provides detailed (and often lengthy) reports to the VI. These set out the context of the investigation, the investigative approach, considerations of welfare and privacy, among a range of other matters.

- 1.12 The report accompanying a summons issued by the VO typically only includes several sentences on the reasons for issuing the summons. These do not provide context on the background to the investigation.
- 1.13 In that regard, it is not clear why the notification process has been described by the Ombudsman as burdensome.¹⁷ The VO is essentially uploading copies of documents that it already possesses under cover of limited and brief reports.
- 1.14 In its procedural fairness response, the VO states that this position *'oversimplifies the notifications process and does not account for the additional complexity and workload of notifying, assessing and responding to the VI during high volume notification periods which often coincide with peaks in investigation workflows'*.¹⁸
- 1.15 The VI considers that the VO's planning for investigations should include allocating sufficient resources to ensure that coercive powers are lawfully exercised. An effective quality assurance process supported by sufficient resources will reduce errors and in turn, the number of issues about which the VI will request a response.

¹⁷ See Transcript – Integrity and Oversight Committee – Performance of the Victorian Integrity Agencies 2021/22 (14 August 2023).

¹⁸ Appendix - procedural fairness response from VO received 13 March 2024, p 2.

2. Our legislative role and approach to oversight

- 2.1 One of our core functions is the oversight of coercive powers by Victorian integrity, accountability and investigatory bodies.
- 2.2 IBAC, the VO, the Office of Chief Examiner (OCE), the Office of the Victorian Information Commissioner (OVIC), Wage Inspectorate Victoria (WIV), and other bodies¹⁹ must notify us when they use these types of powers (coercive power notifications). Each have a different range of notification requirements, and not all uses of coercive powers need to be reported to us.
- 2.3 We have functions under the *Victorian Inspectorate Act 2011* (VI Act) and other Acts to oversee Ombudsman officers including dealing with complaints, carrying out investigations and conducting monitoring projects. We also have a function to report on and make recommendations after performing these functions.
- 2.4 With respect to its use of coercive powers, under the *Ombudsman Act 1973* (Ombudsman Act) the VO is required to notify us, including through the provision of documents and other material, of the following:
- Within 3 days after the issue of a witness summons: a written report specifying the name of the person summoned and the reasons why the summons was issued.²⁰
 - Within 24 hours: a direction made by the Ombudsman to a person directing them not to seek legal advice or representation from a specified legal practitioner.²¹
- As soon as possible after the appearance: audio or video recordings of compulsory appearances and any transcript of the appearance.²²
 - As soon as reasonably practicable, a copy of: each confidentiality notice issued by the Ombudsman; each notice cancelling a confidentiality notice issued by the Ombudsman; each application to the Supreme Court to extend a confidentiality notice; and each order of the Supreme Court extending a confidentiality notice.²³
- 2.5 The VI may also require further information in the report.²⁴ The type of information required in the notification report to enable the VI to assess compliance is not burdensome, as it reflects what the VO should consider before using the coercive power – for example, the reasons for the summons and the appearance and the relevance of the appearance to the purpose of the investigation.²⁵
- 2.6 As the VI Act defines coercive power in relation to the VO as any power under Division 3 of Part IV of the Ombudsman Act, this definition covers voluntary appearances. The VO also notifies us when it conducts voluntary interviews and requires the witness to give evidence on oath or affirmation.

19 The Victorian Auditor-General's Office (VAGO) and the Judicial Commission of Victoria.

20 Ombudsman Act section 18D.

21 Ombudsman Act section 18M(6).

22 Ombudsman Act section 18Q(7).

23 Ombudsman Act section 26E(a)–(d).

24 VI Act, section 42.

25 Ombudsman Act section 18D, VI Act section 42.

- 2.7 Whilst we have a discretion to review notifications,²⁶ the legislation specifies that a review must assess:
- a) whether the requirements under the Ombudsman Act have been complied with
 - b) whether a requirement to produce documents or things for the purposes of an investigation may reasonably be considered as assisting the Ombudsman to achieve those purposes
 - c) whether questioning of a person attending before the Ombudsman may reasonably be considered as assisting the Ombudsman to achieve the purposes of the investigation to which the attendance relates.²⁷

Risk-based oversight model

- 2.8 The VI does not review every notification received from every agency. Instead, as we have a discretion to review coercive power notifications, we assess whether the notification should be reviewed through a risk-based triaging process. This includes a completeness check to identify any missing records or information and a range of factors that indicate an increased potential for compliance issues.
- 2.9 As our processes have matured, we have developed a more systemic approach to providing feedback to bodies. We do this by providing periodic reports, usually on a bi-monthly basis, outlining areas where we think the body can make improvements. While most issues are captured within these periodic reports, we may still elevate issues for direct correspondence at the senior officer level where the matter is serious, requires ongoing engagement or its management is time-sensitive.
- 2.10 When we raise a compliance issue, we outline any legislation, policies or procedures that we have relied on to form our assessment. If we think that the body needs to take an action, we may suggest a course of action to reduce the risk of the non-compliance reoccurring. In assessing an issue and making a suggestion we also consider the body's internal policies and procedures and any other related material. We consider this to be the most effective way to ensure that bodies take a systematic approach to compliance and build capacity for self-managing issues. We also raise issues for noting that do not require a response. These are intended to inform the body as to the frequency of an issue and to help the VI and the body identify whether an issue is or becomes systemic.
- 2.11 Responding to agencies' feedback, we changed the reports from monthly to bi-monthly and have simplified the report and the response process. We will continue to make changes to improve efficiency in this regard. We accept that in mid-2023, we provided a concentrated amount of feedback to agencies as we commenced the periodic reporting process and incorporated in our first report issues from the previous few months.
- 2.12 Generally, our responses to non-compliance and other issues are aimed at preventing similar issues in the future and take account of the body's readiness and capacity to comply, the need for accountability and the prevention of harm to individuals and the integrity system. We call these integrity responses. As a small integrity body, we focus our resources where we can influence improvements to the integrity system.
- 2.13 Sometimes, if issues are particularly serious, or if there is resistance to feedback and further steps are required to deter future non-compliance, it may be appropriate to make recommendations.

26 VI Act section 42AA(1).

27 VI Act section 42AA(2).

- 2.14 Recommendations can be private or public, but if we intend to make a recommendation public, we must do so in a report.²⁸ Where issues are systemic and have relevance to other bodies, it may be appropriate for us to publish educational information or guidance.
- 2.15 Another option is to publish a special report.

28 For recommendations to the Ombudsman, see section 82 of the VI Act. Under section 82(3), a recommendation to the Ombudsman which is not contained in a report must be made in private.

3. Oversight of the Victorian Ombudsman: 2021 to 2023

- 3.1 In 2021–22, the VI made comprehensive observations in relation to a group of investigations conducted by the VO in 2021. These were made in the context of the sensitive environment in which these interviews were conducted, including heightened witness welfare implications.
- 3.2 Accordingly, in those reviews, we provided feedback centred on how the VO conducted its interviews and processes supporting the welfare of witnesses. The VI also reviewed, and provided 97 comments on, specific VO policies and procedures to reduce or mitigate issues identified because of those reviews.²⁹ This approach was taken to assist the VO to make systemic improvements, rather than raising issues individually.
- 3.3 The VO’s responses indicated that it was taking the feedback seriously. The VO’s 6 April 2022 submission to an IOC inquiry that focussed on witness welfare stated:
- ... on 24 March 2022 the VI provided feedback and comments on a number of VO documents, including the Investigations Procedure. Some clarifying amendments have already been made, and the remainder of the VI’s feedback will be considered in detail to determine whether other changes to procedures are necessary and appropriate.³⁰*
- 3.4 A VO letter to the VI of 1 June 2022 advised ‘...we have adopted those suggestions we agree add the most value. We have left others, including some that we agree with in principle, but we would like to consider further.’³¹
- 3.5 The VO’s procedural fairness response refers to the VI’s diversion of additional resources to monitoring VO’s notifications in 2020/21 due to VO documentation being more accessible during the COVID lockdown period.³² The VO stated this increased oversight coincided with the VI’s substantial review project considering issues related to witness welfare, interviewing and managing of a complex series of investigations conduct by the VO.
- 3.6 The VI in 2020/21 reviewed 69% (149) of the VO’s notifications. The VI’s review of specific policies and procedures did not coincide with the increased oversight in 2020/21. Rather, it resulted from the issues identified during our review of those notifications of compulsory and voluntary appearances. As explained above in paragraph 3.2, the VI provided comment on specific VO policies and procedures to reduce or mitigate issues identified because of those reviews.³³ This approach was taken to assist the VO to make systemic improvements.

29 As noted in our 2021–22 Annual Report, in response to issues identified by the VI, VO made changes resulting in improvements relating to large scale investigations, including investigation planning processes, and investigator training, including skills and techniques.

30 Submission dated 6 April 2022 from the Ombudsman to the Integrity and Oversight Committee relating to the IOC’s review of integrity agencies’ witness welfare management during investigations.

31 VO letter to the VI of 1 June 2022.

32 The VO has taken this from the IOC’s Performance of the Victorian integrity agencies 2021/22 Report, November 2023, p 114.

33 As noted in our 2021–22 Annual Report, in response to issues identified by the VI, VO made changes resulting in improvements relating to large scale investigations, including investigation planning processes, and investigator training, including skills and techniques.

- 3.7 In our 2022-23 Annual Report, we observed that, commensurate with an increase in the VO's use of coercive powers,³⁴ there was an increase in compliance issues requiring attention.³⁵ The issues were raised in the first periodic report and promised improvements were not reflected in the Annual Report as the VO's response to the observations in that periodic report was received after the reporting period ending on 30 June 2023. The VO explained in its procedural fairness response that they responded on 21 July *'due to the volume of records requiring review and the amount of consultation needed with operational staff and their managers to provide a response to specific observations directed at actions and conduct'*.³⁶
- 3.8 This trend of increasing issues continued, with the VI making observations about 75% of the 192 notifications we received between November 2022 and August 2023.
- 3.9 There was also a variety of issues: we identified 51 different thematic issues which comprised of a range of observations for action and consideration by the VO. We also separately wrote to the VO on four occasions regarding serious matters.
- 3.10 This report focuses on feedback given in 2021 and 2023, as the most significant batches of feedback were provided in those years, coinciding with the VO's largest investigations. We provided limited feedback on notifications to the VO during 2022.
- 3.11 Our 2021–22 Annual Report³⁷ reported on improvements for large scale investigations including investigation planning processes and investigation training such as investigation skills and investigative techniques, reflecting a commitment to improving compliance by the Ombudsman at that time.
- 3.12 Although the VO has made progress in some of the areas we raised since the 2021 investigations, other issues were raised again in 2023, including:
- not making welfare enquiries at the start of an interview
 - improving the professionalism, demeanour and body language during interviews
 - putting a process in place so the physical location of summons recipients (i.e., whether the recipient was outside of the State of Victoria) is considered alongside legislative requirements.
- 3.13 The VO's 2022 representations to the VI³⁸ and to the IOC inquiry³⁹ indicated the VO gave real consideration to the VI's feedback. The Ombudsman told the IOC in August 2023 that our monitoring from these investigations only resulted in four changes to its operational procedures and that it had disregarded many of the 97 comments we had made on its policies and procedures.⁴⁰ The VO also noted that we had commented on the demeanour and body language of investigators, despite no complaints being made.
- 3.14 The VO's procedural fairness response explains that it analysed each of the 97 suggestions, before deciding that most changes were not warranted. In response to aspects of the feedback it made changes to some practices, and provided counselling and additional training to investigators. The VO adopted the VI's suggestion that professionalism be specifically referred to in the VO's procedures. The VO has also implemented a weekly schedule of regular training for investigators by experienced peers which includes sessions on improving interviewing skills and techniques to increase

34 From 129 notifications in 2021–22, to 184 notifications in 2022–23.

35 VI Annual Report 2022–23, p 66.

36 Appendix - procedural fairness response from VO received 13 March 2024, pp 3-4.

37 VI Annual Report 2021–22, p 20.

38 VO letter to the VI of 1 June 2022.

39 Submission dated 6 April 2022 from the Ombudsman to the Integrity and Oversight Committee relating to the IOC's review of integrity agencies' witness welfare management during investigations.

40 Correspondence to the IOC of 21 August 2023, reported in IOC Report Performance of the Victorian Integrity agencies 2021/22 (Nov 2023).

skills and foster professionalism in interviews. The VO stated they gave this example of the 97 suggestions to the IOC to illustrate the sheer volume of feedback and material provided, and the VO's challenges in determining the significance of issues raised and their usefulness in assisting the VO to improve its practices and procedures.

- 3.15 The VI accepts the VO's response that agreement to make changes does not prevent the Ombudsman from raising issues about the VI's feedback. Adoption of better practice suggestions are a matter for the VO. However, the VI considers that translating its notification review feedback into comments on the VO's policies and procedures was a worthwhile process. The issues related to witness welfare and management of complex and large-scale investigations and the feedback was provided before the integrity system had a benchmark for managing witness welfare – that is, it occurred before the IOC undertook the inquiry that focussed on witness welfare.
- 3.16 The VI's approach to oversight in 2021, in the form of feedback on the VO's procedures for consideration, reflected our perception that the VO was willing to comply. In our [Integrity Response Guidelines](#), this is a key factor guiding the seriousness of our response.
- 3.17 During 2023, we introduced a new periodic reporting model that supported our strategic priority of addressing issues thematically to create improvements across the system. These periodic reports provided consolidated feedback and observations of issues we identified during our reviews for each body, with suggested action where appropriate.
- 3.18 Since this model commenced, the reports to the VO have been lengthy and have highlighted numerous issues, some of which are new, and some identified during 2021.
- 3.19 The VO's procedural fairness response stated that *'while the VI provided the VO with notice of its intention to commence reporting periodically on its monitoring of notifications in 2023, it did not foreshadow the significant increase in the volume of feedback to the VO'*.⁴¹ However the VI could not foreshadow how much feedback would be given until it undertook the reviews.
- 3.20 Following the introduction of this new feedback model and the feedback on compliance issues, the Ombudsman began to publicly push back on our oversight and the notifications regime, despite the VO privately accepting and committing to implementing a large range of improvements from July 2023 onwards. This is evidenced by the timeline discussed in Section 4.

41 Appendix - procedural fairness response from VO received 13 March 2024, p 3.

4. Public and private responses to our feedback

- 4.1 In March 2023, the VI foreshadowed its plan to introduce the new periodic reporting model, with feedback compiled into thematic reports covering one-month periods. We later moved to compiling reports for two-month periods. Within each report, we made observations on areas we consider can be improved, and where necessary, suggestions on a course of action that should be taken.
- 4.2 However we were delayed in providing our first report. As we had considerable feedback from notifications reviewed from previous months, we included in our first report under this model notifications predominantly reviewed between November 2022 and March 2023. This report was provided to the VO on 8 June 2023 (first periodic report) and included 17 observations.
- 4.3 After this, we provided the following reports to the VO:
- 7 July 2023 – (second periodic report) relating to April notifications containing 12 observations (7 new, 5 recurring)
 - 21 July 2023 – (third periodic report) relating to May notifications containing 12 observations (6 new, 6 recurring).
- 4.4 The VI accepts that over June and July 2023 it made observations that covered the seven-month period November 2022 to May 2023. However the VO would have been aware that this period of concentrated feedback was temporary, as the VI had foreshadowed that the ongoing process would be monthly reports. The VI sought feedback from agencies on the benefit or otherwise of the reports and responded by moving to bi-monthly reports for the 2023–24 period to reduce the impact on agencies, as well as streamlining the style of reports to make the issues easier to track and the responses simpler by inserting them in the VI’s report. The VI could not have foreseen the number of issues about which it would need to make observations.
- 4.5 On 21 July 2023, the VO’s response to the first and second periodic reports expressed appreciation for the provision of consolidated reports and committed to making a number of improvements to its processes. The VO advised that in relation to several of the compliance issues we had identified, it was currently preparing new staff training which would cover preparing, issuing and serving confidentiality notices and summonses (including notification requirements to the VI). The VO outlined 15 actions it would take in respect to the first periodic report; and 3 actions in respect to the second periodic report.
- 4.6 On 8 August 2023, the VO responded to our third periodic report. Here the VO outlined the ‘*[a]ctions we intend to take to address your observations...*’ which covered a range of matters that would be dealt with through further training and improved processes. This included training on using confidentiality notices for staff, referring a confidentiality notice for assessment of whether it should be reissued, and alterations to its delegation where investigations are conducted by a different unit within the VO. These were all serious matters.
- 4.7 However, less than a week later on 14 August 2023, the Ombudsman appeared before the IOC’s hearing on the Performance of the Victorian Integrity Agencies 2021/22. There the Ombudsman stated:⁴²

42 See Transcript – Integrity and Oversight Committee – Performance of the Victorian Integrity Agencies 2021/22 (14 August 2023).

It would be a missed opportunity if I did not provide this committee with a short wish list of reforms I believe would help the performance of my office. An area of significant inefficiency is the requirement in my legislation to notify all uses of coercive power to the Victorian Inspectorate [VI]. Real-time oversight is disproportionate and burdensome. The routine provision of information invariably creates the need in the recipient to review it regardless of its importance or otherwise. To give you an idea of the impost, although to my knowledge no-one complained about any of my office's uses of coercive power last year, they resulted in 185 routine notifications, a requirement from the VI to report monthly, multiple requests for information from the VI and considerable resources from my office spent responding, all of this resulting in negligible useful suggestions for improvement. My office is simply unable to respond to such volume without significant delays and diversion of resources from my core work. In my view, an integrity system should provide for meaningful oversight of the use of coercive powers, but the current framework does not do so effectively, or in the case of the VI's own use of powers, at all. Removing the requirement for routine notifications would save significant resources in both agencies without compromising oversight, which could be meaningfully carried out through targeted inquiries or thematic audits.

- 4.8 The VO notes the Ombudsman's statement to the IOC hearing was made a month or so after the temporary period of concentrated feedback. However, the Ombudsman made no mention of the promised training and processes to address issues relating to summonses and confidentiality notices. Further, the VI could not have anticipated the number of issues it would find during this period.

- 4.9 VO's procedural fairness response stated the feedback *'did not show any signs of abating at that time, and giving due consideration to this feedback was burdensome and disproportionate'*.⁴³ Further, that the VI *'does not acknowledge the VO's other core legislative obligations that require resources as a priority. The VO cannot simply, and without notice, pull resources from other parts of its business which are executing core legislative functions and obligations, to deal with an apparently arbitrary increase in the VI's feedback'*.⁴⁴

- 4.10 The increase in the volume of feedback provided during this period was also reflective of the number of issues identified. Whilst the VI expected a large first periodic report as it covered a 5 month period, the VI could not have anticipated the large number of issues identified in the April and May notifications.⁴⁵

- 4.11 Despite the actions the VO had privately committed to take, the Ombudsman continued to publicly minimise the extent of compliance issues it was experiencing in commentary contained in a letter to the IOC of 21 August 2023 which is set out in the IOC Report 'Performance of the Victorian Integrity agencies 2021/22 (Nov 2023)' (IOC report). There, the Ombudsman again noted of our feedback that:

*...the overwhelming majority are trivial or technical in nature ... which would likely have been picked up through ... [the VO's] internal quality assurance and training programs ... [and] frequently relate to improving compliance with the VI's own notification requirements rather than ... [the VO's exercise] of coercive powers.*⁴⁶

- 4.12 Paragraph 7.16 explains that only 9 of the VI's observations related to the VO not providing required documents or the VI seeking further contextual information.

43 Cover letter – procedural fairness response from the Ombudsman of 12 March 2024, p 5.

44 Ibid, p 6.

45 See Table 1 of this report.

46 IOC Report Performance of the Victorian Integrity agencies 2021/22 (Nov 2023), p 116.

The VO's procedural fairness response stated:

The VI asserts that private acknowledgment by the VO of issues and acceptance of the need for them to be addressed does not align with its public minimisation of the significance of those issues – thus supporting, in the VI's opinion, some kind of conclusion that the Ombudsman is duplicitous. This is strongly rejected. The VO is committed to continuous improvement and welcomes appropriate feedback. VI feedback has indeed resulted in improvements. But at the same time, the VO has concerns, which have been expressed publicly by the Ombudsman, about the extent, utility of, and even the VI's jurisdiction over, aspects of the VI's oversight activities. In a number of instances VO staff have agreed to VI suggestions simply because the burden of constantly disagreeing with them became too great. The VI is wrong to suggest that this is evidence of the VO's agreement as to their utility.⁴⁷

4.13 The VI maintains there is a disparity between the Ombudsman's public comments and the VO's private commitment to action in its responses to the VI's reports.

4.14 The fourth and fifth periodic reports followed – the report on 26 September 2023 related to June notifications (fourth periodic report) and contained 17 observations (7 new and 10 recurring); and the report on 9 November 2023 related to July–August notifications (fifth periodic report), and contained 19 observations (8 new and 11 recurring).

4.15 At this time, the VO privately 'pushed back' on the utility of our feedback, and raised the impost on resources.

4.16 On 9 November 2023, the VO wrote to us to '...raise further issues about the work required to be done by our office in response to your monthly, and now bi-monthly⁴⁸, report on VO coercive power notifications to your office'.⁴⁹

There the VO noted that 'many of the matters raised would appear to be immaterial' and that 'others relate to lines of questioning in interviews when a witness's own legal representative was apparently satisfied any issues about questioning had been addressed'.

4.17 The VO also stated that the '...reports set out a large number of issues raised in previous reports, and continue to request further and better particulars even after a response has been provided. They do not take into account that implementation of some changes to process and procedures that we have agreed to, may take some time to put in place and for the effect of those changes to have come through in matters notified.'

4.18 The VI does not agree with these characterisations. The VI's reports intentionally outline matters raised previously in order to help both the VI and VO track whether issues were still occurring. The reports noted that these issues were either flagged without a request for action (i.e., for 'noting only'); or requested further information where the VO's response may not have sufficiently addressed any compliance concerns.

4.19 Despite the apparent public, and now private, views on the immateriality of the issues we raised, the VO's 22 December 2023 response to the fourth and fifth periodic reports in fact committed to a large range of improvements and changes on significant compliance issues.

4.20 The significant range of issues from those reports, which contrast with the Ombudsman's public, and later the VO's private, views on the materiality of our observations and feedback, are outlined in detail in Sections 6-8 and Appendix A.

47 Cover letter – procedural fairness response from the Ombudsman of 12 March 2024, p 5.

48 The VI moved from monthly to bi-monthly reporting, this change also incorporated improvements to the structure of our reports to assist bodies with responding more efficiently.

49 VO letter to the VI of 9 November 2023.

4.21 These issues included:

- The level of professionalism during some interviews, including inappropriate use of language and unprofessional pausing of interviews
- The service of summonses without considering the location of recipients
- Issues affecting the validity of confidentiality notices
- Inconsistencies in the VO's delegation of its powers and functions.

4.22 Appendix A sets out in detail the issues we have raised and improvements the VO committed to following this feedback.

4.23 A serious compliance issue also arose during 2023 which the VI raised separately to the periodic reports. The issue related to the risk of invalidity of two summonses that were incomplete when they were notified to the VI. Although the VO did not serve the summonses, the VI sought more information from the VO to understand the process that resulted in incomplete summonses being signed by the Ombudsman.

4.24 The next section of this report explains this issue, and how the VO responded to the VI's requests for information. The VO has now accepted that the VI's review of these summonses identified a serious issue related to the process for approval and has commenced a review to identify whether the issue extends beyond these two summonses.

5. A serious compliance issue and the VO's response

- 5.1 Before the Ombudsman publicly raised concerns about the effectiveness of our feedback on the VO's exercise of coercive powers, the VO commenced pushing back on our enquiries into two incomplete summonses notified by the Ombudsman.
- 5.2 In June 2023, in our review of notifications, we identified that two summonses, with the Ombudsman's electronic signature, may be invalid because they did not contain the dates the witnesses were required to attend. Although the VO advised that it did not intend to serve these summonses, we sought further information to understand how these had apparently been approved by the Ombudsman without containing all the required information.
- 5.3 When we sought further information and documents about how this had occurred, the VO pushed back because its view was that by changing its processes for how summonses are approved, the matter had been settled.
- 5.4 In advising that it did not wish to provide the documents we requested, the VO did not appear to have appreciated that, as an oversight body, it is our responsibility to determine how to assess an issue and what information may assist us in doing so. While a body is open to provide an explanation about a matter, the VI will generally request documentary evidence, if it is available, rather than be satisfied on the basis of an explanation alone. Where an issue is serious, unknown in scope, or an agency has not been transparent, we must independently verify what occurred.
- 5.5 To independently assess the causes of this issue, we continued to pursue this matter with the VO. However on 1 August 2023, the VO declined to provide the particular information sought by the VI.
- 5.6 At the same time, the VO indicated that because it was atypical, the issue was not something to be concerned about and that unless it was providing materials on the changes to its workflow guiding the summons process, it did not see the benefit of providing the documentation sought by the VI. It was also apparent that the VO and the VI appeared to have a different view on the legal status of the incomplete summonses.
- 5.7 On 2 August 2023, the VO advised that it had decided it could provide the VI with an explanation of what had occurred and copies of the briefing memorandum that went to the Ombudsman requesting approval and issue of the summonses. At the same time, the VO reiterated its view that the documents would not assist in answering the VI's questions on the summonses.
- 5.8 We did not receive any documentation from August to December 2023. In its procedural fairness response, the VO stated that it was not resisting providing documents when they were requested on a voluntary basis as there was no statutory requirement to provide that information and therefore no obligation to respond to the request. In the VI's view, a failure to respond to a statutory requirement would attract the description non-compliance, not resistance. Therefore resistance is an appropriate description for not voluntarily providing information to help an oversight body understand an issue.
- 5.9 On 19 December 2023 the VI used section 12 of the VI Act to formally require the provision of the documents we had originally sought. We also outlined our view about whether

summonses were issued (validly or not) at the time they were signed by the Ombudsman, irrespective of whether they contained all the relevant information. We received the information and documents on 17 January 2024, along with a formal response from the VO (the January response).⁵⁰

- 5.10 In the January response, the VO advised that our raising the issue was beneficial for the VO to identify and rectify a problem with the summons issue process but because *‘the two summonses were never served and the quick rectification of the summons issue procedure, the amount of work that our office has been engaged in to provide explanations, information and documentation to your office has not been a meaningful use of our limited resources.’*
- 5.11 The January response did not recognise that preventing issues recurring in the future does not resolve a matter as accountability also extends to the impact of past actions.
- 5.12 The description of “the quick rectification of the summons issue procedure” seems at odds with the VO’s description of the breadth of the change process in its procedural fairness response which provided these five reasons why the VO did not provide the documents until January. Firstly, priority was given to changing the summons process, which is ongoing work as it involves designing the change, internal consultation, case management system implementation, changes to procedures and templates and informing and educating staff about the changes. Secondly, the availability of technical resources to assist extracting the relevant information and documentation during a systems change; thirdly, directing resources towards periodic report responses; fourthly, the relevant team’s workload at the time, including responding to other VI related matters; fifthly, carrying out its other statutory functions, including investigations.
- 5.13 The VI accepts that there were also other matters impacting resourcing during that period. However the VI does not consider any of these reasons prevented the VO at least providing the VI with the promised explanation and the Ombudsman’s briefing memorandum that had been offered on 2 August 2023.
- 5.14 In its January response, the VO’s description of its practice and process revealed to the VI a risk that the issue could extend beyond the two summonses.
- 5.15 The VO advised that the issue with these two summonses identified by the VI was the first time they became aware that information may not have been included in the final versions of summonses provided for signature. Consequently, the VO identified that its workflow guiding the issue of summonses did not prevent VO officers from providing a summons for approval and signing by the Ombudsman without the summons containing all the necessary information.
- 5.16 In that regard, the VO further advised that VO officers may not have been contacting a prospective summonsed witness about a suitable date and time for a compulsory appearance until they had received approval from the Ombudsman. As a result, the Ombudsman was not only approving the briefing memorandum (requesting the issue of the summons), but also signing and dating an attached draft summons at the same time.
- 5.17 In the VO’s view, the Ombudsman was approving the VO officer to insert the date and time for attendance once they had contacted the witness on an already signed and dated document.
- 5.18 Consideration as to when a witness will be attending to give evidence is required as part of the decision-making process in determining whether the issue of a summons is reasonable and proportionate. After a summons has been signed by the

50 VO letter to the VI of 17 January 2024.

Ombudsman, it is the VI's view that these VO officers have no legal power to modify it.

- 5.19 Moreover, as a legal document, it is the VI's view that a summons cannot be modified without a formal variation process being undertaken, which requires approval of the Ombudsman or Deputy Ombudsman as the only persons with the authority to issue a summons.
- 5.20 Although the VO initially indicated that it was not aware of any further summonses being affected – it had not undertaken an audit or review to confirm.
- 5.21 Following the VI's queries on the prevalence and consequences of this process, the VO advised that it would be *'...undertaking a review of a sample of summonses issued using the previous workflow in order to identify whether or not summonses had been signed by the Ombudsman and whether necessary information had been subsequently added or amended by [VO officers]'*.⁵¹ The VO and the VI have a different view as to the impact of such a practice on the validity of the summons. If necessary following the review, these respective views will be considered further.
- 5.22 The VO advised that it would review summonses issued over the 12 months prior to the implementation of the new summons workflow in October 2023.⁵² This review would encompass 90 summonses issued between 1 October 2022 and 30 September 2023. The VI understands that this review has commenced.
- 5.23 This review will seek to identify whether necessary information has been:
- amended or added after the summons was signed by the issuer, and
 - if so, the nature of any amendments or additions, and why they might have been made, and
 - whether the issuer (Ombudsman or Deputy Ombudsman) was aware of and authorised the making of any amendments or additions.
- 5.24 In the VO's review, 'necessary information' has been defined as:
- description of information/documents required to be provided under summons on the 'What will you be required to do' section of the summons form
 - date and time of appearance
 - location of appearance
 - date of issue.
- 5.25 In response to our initial engagement, the VO was not open about the potential scope of this issue and the internal processes that may not have been followed.
- 5.26 If a compliance issue arises, it is our expectation that a body will undertake necessary actions to not only deal with the issue, but to disclose it transparently to the VI. Had we simply relied on the VO's summary of the issue in July 2023, we may never have known that the VO's process created a risk of invalid summonses being issued and served.
- 5.27 While the VO had complained of the work involved in responding to us on this matter, some of the additional work (for both agencies) was a result of how the VO engaged with us. Had it openly engaged and been prepared to provide the information that we initially requested, the back-and-forth on this matter would have been avoided and the VI could have discussed with the VO its priorities and established a reasonable response timeline.
- 5.28 Regardless of the VI's requests for information, the VO, to understand and appropriately address this issue, needed to invest resources in identifying and considering the issue and the potential for it to be more widespread than the 2 incomplete summonses.

51 VO letter to the VI of 12 February 2024.

52 92 summonses were issued in this period; however, the remaining two summonses were already identified by the VI as being affected by this issue.

What we are doing next

On 31 January 2024 officers from the VI attended the VO's offices at the VO's invitation for a demonstration of its new process which substantially revised how summonses were submitted for approval. This gave useful insight to the VI.

We will further engage with the VO as it undertakes its review.

- 5.29 The issue with these incomplete summonses also brought to the VI's attention that the VO may not be notifying the VI of summonses which it has determined to be invalid, although it should be doing so. This could mean that the VO has limited our oversight to instances where it has determined it has appropriately exercised its powers.
- 5.30 For other bodies we oversee, we are routinely notified of summonses and confidentiality notices that the body did not intend to serve because they were subject to an error that may have affected their validity. Monitoring these incidences enables the VI to determine whether a body has appropriate measures to prevent such errors. We have since requested that the VO notify us of all summonses issued.
- 5.31 This incomplete summons issue was serious and revealed a problem with process and quality assurance.
- 5.32 There are other issues we have identified at the VO that are also serious or are significant because they have affected a large range of the VO's exercise of these powers.
- 5.33 Issues from 2021 are detailed in the following section of the report.

6. Compliance issues at the VO: 2021

- 6.1 In 2021, we provided extensive feedback to the VO regarding a group of investigations. This was provided in the context of the sensitive environment in which these interviews were conducted, including heightened witness welfare implications.
- 6.2 This feedback was centred on how the VO conducted its interviews and the processes it had in place to support the welfare of witnesses. The VI also reviewed, and provided comment on, specific VO policies and procedures to reduce or mitigate issues identified. We took a procedure-based approach to influence systemic improvements after identifying a range of issues, mostly relating to the VO's practices when it held interviews with witnesses. We provided this feedback to the VO in the form of comments marked up in those procedures. We made approximately 97 comments.
- 6.3 In comments to the IOC in 2023, the VO indicated that our monitoring during this investigation resulted in four changes to its operational procedures and that it had disregarded much of the 97 comments or suggestions we made.⁵³ The VO cited these 'four minor changes' as demonstrative of the lack of proportionality and value of our oversight.
- 6.4 We do not expect that a body will agree with every observation or adopt every improvement we suggest, however, we make such suggestions with the intention of bringing about improvements to the way a body exercises its powers which in turn

strengthen the integrity system. Although the VO does not agree, the VI considers it is reasonable to conclude that adopting more of those suggestions may have reduced the number of related issues raised in 2023.

- 6.5 Some of the issues we identified in 2021, particularly those that have a nexus to the issues we identified in 2023, are outlined below.

Interview issues Professionalism and demeanour in interviews

- 6.6 In our review of interviews conducted during this group of investigations we raised concerns regarding professionalism and demeanour in some interviews. In comments to the IOC, the Ombudsman explained that the VI's requests for information and suggestions for improvements ran to 54 pages, even though, to the VO's knowledge, no complaints had been made by witnesses about their interactions with the agency. This included questions about the way in which some legally represented witnesses had been questioned and comments about the 'demeanour and body language' of interviewers, despite no issues having been raised by the interviewees or their legal representatives⁵⁴ at interview.⁵⁵

53 IOC Report Performance of the Victorian Integrity agencies 2021/22 (Nov 2023), p 116.

54 Not all witnesses in these investigations were legally represented at interview. See the examples regarding unfair questioning further below.

55 IOC Report Performance of the Victorian Integrity agencies 2021/22 (Nov 2023), p 116.

- 6.7 This appeared to minimise the nature of our comments, and the ongoing issues with professionalism and demeanour during interviews. It also appeared to be inconsistent with how the VO had originally responded to this feedback. In responding to a batch of feedback on such matters in October 2021, the VO advised *‘There are some instances you have helpfully pointed out where VO investigators could have done better, and individuals will be counselled accordingly. Further, team training is ongoing in interviewing, and there is always room for improvement in our investigative work. I trust you would also agree that these investigations were conducted in less than ideal circumstances.’*⁵⁶
- 6.8 In relation to the feedback provided by the VI in 2021, the VI acknowledges that working arrangements during the pandemic were challenging due to the particular impact of the COVID-19 lockdown restrictions on these investigations. These required careful arrangement of online interviews that were further impacted by the work location and additional restrictions on some witnesses. The VO officers were also working remotely.
- 6.9 However, issues such as abruptly interrupting a witness during an interview to answer the door or respond to a text message, and the explanations provided, were not appropriate. This occurred in the context of a serious investigation, involving witnesses who were attending an interview under compulsion. The VO officer in their procedural fairness response detailed the particular contexts in which the interruptions occurred. While the VI accepts the explanation given about why the VO officer thought it necessary to abruptly interrupt the witness, the VI considers that the witness, and the interview, should be the sole focus of the interviewers. Where an interview must be interrupted it is the VI’s view that this should be done in a professional way which avoids drawing attention to the interviewer’s personal circumstances.
- 6.10 In response to these examples, the VO noted that there will be circumstances in which VO investigators, particularly when conducting an interview remotely from their homes, will be faced with unexpected callers and possible family emergencies (as will witnesses). In such circumstances, the VO noted, it would be necessary for an adjournment so that the participant affected can sort out the issue.
- 6.11 The VO accepted that the interviewer could have provided fewer details about the reasons for the interruption and that it would *‘provide feedback to staff on how to deal with unanticipated interruptions’*.⁵⁷
- 6.12 We also noted that there were various instances of a lack of professionalism including inappropriate demeanour and body language during some interviews. We acknowledged that interruptions were likely to occur when conducting interviews virtually, however, that as the VO was exercising a coercive power, VO officers should approach interviews in a more professional manner and set the standard for the overall management of the interview.
- 6.13 In our feedback at the time, we did not include further specifics to avoid singling out VO officers, providing instead the opportunity to the VO to provide guidance to its staff.
- 6.14 In subsequent correspondence to the VO, we acknowledged that although instances of a lack of professionalism including inappropriate demeanour, body language and interruptions during some interviews had been addressed, more proactive training should be provided to VO staff, especially for interviews held virtually.⁵⁸
- 6.15 Similar issues were identified in 2023, including inappropriate demeanour in interviews, a lack of professionalism and boundaries in discussions, and inappropriate pausing of interviews. For more details see Snapshot 1 in Section 8.

56 VO letter of 22 October 2021.

57 Ibid.

58 VI letter to the VO of 24 March 2022.

- 6.16 Relevantly, these types of professionalism issues have not been observed in reviewing IBAC and OCE hearings.
- 6.17 The VO's procedural fairness response stated IBAC and OCE hearings are not analogous to interviews conducted by the VO as the VO's investigation and interview processes and the matters it investigates usually significantly differ from those of IBAC which investigates corruption and police misconduct and has power to bring criminal proceedings.
- 6.18 The fact that these bodies investigate different subject matter is not relevant to the professionalism of the hearings. Each body uses the same coercive power, a witness summons, to require the person to give evidence. Failure to comply with a summons is a criminal offence for every witness, whether appearing at the VO, IBAC or the OCE. As the powers exercised by each body carry similar consequences if not complied with it is important that this is considered when exercising the power.
- 6.19 The VI agrees with the VO's response that the rules of evidence do not apply to it, that investigations are inquisitorial and that unlike in court, there is no examination in chief and cross examination. However, this is the same for IBAC⁵⁹ and OCE hearings.
- 6.20 The VI agrees that in relation to the interview arrangements, IBAC examinations are presided over by the Commissioner, or a Deputy Commissioner, and OCE examinations are presided over by the Chief Examiner or an Examiner. The hearing rooms have a similar set up to a court room. Whilst this brings a sense of formality to the interview that is not present in a VO interview, the impact on the witness of being required to give evidence is the same – they must comply or face criminal sanction.

Unfair questioning

- 6.21 In four interviews reviewed by the VI, we identified several issues relating to unfair questions put to the witness.⁶⁰ This occurred where the quality of CCTV footage played to each of the witnesses was very low which made it difficult for the witness to hear what was said.⁶¹ In addition, the scenes in that footage were dynamic and busy, making it difficult for the witnesses to hear and attribute anything that was heard to the persons present.
- 6.22 As a result, we advised the VO that we did not consider the witnesses were provided with a real opportunity to understand the case or to respond to key evidence.
- 6.23 We also considered that given the footage is critical evidence for the VO's investigation, any footage or recordings put to witnesses should be sufficiently clear and audible to allow the witnesses to adequately respond to any questions. We also noted that it would have been more appropriate for the witnesses to be asked to describe their observations from viewing the footage.
- 6.24 The nature of this questioning, and the quality of the audio, was demonstrated in two of the examples we provided to the VO.

Example 1

The VO played footage and asked a series of questions about what was said in the audio. Although the witness states that they cannot hear the statement they were asked about, the VO then asks the witness why the person in the footage would have made this statement. When the witness adds that they are not sure that was what was said, the VO stated, *'Just humour me and assume that [they] did say it'*.⁶²

59 Other than at a public examination of a witness, see section 132A of the *Independent Broad-based Anti-corruption Commission Act 2011*.

60 VI letter to the VO dated 20 August 2021.

61 We considered this may be attributed to the footage being shared live over Microsoft Teams.

62 Example 4 in Annexure A of the VI's letter to the VO of 20 August 2021.

6.25 The VI considered this questioning inappropriate because the VO had not established the witness' knowledge of the fact underlying the question and the witness should not have been asked to speculate. We noted that it was inappropriate for the witness to be asked to 'humour' the VO in circumstances where there are harsh penalties for failing to answer a question. The VI acknowledges the VO officer's procedural fairness response that after making this comment, they in effect asked the witness, if that was said, would it have been appropriate.

Example 2

Similarly, during a separate interview, questions were put to the witness which the VI considered unfair because the VO had not established the witness' knowledge of the fact underlying the question and therefore no meaningful response could be given. This was evidenced in an exchange where the witness was asked questions relating to words spoken in footage which the witness noted they could not hear. In response to this the VO had stated '*Nah you won't hear it but trust me that's what [the person] says. [The person] says it again...now you can't hear that but that's what [the person] says...*'.⁶³

6.26 In response to these examples (and others listed in our letter) the VO noted that all witnesses were legally represented at interview and the legal representatives were able to advise their clients or raise an objection if any of the questioning was indeed unfair.⁶⁴

6.27 It was not however the case that all witnesses were legally represented.

6.28 In only one of the interviews raised

(Example 1) was a witness legally represented. In that interview, the VO gave its usual advice to legal representatives that it 'was not appropriate for them to object to questions like they would in a normal court setting'.

6.29 The VO also agreed that ideally footage or recordings should be sufficiently clear and audible to witnesses. In that regard, the VO also agreed that in the case of the examples given, there were problems with the witnesses' ability to hear the audio on the recordings, and therefore it was not possible for them to provide clear responses to questions about what was being said by people in the recordings.

6.30 The VO agreed that one approach would have been to ask the witnesses to give their observations from viewing the footage, rather than asking them to respond to propositions about what was said or done.

6.31 The VO did not however agree that the questions in themselves were unfair and stated that '*It was unfortunate that the witnesses could not respond well to questions based on audio that they could not hear clearly*'.⁶⁵ Despite the problems with the audio quality the VO considered that it was not unfair to play these for the purpose of refreshing the witnesses' recollection of events.

Witnesses with legal representation

In the IOC report, the VO noted that we raised questions about the way in which some legally represented witnesses had been questioned and comments about the 'demeanour and body language' of interviewers, despite no issues having been raised by the interviewees or their legal representatives at interview.

Of the 24 interviews conducted, 22 of which were compulsory, only 9 witnesses were legally represented.

63 VI letter to VO of 20 August 2021.

64 VO letter of 22 October 2021.

65 VO response 22 October 2021.

We raised issues in relation to questioning for 10 interviews. In only 3 of those interviews was the witness legally represented.

When represented, the VO gave its usual advice to legal representatives that it was not appropriate for them to object to questioning as they would in a court setting.

No general welfare enquiries at interview commencement

- 6.32 As a thematic issue, during those 2021 interviews, we identified that no general welfare enquiries were made with witnesses by the VO at the commencement of three interviews. As there were likely to be further interviews, we suggested that the VO revisit its welfare guides and procedures to ensure that general welfare enquiries are made at the beginning, and throughout, each interview.⁶⁶
- 6.33 The VO indicated that building these types of preliminary questions into the interview script would ensure that interviewers do not forget to raise these enquiries with witnesses and their support person or lawyer.⁶⁷
- 6.34 Despite the VO's indicated actions, this issue continued to be identified during 2023. For more detail on this issue and the VO's procedural fairness response, see Snapshot 4 in Section 8.

Statement on commission of offence by witness

- 6.35 We identified that the VO alleged that a witness had committed a criminal offence for failing to attend on the date summonsed. This occurred before the questioning commenced in a compulsory interview which also raised serious concerns about welfare and fairness. The VI was of the view that as the summons had in

fact been varied before the witness was due to attend, the issue was irrelevant to the investigation and if it needed to be raised, we noted that it should have been raised separately, and not during the interview.⁶⁸

- 6.36 The VO agreed that the witness had not breached the terms of their summons, and that the relevant officer had been alerted to their error and appropriately counselled.⁶⁹

Argumentative questioning

- 6.37 In the same interview, the witness alleged their wellbeing was affected as they were provided conflicting information concerning access to a support person. The ensuing discussion between the VO and the witness appeared argumentative. The VI considered that arguing with the witness about the validity of the witness' concerns, defending colleagues and insisting that support had been available to the witness did not have any utility and meant that the interview commenced in the context of conflict.⁷⁰
- 6.38 The VO provided some additional information and context to the VI about what had occurred prior to the interview outlining some difficulty contacting the witness and settling a date for the interview. The VO did not agree that the VO officer had been argumentative but stated that the witness was confrontational throughout the interview and that their repeated questions resulted in repeated explanations that may have been misconstrued by the VI as argumentative.⁷¹
- 6.39 In their procedural fairness response, the VO officer asked the VI to note the challenges investigators face in managing aggressive interviewees. They acknowledged that, seen in context, their words *'could have been better chosen'*, but also stated that they were *'far from unprofessional, and that the interview proceeded unhindered.'*

66 VI letters of 4 March 2021, 26 May 2021.

67 VO letter of 6 April 2021.

68 VI letter to VO of 20 August 2021.

69 VO letter to VI of 22 October 2021.

70 VI letter to VO of 20 August 2021.

71 VO letter to VI of 22 October 2021.

6.40 We acknowledge the VO officer's reflection that their words could have been better chosen. However we consider that the interviewee, rather than being aggressive, was stressed and frustrated by the issues raised by the VO officer at the start of the interview. See paragraph 6.35.

The location of interviews

- 6.41 Noting the sensitive context of the interviews in this group of reviewed investigations, we flagged with the VO an instance where a witness and their support person had raised concerns about the lack of privacy for an interview that was conducted in a 'breakout room' in the witness' workplace. It was not clear to the VI why the VO had not suspended or adjourned the interview when a different staff member had attempted to enter the room.⁷²
- 6.42 The VO advised in response that a different room had been booked however it was not able to be used and a new room was found at short notice. It also noted that no concerns were raised by the witness during the initial part of the interview and the VO had contacted one of the facilitators following the interview to raise concerns about this staff room being used for the interview.⁷³

Breaks provided to witnesses during interviews

- 6.43 The VI noted instances where witnesses were not provided sufficient breaks during interviews that were lengthy and ran over the lunch time hour.⁷⁴
- 6.44 The VO advised that its procedures relating to witness welfare take into account the requirement to provide adequate breaks; and throughout interviews VO investigators monitor this and determine whether or not a break is needed for a witness. The VO also noted that the witness or their

legal representative or support person can all request a break for the witness, and the interviewers are responsive to those requests.⁷⁵

- 6.45 The VI raised additional observations regarding breaks for witnesses during 2023. This is addressed in Appendix A, Observation 42.

Procedural issues

Overly restrictive confidentiality notices

- 6.46 In reviewing a number of confidentiality notices issued to support persons, the VI noted that the limited disclosure of restricted matters to persons, bodies or agencies may not be compliant with the Ombudsman Act. Under section 26F(2)(f) of the Ombudsman Act, the default position is that restricted matters can be disclosed to a registered health practitioner, and specified bodies or agencies unless there is a direction by the Ombudsman to the contrary.⁷⁶
- 6.47 The VO noted that it had not anticipated that support persons would need to consult a medical practitioner (as they were not involved in the incidents in questions). However, on reflection and in hindsight, added that it was reasonable to suggest that those support persons might find the incidents under investigation as distressing as those who were involved, particularly where relevant footage was played.⁷⁷
- 6.48 Although the VO noted that the direction under section 26F(2) was covered by the terms of the confidentiality notice itself, the VO acknowledged that it should have considered the possible impact of the evidence on support persons who were from the same workplace as the witnesses they were supporting. In that regard, the VO noted that it should have ensured that the

72 VI letter to VO of 26 May 2021.

73 VO letter to VI of 14 July 2021.

74 VI letter to VO of 20 August 2021.

75 VO letter to VI of 22 October 2021.

76 VI letter to VO of 20 August 2021.

77 VO letter to VI of 22 October 2021.

confidentiality notices did not effectively prevent them from seeking professional help and that it would take into account our suggestions.

- 6.49 A different issue with confidentiality notices was identified in 2023, where we noted instances where the VO had included additional persons on the confidentiality notices who were not specified in section 26F(2).

Requests for documents during interviews

- 6.50 The VI also explored with the VO how documents were sought during interviews, following two instances where the VO had sought to obtain documents from witnesses in a casual manner.⁷⁸
- 6.51 In response to this issue, the VO noted that it was unusual for VO to request documents during an appearance, but in this case, it was the witness who identified that they had made notes which were relevant to the matters that were being examined.
- 6.52 The VO also noted there was no reference in the Investigations Procedure that covers this scenario, but the interview script provides for the production of documents under a summons and for a register to be completed for documents taken and/or copied at interview.
- 6.53 VO conceded that as a matter of practice, if documents are to be requested from a witness during interview that a witness needs to be told that they are not required to produce the documents, but may do so on a voluntary basis.⁷⁹

- 6.54 Although we raised this issue with the VO during 2021, we continued to identify this during our 2023 reviews. For more detail see Snapshot 5 in Section 8.

- 6.55 In its procedural fairness response, the VO said that it *'made changes to its templates and procedures in response to this issue in 2021 with respect to voluntary appearances. It made further changes, this time to its compulsory appearance interview script, when similar issues were raised by the VI in 2023'*.⁸⁰

Errors in confidentiality notices

- 6.56 In one of our earlier reviews during 2021, we identified three confidentiality notices that did not include a warning regarding the application of the *Public Interest Disclosures Act 2012* (PID Act). Where a confidentiality notice is served in respect of an investigation of a public interest complaint, the Ombudsman Act⁸¹ requires the confidentiality notice to include this wording and direct the recipient to the applicable provision of the PID Act.⁸²
- 6.57 In these instances, those circumstances applied and therefore the warning was important to draw the witness' attention to the relevance of the PID Act as it contained further restrictions on what the witness could disclose.
- 6.58 The VO later reissued these confidentiality notices to the witnesses.⁸³
- 6.59 We identified this same issue for three confidentiality notices issued in 2023. These were later cancelled by the VO without being reissued.⁸⁴

78 VI letter to VO of 26 May 2021.

79 VO letter to VI of 14 July 2021.

80 Appendix - procedural fairness response from VO received 13 March 2024, pp 12-13.

81 Ombudsman Act, section 26C(2)(ca).

82 VI letter to VO of 4 March 2021.

83 VO letter to VI of 6 April 2021.

84 VI's second periodic report.

Unrecorded discussions

6.60 In reviewing the recording of an interview, it was apparent to the VI that there was a discussion prior to the recording commencing, and at the end of the recording. The witness started to ask a question and the VO officers asked them to wait while they turned the recording off. While the discussions that took place before and after the recording may have been entirely benign, the VI considers that having discussions so proximate to the recording that are not recorded falls below better practice. It creates a risk that matters that may bear on the propriety and fairness of the overall interview are not provided to the VI.

6.61 The VI considered that VO officers ought to be reminded that:

- the entire interview should be recorded except for adjournments; and
- once the recording is resumed VO officers should confirm they have not discussed the substance of the interview with the witness during the break.⁸⁵

6.62 In response, the VO advised that it does record the whole interview and that it agrees this must occur. It noted that it was unavoidable that it must speak with witnesses before and after the interviews, but the matters discussed are either pleasantries or other questions of a practical nature and were not discussions about the substance of matters being investigated.

6.63 The VO advised that in the instance we raised, the VO was in the process of turning off the recording when the witness continued to speak about an administrative matter. The VO did not have a file note of what was said.⁸⁶

6.64 During 2023, we identified a related issue with the recording of an interview. This time however, the conversation had been inadvertently captured when it appeared the interviewer and witness were unaware the recording was still running. This is addressed in Snapshot 1 in Section 8.

Administrative errors

6.65 We also raised administrative errors where a confidentiality notice provided to a witness contained highlighted text and two confidentiality notices were issued to a witness with the date as a tracked change and the Ombudsman's name and position highlighted.⁸⁷

6.66 The VO noted that these errors were unintentional.⁸⁸

85 VI letter of 20 August 2021.

86 VO letter to VI of 22 October 2021.

87 VI letter to VO of 26 May 2021.

88 VO letter to VI of 14 July 2021.

7. Compliance issues at the VO: 2023

- 7.1 Between November 2022 and August 2023, we received 192 notifications from the VO. We triaged 192 and reviewed 79 (41%) of these. These comprised:
- 72 summonses (40 reviewed)
 - 18 variation of summonses (1 reviewed)
 - 30 voluntary interviews (6 reviewed)
 - 35 confidentiality notices (15 reviewed)
 - 6 confidentiality notices cancellations (6 reviewed)
 - 31 compulsory appearance audio or video recordings (11 reviewed).
- 7.2 Although we received a higher number of notifications from IBAC during this period, we consistently identified more issues at the VO and had to do more work to influence improvement. Of the 192 notifications we received between November 2022 and August 2023,⁸⁹ 75% resulted in observations. We made a total of 51 thematic observations in relation to 144 of the 192 notifications we had received during that period. See Appendix A.
- 7.3 For the 72 summonses the VO issued, we identified issues in respect to 26 of those that the VI considers may have affected the validity of the summons, or its enforceability. This amounts to 36% of the 72 notified summonses. For the VO's confidentiality notices, we identified that 11 of 35 were affected by an error that the VI considers may have rendered the notice invalid. This represents 31% of the 35 notified confidentiality notices.
- 7.4 Underlying the frequency of these errors was the VO's limited capacity to address compliance issues. From a headcount of 118⁹⁰, it is the VI's understanding that there are only two legal staff.⁹¹ Because they must also support the VO's operations generally, those legal staff are limited in the amount of resourcing and time they can dedicate to compliance relating to coercive powers. The VI understands that an additional lawyer was to join the VO's legal team in February 2024. In its procedural fairness response, the VO stated that it *'has a team of four full-time staff who provide oversight and guidance on matters relating to organisational risk, compliance and governance activities, ensuring the organisation is acting consistently with whole-of-government compliance frameworks. Additionally, the VO has two full-time staff dedicated to quality assurance in its Complaints Unit and one in its Investigations Unit. In addition, significant amounts of time are regularly dedicated to a range of compliance and quality assurance activities, including engaging with the VI, by the VO's most experienced and senior staff in the Statutory Functions area'*.⁹² The response did not state how many legal staff it had.
- 7.5 The Ombudsman's characterisation of the 'overwhelming majority' of feedback as 'trivial or technical in nature',⁹³ understates the importance of being compliant with legislative requirements.

89 Two observations (10 and 15) relate to notifications received in the period July – October 2022.

90 Victorian Ombudsman Annual Report 2023, p 84.

91 The VO was in the process of adding a third legal adviser in February 2024.

92 Appendix – procedural fairness response from VO received 13 March 2024, p 14.

93 IOC Report Performance of the Victorian Integrity agencies 2021/22 (Nov 2023), p 116.

- 7.6 Given the serious and extraordinary nature of coercive powers, the VO's approach to prescribed forms and material provided to witnesses should be technically correct to comply with the law and ensure clarity for witnesses – this requires it to be free from errors, omissions and administrative mistakes.
- 7.7 Although the VO considers that its quality assurance processes would have likely identified the issues we have reported,⁹⁴ that issues frequently arose without being identified by the VO, indicates that its quality assurance processes were either ineffective or not working as intended. The process resulting in the incomplete summonses discussed in Section 5 is one serious example of this.
- 7.8 Our observations have influenced a number of improvements to the VO's processes and procedures. An overview of these is provided in Section 9.
- 7.9 From our review and triage of those 192 notifications, the VI provided five periodic reports to the VO with feedback and observations on its exercise of coercive powers for these notifications.⁹⁵ Our most recent report was provided to the VO on 1 November 2023 and it was responded to on 22 December 2023.
- 7.10 Separate to those reports, the VI also wrote to the VO during 2023 on 4 occasions regarding serious issues that we considered should be addressed soon as possible. Three of those issues, which relate to professionalism during interviews and an inadvertent data breach, are outlined in compliance 'Snapshots' in Section 8.⁹⁶
- 7.11 When we raise an issue in a periodic report, we refer to this as an observation. Each observation is focussed on a separate issue and contains informative background, any legislative references and details of any applicable VO policy or procedure. We may make multiple observations on a single notification, and likewise, the same observation may apply to more than one notification.
- 7.12 Within each report, we made a large number of observations. Our fifth, and most recent periodic report, which covered two months, contained 19 observations (11 of those were in relation to recurring matters). The reports we made, along with the number of corresponding observations, are detailed in the table below. This table also details when the report was provided, and the date the VO responded to each report.

94 Ibid.

95 For efficiency and to allow bodies more to respond in detail, from July onwards the VI moved from a monthly reporting model to bi-monthly.

96 Where we wrote to VO separately to the periodic reports, these issues are not included in the observation statistics.

Table 1 – New and recurring observations made in each report⁹⁷

Period	Date provided to VO	Notifica-tions received	Total observations	Notifica-tions affected	VO response
Predominantly⁹⁸ November 2022 – March 2023 First periodic report	8 June 2023	75	17	50	21 July 2023
April 2023 Second periodic report	7 July 2023	35	12: 7 new 5 recurring	30	21 July 2023
May 2023 Third periodic report	21 July 2023	18	12: 6 new 6 recurring	19	9 August 2023
June 2023 Fourth periodic report	26 September 2023	35	17: 7 new 10 recurring	27	22 December 2023
July/August 2023 Fifth periodic report	9 November 2023	29	19: 8 new 11 recurring	18	22 December 2023
Total		192	77: 45 new 32 recurring	144 of 192	

97 We note an observation may address more than one issue however, for simplicity we have not counted additional issues in our calculations.

98 This report's focus is on the notifications made from 1 November 2022. For completeness it should be noted that the VI received 40 notifications between 1 July and 31 October 2022, 7 of which were affected by an issue raised with the VO.

- 7.13 The 77 observations that we made in the periodic reports included issues relating to non-compliance with legislation and procedural fairness, procedural issues, witness welfare, privacy and better practice.
- 7.14 The VO's procedural fairness response stated that the VI's approach to reviewing notifications goes beyond the legislative requirements, such as observations on witness welfare which may be couched as directives even where the VI has no authority to direct. Further stating '*while some of these observations may be helpful, they require time and resources to respond to, and at times are disputed by the VO. Importantly, the legislation does not require the VO to respond to, or promptly respond to, let alone agree with, all such observations. The VI appears to have elevated all of its observations, even those which may go beyond its statutory remit, to compliance requirements*'.⁹⁹
- 7.15 The VI strongly disagrees that it couches observations as directives and has elevated all of its observations to compliance requirements. Paragraph 7.13 above and the observations set out in full in Appendix A make this clear. As the VI's legislation requires that any review must cover a large range of issues, any observations the VI makes during such review are shared with agencies. The VI is careful to distinguish compliance issues from suggestions about better practice. Whilst section 42AA(2) of the VI Act sets out what the VI must consider in a review, the VI must also look at general lawfulness. Given its learnings across agencies, it is appropriate for the VI to make observations about better practice. This does not make the observation trivial, disproportionate or burdensome. The VI is confident that the regular meetings being commenced with the VO will assist in explaining the context for its feedback and the VO's response.
- 7.16 For the most part, the VI provides feedback in the context of legislative requirements and the VO's policies and procedures. The VI

acknowledges that the VO is not required to accept observations, or suggestions that go beyond compliance requirements, and is not demanding a commitment from the VO to agree in advance to comply with all the VI's suggestions. Relevantly, this report concludes that in a 6 month period we identified issues that the VI considers may have affected the validity of up to 36% of summonses issued or varied, or their service, and up to 31% of confidentiality notices.

Observations relating to VI requirements

The VO raised in its comments to the IOC that our feedback '*...frequently relate[s] to improving compliance with the VI's own notification requirements rather than ... [the VO's exercise] of coercive powers*.'

However, we made only 9 observations regarding the VO not providing required documents or seeking further contextual information. Those requirements are nevertheless important because without all documents the VI may not be able to identify and act on issues, or understand the context of why the VO took a particular action.

These observations are detailed in observation 51 of Appendix A.

Risks of invalidity for summonses

- 7.17 One of the most significant errors that the VI seeks to address in our reviews are those that may affect the validity or enforceability of an exercise of a coercive power. As is reflected in Table 2 below, we identified a number of errors with summonses issued by the VO that the VI considered had the potential to affect the validity of the exercise of the power, or the enforceability of the summons.
- 7.18 Where a power is not validly exercised, or a summons is not validly served, a person

99 Cover letter – procedural fairness response from the Ombudsman of 12 March 2024, p 6.

may not be required to comply with the summons. In some instances, because VO did not list the address of recipients on summonses, we were unable to assess the validity of service and by the time VO had considered this, the recipients had already complied with the summonses – despite there being a possibility that they were not required to do so if they were outside Victoria.

- 7.19 We had previously provided feedback to the VO in March 2022¹⁰⁰ that it consider the relevant legislation for interstate service (see Section 6).
- 7.20 For the period November 2022 to August 2023, the VO issued 72 summonses and we identified and made observations about several compliance issues that could have affected the validity or enforceability of up to 36% of them.

Table 2 – Summonses with issues that the VI considers could have affected validity or enforceability

Issue observed	Instances identified
Summons served without considering location of recipient	16
Summons served interstate without leave of the Supreme Court of Victoria	1
Summons did not provide minimum 7 days to respond	5
Incorrect summons issue date	1
Incomplete summons issued by Ombudsman (but not served)	2 ¹⁰¹
Summons served on person not named on the summons	1
Summons served by VO officer without appropriate delegation	1
Summons informally varied	1

100 VI letter to VO of 24 March 2022.

101 This figure is limited to instances directly identified through our monitoring. We note that these summonses were not served. The VI is engaging further with the VO on this issue – see Section 5.

102 With respect to one observation, the VO advised that it did not consider that the issue of specificity rendered the CN invalid.

Risks of invalidity for confidentiality notices

- 7.21 We also identified several errors in confidentiality notices issued by the VO for the same period. We observed in 11 confidentiality notices, 20 instances of the issues that could have affected validity. These are set out in Table 3.

Table 3 – Issues in confidentiality notices that the VI considers could have affected validity

Issue observed	Instances identified
Amendment to restricted matters or prescribed forms inconsistent with legislation	10
Removal of legislatively required marking (PID)	3
Lack of specificity in restricted matters ¹⁰²	6
Inconsistency specifying restricted matters	1

Recurring observations and proportionality

- 7.22 As outlined in Table 1, 32 observations were recurring observations where we had previously raised an issue with the VO but identified the same issue in later notifications. Where a recurring observation is made, we continue to include these in our report, even though the body may not yet have had time to address the issue, so that it is aware of the scope and potentially systemic nature of the problem.
- 7.23 Given the time required to implement changes, we have assessed that VO had a reasonable period of time to address 4 of the 32 recurring observations. Two of those were issues we first highlighted to the VO in 2021: these were the VO not making welfare enquiries as a matter of practice at

commencement of interviews, and its failure to consider the application of the *Service and Execution of Process Act 1992* (Cth) (SEP Act) when serving summonses interstate. See Snapshots 4 and 2 respectively in Section 8.

7.24 The VO's procedural fairness response stated that the introduction of a SEPA process and subsequent amendments to relevant policies and procedures and templates has taken longer than the VO would have wanted, but a draft process has been prepared and VO has been in consultation with IBAC about their policies and procedures. VO has not issued any further interstate summons since those identified by the VI and there are clear instructions to staff on who to consult with if a summons may be required to be served interstate.

7.25 The IOC report noted that the VO did not consider that enquiries it receives from the VI in relation to the triaging and review of notifications are '*targeted*' or '*proportionate*' and that as an example, the VO had informed the Committee that between November 2022, when the VI introduced the new model,¹⁰³ and May 2023, '*the VI provided 59 pages of feedback, referencing some 70 per cent of notifications made in that period*'.¹⁰⁴ However, these views did not have necessary context.

7.26 In the six-month period from November 2022 to May 2023, approximately 75% of the notifications received from the VO resulted in observations to the VO. Not all notifications were reviewed, as we identified issues during both our triage and review processes. Further information on our triage process is outlined in Section 1 of this report.

7.27 The length of a report is not the sole measure of proportionality or a clear indicator of whether a review is targeted, there are also multiple factors that influence the length of a report including: referencing relevant policies, procedure and legislation that apply to an observation; the background and

progress made on an issue; demonstrative examples of what we have identified; and the nature of any suggested action to remedy the issue. Because of this additional contextual information, a single observation can span one page or more pages within a periodic report.

7.28 For these reasons, our periodic reports are structured in a manner which provides detailed contextual information to the VO. We apply this same approach to our reviews of coercive powers for other bodies.

7.29 By way of example, Observation 9 of the first periodic report regarding requests for documents in interviews spans two pages in the report, as it outlines relevant legislation and practices, previous advice on the issue, and a description of each example we identified. The suggested action comprised one short paragraph.

7.30 The purpose of formatting reports in this manner is to clearly state the basis on which our observation is made to allow an agency to understand how we have arrived at a particular view and to offer an opportunity to refute our assessment if needed. Another intention of this structure is to clearly articulate the observation which allows the relevant body, such as VO, a fair and reasonable opportunity to respond to an observation that may later be reported publicly in our annual report.

7.31 We note as of the fifth periodic report, the structure of the report has changed to more readily allow identification of the action required, along with a blank section for VO to respond within the report to simplify the response process. This formatting means that the reports are naturally longer due to blank spaces within the reports.

7.32 The next section provides an overview of seven distinct compliance issues that we identified during 2023. As explained in Section 6, some of these were first raised with the VO back in 2021.

103 As noted earlier in this report, the reporting model was introduced in March 2023, rather than November 2022.

104 IOC Report Performance of the Victorian Integrity agencies 2021/22 (Nov 2023), p 116.

8. Seven compliance issue snapshots from 2023

- 8.1 Our feedback during 2023 ranged from repeated administrative errors, invalid summonses, and serious procedural issues, including the standard of professionalism during some interviews.
- 8.2 To illustrate the varied and serious nature of these issues, this section presents seven thematic issues. Each thematic issue is detailed as a snapshot describing what we identified, the steps we took to help prevent recurrence, and how the VO responded to our engagement (including whether or not it took or agreed to take appropriate steps to improve its policies and procedures).
- 8.3 The seven snapshots are:

Snapshot 1 – issues with professionalism during some interviews

Snapshot 2 – inaction resulting in a risk of invalid service of summonses

Snapshot 3 – an inadvertent disclosure of information and a failure of quality assurance

Snapshot 4 – limited welfare enquiries at the start of interviews

Snapshot 5 – not making clear the limits of the VO's authority during compulsory interviews

Snapshot 6 – not ensuring functions and powers are delegated appropriately

Snapshot 7 – limiting oaths to a single religion.

Snapshot 1: issues with professionalism during some interviews

- 8.4 One thematic observation during 2023 was the standard of professionalism in some interviews with witnesses. Although many interviews demonstrated an appropriate level of respect, professionalism and sensitivity, we did identify inappropriate comments, informality, a lack of appropriate boundary setting, and practices which were inconsistent with the VO's own investigation procedure.¹⁰⁵
- 8.5 Similar feedback was provided to the VO following our review of its 2021 investigations (see Section 6). At that time, we advised that it is necessary to ensure the interviews are conducted in a manner that reflects the serious nature of the compulsory appearances. The VO adopted the VI's suggestion that 'professional' be specifically referred to in the VO's procedures. The VO has also implemented a weekly schedule of regular training for investigators by experienced peers which includes sessions on improving interviewing skills and techniques to increase skills and foster professionalism in interviews.
- 8.6 The issues identified during 2023 included two examples from the VO's politicisation of the public service investigation, where we identified that interviewers had engaged in inappropriate discussions with witnesses: one of those was a political discussion;¹⁰⁶

105 The VO's Investigations Procedure assigns 'Minimum standards for interviews' which sets an expectation that when conducting interviews, officers are 'courteous, respectful and professional'. The expectation to be 'professional' was added following feedback from the VI on this procedure in 2022.

106 VI letters of 21 February 2023, 2 March 2023.

in the other, the interviewer had voiced a private opinion after an interview that the conduct of a prominent Australian business could be described as ‘soft–corruption’ if they were engaging in the conduct attributed to them by an article the interviewer had read. These interviews lacked appropriate boundary setting and professionalism.

- 8.7 The VI expects that during compulsory and voluntary appearances, interviewers are circumspect in their conduct and approach the interview professionally with an appropriate level of formality. The VO’s investigations deal with inherently serious matters; however, the lack of formality by an interviewer may affect how the interviewee perceives the seriousness of the interview.
- 8.8 Interviews are often a stressful experience for those required to attend, particularly where they are the subject of allegations. It is the VI’s view, that in such a circumstance, a lack of formality and professionalism can impact a witness where they may not feel respected or that their time and input is valued. The VI considers that an appropriate level of formality and professionalism is paramount to ensuring that an interview proceeds respectfully.
- 8.9 This also includes ensuring that appropriate boundaries are applied in any conversations with witnesses that may occur before, during or after an interview. The VI recognises that discussions may naturally occur adjacent to interviews and that these can contribute to reasonable rapport building with witnesses; however, good judgement should be exercised in what is discussed and interviewers should be trained to know when to draw boundaries on conversations. In all cases their conduct should be consistent with relevant procedures.
- 8.10 Below the VI has outlined examples where this did not occur at the VO.

- 8.11 The VO’s procedural fairness response represented its view about the appropriate level of formality in particular interview settings – it stated that the VO is aware of the stress interviews can cause witnesses and considers overly rigid and formal approaches can be more harmful. The approach for each interview, the appropriate level of formality and the need for appropriate rapport building is considered by the VO during interview planning and execution.
- 8.12 The VO stated that while its investigation procedures and templates set minimum standards and provide detailed guidance for officers conducting interviews, they also state, *‘Officers use their judgement to decide how to conduct the interview. This will vary depending on the nature of the investigation, the witness’ status and the best way to elicit information from the individual’*. The VO’s procedural fairness response also stated a *‘level of informality in VO interviews is critical to establish trust and rapport with witnesses. This is without question an appropriate approach and is expected of VO interviewers’*.
- 8.13 The VO also stated that the level of formality in an interview may be impacted by a witness’ status as a subject or otherwise, their level of education or professional experience, and the conduct or administrative action being examined.

Inappropriate discussion with witnesses

- 8.14 In February 2023, the VI wrote to the VO to share our concerns about an apparent political discussion between a witness and VO interviewer during a break in a voluntary interview relating to the VO’s investigation into the politicisation of the public service.¹⁰⁷ This occurred when the VO interviewer and the witness had returned to the interview room (unaccompanied by the second VO interviewer) while engaged in conversation.¹⁰⁸

¹⁰⁷ VI letter to the VO dated 21 February 2023.

¹⁰⁸ The VO’s investigations procedure requires that investigators should ‘...both remain in the recorded interview when the witness leaves the room for a break’.

- 8.15 At this time the audio–visual recording in the room had not been paused, and as a result a brief discussion, which was centred on politics, was captured. Upon the VO interviewer noticing that the recording (and the automatic transcription) had not been paused, they stated: *'I just noticed too that the transcription's still going...so we might... temper our comments accordingly. Sorry I just noticed... that's still going.'*
- 8.16 A transcript of this discussion was prepared by the VI, and sent to the VO in February 2023.¹⁰⁹
- 8.17 In summary, during the conversation and prior to the VO interviewer noticing the recording and transcribing was continuing, the witness, a public servant, suggested that the investigation that the VO was undertaking was important, and that a certain politician's 'style' was at the heart of the issue. The conversation traversed a number of issues that had been in the media following the then recent Victorian State election, including several politicians, members of political parties and the voting system.
- 8.18 In response to the VI raising this issue with the VO, it did not acknowledge that in the context of such an investigation this kind of discussion was inappropriate. Instead, it noted that there was an element of ambiguity in the VO interviewers' remarks, which could on one hand be construed as disapproval of one member of parliament and partiality towards another. It further noted that those remarks *'could alternatively be construed as the [VO interviewer's] opinion on a topic of public interest – the possibility that preferential voting in Victorian State elections will deliver unexpected outcomes that do not accord with first preference voting intentions'*.¹¹⁰
- 8.19 In that regard, the VO advised that in general terms it did not regard it as *'unfitting for a VO officer to make a passing remark of that second kind during a short break in a voluntary interview, when the remark is responding to a passing observation of the person being interviewed.'* Further, while the VO did consider that it would be inappropriate for a VO Officer during the course of a voluntary interview to express unexplained preference for one member of parliament, it noted that it was an *'open question whether the interviewer's passing remark should be construed in that way'*.¹¹¹
- 8.20 Rather than simply acknowledge that this type of conversation was inappropriate, the VO noted that it was inadvisable for the interviewer to respond in a way that was open as to how it should be construed. In that regard, the VO advised that it had conveyed to the interviewer that their comments were *'ambiguous and inadvisable'*. The VO also advised that it had taken up with other investigations staff (in general terms) the need for caution in informal discussions that are held with witnesses.¹¹²
- 8.21 This response did not recognise that rather than the issue being how the comments could be construed, the issue was that such a conversation had occurred at all.
- 8.22 While the VO did not consider it unfitting for its investigators to make such a *'passing remark'*, that this conversation occurred in the context of an investigation that was dealing with an inherently political subject is something that should have been recognised by the VO as inappropriate.
- 8.23 In their response during the procedural fairness process, the interviewer stated they disagreed with the VI's characterisation of the discussion as political or centred on politics and emphasised that the discussion was focussed on issues in the public domain. They did not consider there to be a basis to conclude the conversation lacks professionalism when relevant context and surrounding circumstances are taken into account. The interviewer also raised as relevant factors that it was the witness

109 VI letter to the VO dated 21 February 2023.

110 VO letter to VI of 24 February 2023.

111 Ibid.

112 VO letter to VI of 6 March 2023.

who brought up the politician's style, and that the interviewer changed the subject. Whilst the interviewer did accept that it would have been better for the conversation not to have taken place, they continued:

Nonetheless, an impartial evaluation of that conversation, taking account of relevant context (which may not have been apparent to VI while preparing the draft report), cannot reasonably support a contention that it is a "compliance issue" or demonstrates a lack of professionalism or boundary-setting, or warrants adverse comment in a public report.

They also stated:

Following the interview and VI's correspondence, I was spoken to about the conversation in question and counselled by [a VO officer]. I acknowledged at the time that ideally, that conversation would not have proceeded as it did, but that it was neither inappropriate nor demonstrative of a lack of professionalism. That view has not changed.

and

In the context of a voluntary interview at a fledgling stage of the investigation, maintaining rapport with the witness to increase the likelihood of them providing more detailed and better quality information in response to further questions would have been a paramount professional consideration for any competent interviewer.

8.24 The VI does not consider there is any context that justifies a conversation about politicians, members of political parties and the preferential voting system taking place during a break in an interview conducted as part of an investigation. The VI has not contended it is a compliance issue but maintains it demonstrates a lack of professionalism and boundary setting. There are many ways to build rapport – talking about any political related issue in this setting

was inappropriate. It also occurred in a break two hours into the interview. Whilst the VI acknowledges the interviewer changed the subject after the witness raised the politician's style, the subject change was still political and inappropriate.

8.25 The VO advised it would act on the feedback and did so. However, a further discussion occurred during the same investigation. In response to that, on July 2023, we also wrote to the VO regarding what we considered were inappropriate comments by a VO interviewer during a discussion with a witness after the conclusion of an interview.¹¹³

8.26 There, in response to a conversation started by the witness, the interviewer had offered the view that the conduct of a prominent Australian business' could be described as 'soft-corruption' if they were engaging in the conduct attributed to them by an article the interviewer had read.

8.27 The VI had advised that where comments such as those relating to 'soft-corruption' are made by a representative of the VO in connection with a compulsory interview, it may be ambiguous to a witness whether this constituted a professional observation or a personal opinion. The VO did not agree that the remarks were inappropriate 'given the context in which they occurred' and the interviewer's 'role in conducting certain types of compulsory interviews in this investigation'.¹¹⁴

8.28 It was unclear to the VI how the interviewer's role was relevant to the appropriateness of any comments.¹¹⁵ While the interviewer indicated that they saw nothing inappropriate in their response, they accepted that they could have ended their remarks before making the comment regarding 'soft-corruption'.¹¹⁶

113 VI letter to VO of 5 July 2023.

114 VO letter to VI of 20 July 2023.

115 VI letter to VO of 26 July 2023.

116 VO letter to VI of 20 July 2023, attaching interviewer's response to VI's letter of 5 July 2023.

Other examples and lifting the standard

- 8.29 When the VI has raised issues related to professionalism in VO interviews, as was the case for the examples above, the VO has not always openly acknowledged or recognised that the standard of professionalism and level of formality in its interviews should be lifted. This approach was reflected in the VO's comments to the IOC, where it indicated that our comments on the demeanour and body language of interviewers, in the absence of complaints by witnesses, demonstrated 'the lack of proportion' in our oversight.¹¹⁷
- 8.30 It is however axiomatic that issues arise, even in the absence of a complaint. This is evidenced through the examples above, and other instances, detailed below, where VO interviewer professionalism fell below expected standards. For that reason, it is not useful to benchmark compliance through the absence of a complaint. The VI accepts the issues raised vary in degree and that the VO's explanation for an observed issue may resolve it.
- 8.31 By way of comparison, for our notification reviews conducted during 2023, we have not had cause to comment on the professionalism of interviews at any other body we oversight.
- 8.32 Issues may arise with the exercise of a coercive power even when the witness or their legal representative does not raise a concern or make a complaint. While witnesses can be legally represented, the purpose of a legal representative is not to assess and hold a body to account for how it carries out a function or complies with its legal and procedural obligations — that is the role of the VI as the independent oversight body. Through the mandatory notifications scheme, we have valuable insight into whether the powers are applied consistently with legislation and human rights and whether the interview reflects better practice. Such insights are simply not available to legal representatives, and indeed are not their focus.
- 8.33 The VO is also aware that legal representatives generally play a very limited role in such interviews. This limited role is built into its interview scripts which indicate to a legal representative that unlike in regular legal proceedings: *'It is not appropriate for you to answer on behalf of [witness name] and it is also not appropriate for you to object to questions as you would in a court setting.'*¹¹⁸
- 8.34 In the 61 interviews we received (31 compulsory and 30 voluntary) between November 2022 and August 2023, 17 witnesses were legally represented in compulsory interviews and 2 witnesses in voluntary interviews. When a witness is not legally represented this is a risk we consider when deciding whether we should review an interview recording.
- 8.35 Where a person has been compelled to attend for questioning, and where they may be the subject of the investigation, there is a clear power imbalance between them and the body conducting that interview. This can create a barrier to making a complaint to the very body that may be investigating them.
- 8.36 We also note, unlike IBAC, OCE and OVIC, that aside from guidance on its website, the VO does not directly inform its witnesses, or summons recipients, in correspondence or interviews, that they have the right to complain to the VI should they have concerns with how the VO has exercised its coercive powers.
- 8.37 While less overt than other matters relating to professionalism, the demeanour and body language of VO officers conducting interviews may nevertheless impact a witness. The VI

117 IOC Report Performance of the Victorian Integrity agencies 2021/22 (Nov 2023), p 116.

118 Witnesses are also advised: *'However, if you consider [witness name] may not be obliged to answer a question or you would like to consult with him/her before answering, it would be appropriate to raise that issue before the question is answered and I will consider the request. Where adjournments for you to confer are allowed, we will make arrangements for them to be conducted in private. At the end of the interview, you will also be provided with the opportunity to make any observations or submissions that you consider appropriate.'*

has also raised with the VO several behaviours by interviewers which the VI considers may make witnesses ill-at-ease during an interview. Whilst there is no evidence of how the witnesses felt, the observed behaviours included:

- asking questions about cohorts of people by categorising them using terms such as ‘the Arabs’, or ‘Pacific Islands somewhere’
- abruptly pausing an interview while a witness was answering a question, preceded by saying ‘nature calls’¹¹⁹
- eating
- picking at something stuck in their teeth
- informal and colloquial language.

8.38 We note that the above occurred in interviews where some witnesses were the subject of serious allegations. We also note that not all interviewers present demonstrated these behaviours.

8.39 We advised the VO that where it was unavoidable, a more professional approach should be taken when calling for a break. This was because by not allowing the witness to respond, and abruptly calling for a break, there was a risk that the witness may feel disrespected or that their evidence or time was not valued. The VO did not agree that this was an issue.¹²⁰ The VO advised us that its interviewers used appropriate cultural terms of various descriptors of races/ethnicities to help guide the witness that they were asking about cohorts of race/ethnicity; and that the terms used were categorical, not racist, derogatory or colloquial.¹²¹ The VO also stated that interview questions based on language taken directly from other evidence are sometimes necessary and that the allegations in that case included descriptions of persons on the basis of cultural identity and language spoken. Further, that when asking questions it is important to balance the need to use

inclusive language with the risk of straying too far from the language witnesses use themselves, and that the interviewers sought to use language that was accessible to the witness, based on context and communication needs. Despite the VO’s view, the VI considers that these descriptions could have been phrased more respectfully.

8.40 While these kinds of issues did not occur in most interviews during 2023, in the context of the exercise of coercive powers relating to investigations that may have serious outcomes for a witness, there should be a high standard of professionalism.

8.41 We acknowledge that people do make errors, however, where these relate to professionalism, there must be adequate training and guidance to ensure interviewers conduct themselves with an appropriate level of professionalism and formality.

8.42 However we acknowledge the following response from a relevant VO officer during the procedural fairness process:

With respect to various observations made by the VI about investigative interviews conducted by VO... there are rare occasions when individual interviewers unfortunately depart from good practice or may from time to time appear less professional than desired. When such practices are identified via the VO’s Quality Assurance processes or are highlighted by oversight from the VI, investigators are provided feedback and counsel. Where appropriate, they are given additional training and sometimes greater supervision of the interviews they conduct.

119 VO explained to the VI that there were particular circumstances that led to the interruption. The VI’s concern is with the language chosen to explain the interruption.

120 VO response of 22 December 2023.

121 Ibid.

Snapshot 2: inaction resulting in a risk of invalid service of summonses

- 8.43 Where a summons is served on a recipient who is located outside Victoria, there are additional considerations and requirements that may impact compliance or the validity of service. Specifically, where applicable, the SEP Act requires a body such as the VO to seek the leave of the Supreme Court of Victoria to serve a summons on an interstate recipient. For that reason, it is important to actively consider the location of a recipient and whether the SEP Act requirements are enlivened. As agencies had been unclear as to the application of the SEP Act to bodies corporate, the VI recently detailed these considerations in Guidance Note 2 which is published on our website.¹²²
- 8.44 Following our review of the VO's Investigations Procedure, on 24 March 2022, we suggested that where a summons recipient is located interstate, VO should consider the applicability of the SEP Act. It did not appear that this consideration was built into the procedure as we had suggested,¹²³ as in 2023, we identified 13 summonses issued by the Ombudsman that did not include the recipient's physical address. In raising this with the VO, we noted that without a physical address, we may not be able to assess whether the SEP Act applied, and in turn, whether a summons was properly served. Where such a summons has been served without leave under the SEP Act, the summons may not be enforceable if the recipient is located interstate.
- 8.45 To follow up on this matter, in a later report, we requested VO advise whether the recipients of the related 13 summonses were located within Victoria at the time of service; and suggested that VO consider how it will clearly identify the location of a recipient at the time of service.
- 8.46 In response to this matter, the VO acknowledged that the operation of the SEP Act means that VO may not have been in a position to enforce those summonses or prosecute the recipient bodies in the event of non-compliance. However, the VO advised that given that the 13 summonses were complied with and that the investigation they relate to has been finalised, it was not proposing to take any further action in relation to these summonses.¹²⁴
- 8.47 Although it is too late for the witnesses to have the opportunity to decide whether they will comply with a summons where there may have been no legal obligation, there is still opportunity for the VO to assess whether it had given summonses to persons in circumstances where it had no authority to do so. The finalisation of the investigation is not a barrier to the VO determining whether it had appropriately exercised its powers.
- 8.48 In some instances, the VO issues a summons to a person to ensure that they are protected from breaching non-disclosure obligations when providing documents or information to the VO. Should service of a summons be invalid, the summons is not enforceable such that any protections that the summons provides may not apply.
- 8.49 The VO advised that it was currently working to set up a procedure to ensure compliance with the SEP Act for future summonses. In the meantime, the VO was monitoring this issue when reviewing individual summonses.¹²⁵
- 8.50 This issue was likely avoidable, because we had already provided feedback on this matter and the VO's Investigation Procedure already

122 [Service of summonses on interstate bodies corporate: What is the proper process to follow? | vicspectorate.vic.gov.au.](https://vicspectorate.vic.gov.au/service-of-summonses-on-interstate-bodies-corporate-what-is-the-proper-process-to-follow/)

123 In reviewing VO's Investigations Procedure, we previously suggested on 24 March 2022 that it consider the applicability of the SEP Act and that we considered a witness summons must be served on the person to whom it is directed. That is, if the person is interstate, then the provisions of SEP Act must be followed.

124 VO response of 22 December 2023.

125 Ibid.

indicated that a summons was not enforceable if served interstate.¹²⁶

- 8.51 In addition to these instances, we identified three summonses which did not indicate the address of the recipient. The VO later confirmed that while two of those recipients were located in Victoria, it did not have records confirming where the third recipient was located at the time of service. The third recipient was a resident of Victoria who worked regularly in another state. Should that person have been outside Victoria, they would not have been required to comply.
- 8.52 Where a body has acted contrary to legislative requirements, it is our expectation that not only will they be transparent with us, but also that they will be open with any individual whose rights may have been impacted.
- 8.53 We also identified one further instance where a summons was clearly served on a person located outside of Victoria without the VO seeking leave of the Supreme Court of Victoria. The VO advised that this was served prior to it having considered the issues we raised in relation to the SEP Act and that it was not compliant.¹²⁷ In this case, the VO should have informed this person that they had no legal requirement to comply with the summons.
- 8.54 Noting that the VI had previously commented on the application of the SEP Act, and that VO's procedures at the time had indicated that a summons was not enforceable if the witness was interstate or overseas,¹²⁸ these instances, and the associated risks of serving a summons where a witness may have had no obligation to comply, could have been avoided had the VO effectively implemented our earlier suggestions.¹²⁹

Snapshot 3: an inadvertent disclosure and a failure of quality assurance

- 8.55 After reviewing a notification report, we contacted the VO to advise we had identified a privacy breach in which the VO wrote to a witness to outline the matters they would be interviewed about and included details about the wrong investigation—the information provided was confidential as it related to an investigation under the public interest disclosure scheme. We requested that the VO immediately address the issue and advise us of steps it would take to prevent a reoccurrence to ensure information provided to witnesses during an investigation goes through a quality assurance process.
- 8.56 We were advised that the recipient had been contacted and asked to destroy the letter containing the confidential information. A few months after the incident, the VO advised that it took several further steps including reporting the incident to OVIC and turning its mind to whether a breach occurred with respect to section 52 of the PID Act¹³⁰, determining that a breach had not occurred. The VO took action to prevent the issue recurring such as reminding staff to follow the existing processes and strengthening training through the incorporation of a scenario as an example of how issues may occur.
- 8.57 While there were several circumstances that contributed to this error, it is an example of the VO's quality assurance framework and practice not identifying an issue before a risk is realised.

126 VO Investigations Procedure, paragraph 109 (31 May 2022 version), p 19.

127 VO response of 22 December 2023.

128 The VO's procedure did however outline a process, which later in our first periodic report, we made clear was not compliant. There, the procedure stipulated that a summons could be directed to the person interstate but served on a local office, if the recipient was, for example, a bank. This was the basis for our comment that a summons must be served on the person to whom it was directed.

129 In its comments to the IOC the VO had indicated that it had disregarded many of the comments we had made on its procedures. This was one of those comments. (see IOC Report Performance of the Victorian Integrity agencies 2021/22 (Nov 2023), p116).

130 Section 52 of the PID Act contains a prohibition on the disclosure of the content of an assessable disclosure.

Snapshot 4: limited welfare enquiries at the start of interviews

- 8.58 Being asked to either produce documents or to attend for questioning can be an inherently stressful process. Welfare concerns may heighten when a witness is the subject of the investigation, fears reprisal for providing evidence, or where a person has mental or physical health concerns that may impact their ability to provide evidence.
- 8.59 As welfare concerns are dynamic and therefore, may change over the course of an investigation, welfare should be monitored on an ongoing basis. Given the context and nature of an interview, the VI is of the view that witnesses should be asked at the outset of an interview whether there are any welfare concerns that may impact their ability to give evidence.
- 8.60 In reviewing VO's Welfare Policy and Investigation Procedure we noted that VO has processes relating to the assessment of witness welfare, including welfare support expectations. However, we identified in our review of interview recordings from November 2022 to August 2023, that witnesses only on limited occasions had been asked whether they had any welfare concerns during the interview opening.
- 8.61 We had previously considered and suggested to VO in 2021 that it revisits its welfare guides and procedures to ensure general welfare enquiries are made at the beginning of each interview.¹³¹ In response, the VO acknowledged that incorporating these preliminary questions (along with enquiries on whether a witness required a break) into the interview script would serve as a reminder for interviewers.¹³²
- 8.62 Similarly, in our review of VO's Investigations Procedure provided to the VO in March 2022, we suggested that for consistency VO should consider adding questions relating to welfare to the preamble section of the interview script.¹³³
- 8.63 Given some time had elapsed and VO previously indicated it would be considering further changes to its Investigations Procedure in 2022–23, we sought further advice on VO's current practices for management of witness welfare, including at what point witnesses are asked whether there are any witness welfare concerns.
- 8.64 VO advised that the welfare of a witness is monitored over the course of the investigation and supports are offered as appropriate. VO advised it is not part of its procedures or interview scripts to routinely ask witnesses a specific question on welfare, however, that it would consider whether any amendments to interview scripts are warranted to standardise and require questions about welfare and fitness at the commencement of interviews.¹³⁴
- 8.65 In December 2023, VO indicated that it would be incorporating a welfare question into its interview scripts, where interviewers will retain the discretion to modify or leave out these questions based on their assessment of the circumstances in each interview.¹³⁵ The same letter criticised the VI for continuing to raise this issue with the VO.
- 8.66 The VO's procedural fairness response states that its *'approach to witness welfare is continuous throughout an investigation and tailored to individual needs. It is not assisted by a templated question in an interview script'*. The VO stated that the VI's observation about a witness welfare question does not concern any potential breach of law, policy or procedure and that the agencies

131 VI letter to VO of 4 March 2021.

132 VO letter to VI of 6 April 2021.

133 VI letter to VO of 24 March 2022, see feedback in Procedure – Investigations (welfare edits): point 4 in the list of the first comment on page 7 of 59.

134 VO response of 21 July 2023.

135 VO response of 22 December 2023.

simply disagree about its usefulness. The VO also stated that the VI's criticism is in stark contrast to the IOC's conclusions about the VO in its October 2022 report. The response further stated:

In 2021 the VO did consider both the VI's suggestion to add a welfare question at the beginning of the script and the feedback re investigation welfare matters and VO procedures. The VO has now incorporated a welfare question into its interview script, because of the VI's insistence but not because we consider that it was useful. The VO had already decided in the context of its broader welfare practices that the addition of this question would not add any genuine additional benefit to the management of witness welfare throughout the VO's interaction with them. While it is good practice for an interviewer to assess and respond to any potential welfare issues immediately prior to interviewing a witness, the VI's insistence on the adoption of its suggestion that the VO ask a standard question at the beginning of each interview will not, in the VO's view, improve witness welfare. The VI has not identified (or even suggested) any impacts on witness welfare in VO's 2023 interviews which might have been prevented by VO adopting the VI's suggestion. The VO maintains that it has a strong commitment to witness welfare, is very aware of the impacts its interviews can have on witnesses, and refutes the implication that witness welfare is not front of mind at all times. Welfare issues are considered throughout the interview process. Every interview and witness is different. In this case, there is no compliance issue with the VO's exercise of coercive power, where the VI and the VO take different views, and where the VI's conclusions are not based on evidence of negative impact or significant risk.

8.67 The VI disagrees with the VO's characterisation that it insisted on the adoption of its suggestion. The VI raised this issue in its first 2023 report as it had observed the VO making such enquiries on limited occasions. The VI noted that in 2021, the VO had acknowledged the utility of building these types of preliminary questions into the interview script and sought clarity about the VO's current practices given some time had passed. Our second and third periodic reports also noted the issue, and explained a response to the first report was sufficient. The VO's response explained it had implemented an action item to consider the issue. In our fourth report, we acknowledged this consideration and indicated amendments to the script would be a positive step. We also included additional instances of the issue. In our fifth report, we provided further instances where no enquiries were made and one instance where enquiries were made. We indicated the issue was for noting only, unless the VO had finalised its position. The VO's December response indicated it had made amendments to the script to provide interviewers with discretion to modify or leave it out, and that it would also be asking a further welfare question if necessary on a case by case basis.

Snapshot 5: not making clear the limits of the VO's authority during compulsory interviews

- 8.68 When a summons is issued it may require the recipient to:
- produce documents or other things; or
 - give evidence; or
 - do both of the above.
- 8.69 This means that there is no legal obligation for a witness to provide documents if they are only required to give evidence, or to give evidence on matters that are not covered by the summons. Sometimes during an interview, it may become apparent that a witness may be able to give evidence about additional matters or provide additional documents. Where those matters or documents are not covered by the summons, a witness has no legal obligation to comply. In that regard, a witness can elect to voluntarily comply and provide further documents or evidence.
- 8.70 However, providing an explanation of the difference between voluntary and compulsory engagement, and making clear the limits of the authority provided by a summons, is important as it allows witnesses to make an informed decision about their co-operation. It will also give clarity about whether there are any associated penalties relating to non-compliance (which apply if a matter is covered by a summons).
- 8.71 We had previously identified the issue of VO requesting documents during an appearance relating to a previous investigation during 2021.¹³⁶ In response VO indicated that as a matter of practice, if documents are to be requested from a witness during interview, that a witness needs to be told that they are not required to produce the documents but may do so on a voluntary basis.¹³⁷
- 8.72 Later, in March 2022, we suggested that VO should include in the interview script that if documents are requested during an interview that the witness be informed that they do not need to produce the documents but can do so voluntarily.
- 8.73 Following this feedback, we identified in two compulsory appearances in late 2022 that witnesses (who were only required to provide evidence) were advised that the VO may give the witness a list of requested documents following the interview.
- 8.74 In those instances, this was done without explicitly informing the witnesses that, as they were not required by summons to produce documents or further information, they could do so voluntarily. This issue was noteworthy as in one of those instances VO suggested a timeframe to provide documents which further reduced clarity as to whether the request was voluntary.
- 8.75 Given that this practice has continued, and witnesses need to be informed of their rights, we suggested that if it has not yet done so, that VO revise its policies and procedures to ensure that witnesses are appropriately informed that they do not need to produce documents and that they may do so voluntarily.
- 8.76 In July 2023, the VO advised that its Investigation Procedure covers this process and to embed it in practice, it would amend its compulsory interview script to address this issue.¹³⁸ The VO advised that these amendments were finalised on 2 August 2023.¹³⁹

136 VI letter to VO of 26 May 2021.

137 VO letter to VI of 14 July 2021.

138 VO response to first periodic report of 21 July 2023.

139 VO response to fifth periodic report of 22 December 2023.

Snapshot 6: not ensuring functions and powers are delegated appropriately

- 8.77 To explore potential issues, the VI makes enquiries with the body by requesting further information and documents. Not all of those enquiries result in findings of non-compliance; instead, on the basis of information we have received and independently assessed, where appropriate, we determine that no further action is necessary, and we close off any further enquiries. While a finding of non-compliance may not be made, an agency may still, from our suggestions or by its own motion, make changes to improve its processes.
- 8.78 An example of this was recently seen through our engagement with the VO on its delegations in relation to the politicisation of the public service investigation.
- 8.79 In reviewing the VO's delegations and authorisations, we observed that no VO officers, other than the Ombudsman and Deputy Ombudsman, were delegated the function under section 16(2) of the Ombudsman Act to investigate a matter referred by Parliament.
- 8.80 This differed from how the VO had delegated its functions for other types of investigations, such as own motion investigations (section 16A of the Ombudsman Act), where investigators were delegated the investigation function and the powers that went alongside this, such as the power to serve a summons or direct a person to take an oath or affirmation during an interview.
- 8.81 This meant that it appeared that for the politicisation of the public service investigation, the VO had delegated the powers relevant to the investigation but not the function of conducting the investigation itself. Because this contrasted with the VO's approach for other investigative functions, we engaged with the VO to understand their position and why a different approach was taken in this instance.
- 8.82 In response, the VO advised that our enquiry had caused it to reconsider the inclusion of certain functions in its delegation. Because these delegations had been in place for some time, it was unable to determine why those functions, which it considered to be related to the decision to conduct an investigation, were delegated. However, the VO advised that it had concluded that it was not appropriate to delegate the decision to conduct an investigation and would remove the delegation of investigation functions from its delegation instrument.
- 8.83 On the basis of external legal advice and the VO's responses, we were satisfied that the VO had appropriate delegations in place for this investigation.¹⁴⁰
- 8.84 Separately, when the VI had made other enquiries connected to a different matter, we had observed that a unit other than the investigations unit appeared to be conducting an own motion investigation. Because this unit was not delegated the function under section 16A and only limited members of the unit were delegated investigative powers, we also explored this with the VO.
- 8.85 While we were satisfied on the basis of the response in relation to the earlier matter that a delegation of the function was not necessary, we did identify that a member of that unit had served a summons despite not being delegated this power.
- 8.86 The VO advised that it recognised the need for VO officers to have appropriate delegations to use investigations powers and that no other summonses had been served without an appropriate delegation.
- 8.87 In this instance, the VO also advised that it would consider any impact of that area conducting investigative functions as it relates to present, and previously delegated functions.

140 VO response to the third periodic report of 9 August 2023 and VO letter of 9 November 2023.

8.88 However, it also noted that the summons was complied with by the recipient and that the summons had been validly issued, and that the serving officer was carrying out the instructions of the investigative team whose leader was appropriately delegated.¹⁴¹

8.89 The VI will continue to consider this issue.

Snapshot 7: limiting oaths to a single religion

8.90 Before a witness gives evidence in an interview at the VO, they are 'sworn in'; that is, they make a statement that they will give truthful evidence. A witness may make a secular affirmation to give truthful evidence or take an oath, on the basis of their beliefs, that they will give truthful evidence.

8.91 In assessing whether witnesses had been sworn in correctly during VO interviews, we identified several issues with VO's practices. These related to the VO limiting its explanation of an oath to a single religion.

8.92 There we noted several instances where VO had indicated that an oath was 'on the Bible' or 'Bible or non-Bible', in contrast to the *Oaths and Affirmations Act 2018*, which does not limit an oath in such a manner.

8.93 Similarly, we identified instances where witnesses were instructed to hold the bible as they took their oath. We noted that while a witness may do so on a discretionary basis, they are not required to do so for the purpose of making a valid oath (see section 10(1) of the *Oaths and Affirmations Act 2018*).

8.94 We also noted that in the event that a witness is unsure whether they should choose an oath or affirmation that, following a witness being sufficiently advised as to the nature of an oath or affirmation that where relevant, they should

be informed that the decision should be dependent on what has meaning to them. This is a preferred approach rather than suggesting an affirmation, as seen in two interviews.¹⁴²

8.95 We further identified, in the context of a witness appearing to be unsure whether they preferred to take an oath or make an affirmation, that the VO said, *"I assume you're not the most religious of people..."*. The witness agreed and the VO continued, *"I think an affirmation is better in that case."* In relation to this we suggested that VO ensures that it does not voice a presumption about whether a witness is religious or not.

8.96 VO noted that based on the VI's feedback, and its own quality assurance processes, it was considering amending the templates it provides to witnesses prior to interviews to offer more detailed information on oaths and affirmations. This guidance would be available to VO staff to ensure that they provide appropriate responses to queries from witnesses about oaths and affirmations.¹⁴³ The VO advised that these changes to its templates were implemented on 2 August 2023. Additionally, VO indicated due to the VI's ongoing feedback, officers will remove any reference to 'bible' from explanations.¹⁴⁴

8.97 At the time it was raised, the VI did not receive a specific response from the VO in relation to a VO officer making a presumption about a witness not being religious.

8.98 The VO officer in their response during the procedural fairness process stated that they *"...used the word 'assume' in asking a question of the witness to assist them in determining whether they would prefer to swear an oath or make an affirmation. I asked this question in such a way that the witness could quite comfortably have responded either that they did in fact hold religious beliefs, or that they did not"*.

141 VO further response to the third periodic report on 22 December 2023.

142 We acknowledged that there may be instances where this is appropriate as permitted under section 7 of the *Oaths and Affirmations Act 2018*. This relates to circumstances where the administering officer may direct a person to make an affirmation if, 'the person refuses to choose to take an oath or an affirmation; or it is not reasonably practicable for the person to take an appropriate oath'.

143 VO response to the first periodic report of 21 July 2023.

144 VO response to the fifth periodic report on 22 December 2023.

9. Overview of improvements we have influenced

- 9.1 In 2021–22¹⁴⁵, the VO committed to make improvements for large scale investigations including investigation planning processes and investigation training such as investigation skills and investigative techniques, reflecting a commitment to improving compliance by the Ombudsman at that time.
- 9.2 Since 14 August 2023, in submissions to the IOC, the Ombudsman has minimised the significance of the issues raised by the VI between 2021 and 2023.
- 9.3 However, between 21 July and 22 December 2023, the VO’s responses to the periodic reports contained commitments to implement a range of changes to policy and procedures, as well as further training for its investigators and other staff on summonses and confidentiality notices.
- 9.4 Through the observations we made in 2023 in the periodic reports, we have influenced a range of improvements to the VO’s processes and procedures. These covered 8 improvements where the VO committed to providing further training to its staff on issues we had raised and 26 improvements to be made to the VO’s processes, procedures and guidelines. This included the cancellation of 3 likely invalid confidentiality notices and a recipient being advised that their confidentiality notice was invalid. The VO is also considering 6 other suggested improvements.
- 9.5 The VI’s engagement with the VO on the incomplete summonses issue discussed in Section 5 also influenced two major

improvements – firstly, the VO comprehensively changed its process for issuing summonses, to ensure that summonses were only signed by the Ombudsman (or their delegate) when the summonses were complete. Secondly, the VO is undertaking a review of 90 summonses notified to the VI over a 12-month period to identify whether the issue extended beyond the two incomplete summonses identified by the VI.

- 9.6 A list of improvements achieved through our monitoring of the VO’s coercive power notifications is set out in Table 4.

Table 4 – Improvements achieved through monitoring VO’s coercive power notifications

Improvements

Improvements to staff training

- 1 VO to incorporate training on the SEP Act into planned training about summonses and confidentiality notices.

- 2 VO training on confidentiality notices and summonses to include variation of summonses and when a summons can be varied as opposed to revoked and reissued.

- 3 VO training to incorporate service requirements, including the requirement for the date of an appearance to be at least 8 days after the date of service.

- 4 VO to incorporate training that will address the importance of completing a final review of notices prior to service.

145 See the VI’s 2021–22 Annual Report, p 20.

-
- 5 VO to incorporate training that will address the use of the prescribed options in the restricted matters table of confidentiality notices.
-
- 6 VO training to include the need for the description of restricted matters to be consistent.
-
- 7 VO training to cover the requirements of VI notifications.
-
- 8 VO staff provided with training relating to its case management system.
-

Procedural improvements

-
- 1 VO updating procedures based on the VI's Guidance Note on interstate service.
-
- 2 VO reminding staff that all summonses must contain a physical address and to consult internally with respect to any interstate service of summonses.
-
- 3 VO to make changes to any necessary policies, procedures and templates to make the service requirements clear.
-
- 4 Email reminder sent to staff confirming that all letters containing statutory notifications to the VI must be reviewed and signed by staff with appropriate delegation.
-
- 5 VO updated its instrument of delegations to give an officer in another team all the powers of an Investigations Officer in the Investigations team.
-
- 6 VO updated the Confidentiality Notice letter template to provide staff the option of providing further clarifying information (where applicable) to the recipient, instead of amending the CN.
-
- 7 Recipient was advised that their confidentiality notice was invalid.
-
- 8 Cancellation of three likely invalid confidentiality notices.
-

-
- 9 Additional information to be provided in the report to the VI that accompanies summonses. This assists the VI's oversight with respect to assessing whether the VO has reasonably required a person to produce documents or things to achieve the purposes of the investigation.
-
- 10 VO updated its compulsory interview script to inform witnesses that documents requested can be provided voluntarily.
-
- 11 VO to include a new paragraph in the summons cover letter template, which can be used as applicable, when summoning a principal officer in that capacity to produce documents, that clarifies that the summons has been directed to them as the proper officer of a body corporate (not in a personal capacity).
-
- 12 VO to update pre-interview information templates and the Investigations Procedure to include guidance relating to providing allegations in writing.
-
- 13 VO amended the summons template to reflect the correct provision.
-
- 14 VO to be more specific in its requests for telecommunications data.
-
- 15 VO amended templates for documents provided prior to the interview which can be referred to by staff to ensure appropriate responses are provided. VO also indicated it will remove reference to 'Bible' from explanation.
-
- 16 VO provided feedback to staff to ensure that witnesses receive complete, clear and accurate information.
-
- 17 VO amended the interview scripts relating to PID investigations including informing PID disclosers that they do not need to keep the information confidential however it would be beneficial to do so.
-
- 18 VO to remind interviewers to avoid pointing at witnesses to avoid any misinterpretation.
-
- 19 VO to update its Privacy Policy for Health Privacy Principle 5 (Access and Correction).
-

-
- 20 VO to update its interviews scripts to include questions relating to witness welfare, which can be deleted when not required.
-
- 21 VO has updated a series of procedures and templates to provide advice to witnesses relating to the conclusion of the investigation including:
- updates to the interview script closing remarks
 - changes to the VO Investigations Procedure
 - a new template letter informing witnesses of the conclusion of the investigation
 - a new template letter for acknowledging receipt of responses to draft reports which includes confirmation that they will advise the recipient when the investigation is finalised.
-
- 22 VO to make changes to data breach incident reporting system to allow for automatic internal notification within the VO for assessment as to whether a report to OVIC is required and progression of incident report following VI raising this matter.
-
- 23 VO to make changes to its case management database to prompt and remind staff to provide the VI with records of service relating to summonses and documents relating to voluntary interviews.
-
- 24 VO to update its internal guide relating to the documents required to be provided to the VI relating to records of service and voluntary interviews.
-
- 25 VO update to case management system 'action' to include the relevant fact sheet with respect to public interest complaint investigations.
-
- 26 VO staff reminded by email to provide the applicable fact sheet when confirming interviews relating to public interest complaint investigations.
-

Potential improvements – under consideration by VO

- 1 VO giving consideration as to whether the wording in the prescribed form is sufficient to comply with legislative obligations.
-
- 2 VO to consider providing additional information in the report to the VI to explain why the VO has restricted the detail in the summons of matters about which a person will be questioned. This will support the VI's oversight when considering whether the VO has met its obligations.
-
- 3 VO indicated it would consider whether any further updates to its interview script are required.
-
- 4 VO to consider adding information to pre-interview material about mobile phones and recording devices.
-
- 5 VO to consider updating its Investigations Procedure to require officers to record interviews with two recording methods.
-
- 6 VO noted delegations currently in place for particular staff may need to be altered to better support VI notification processes.
-

10. Why we issued this special report and the change required at the VO

- 10.1 The Ombudsman has publicly questioned the utility of the legislated notifications scheme, resisted our oversight on a serious matter as demonstrated in Section 5 on the incomplete summons issue, and publicly minimised the value and proportionality of the VI's feedback that has followed our reviews of its exercise of coercive powers without explaining the extent to which the VO has committed to making improvements.
- 10.2 While in July, August and December 2023, the VO privately committed to implementing and acting on a range of our suggestions for improvement, these commitments were inconsistent with the Ombudsman's publicly expressed view during that time that the issues we raised are trivial and take away from the VO's core work.
- 10.3 The detrimental effect of a defensive approach to feedback was recognised by the Ombudsman when she advised the IOC that 'Highly defensive senior management' was a factor that has resulted in a productive relationship between the overseer and the overseen falling down. There, the Ombudsman also stated: 'Sometimes people are prepared to acknowledge failings and are prepared to do something about it and sometimes they are just not.'¹⁴⁶
- 10.4 This kind of defensiveness appears to have been a factor in how the Ombudsman has engaged with us as the VO's oversight body: where we have raised significant issues, the Ombudsman and her office have questioned the resources needed to be devoted to responding and to making improvements, and the Ombudsman has characterised the issues we identify as trivial. But rather than trivial, many of the issues are significant as seen through the incomplete summons issue and the snapshot case studies in this report, which have demonstrated:
- the range and seriousness of the issues raised;
 - apparent inconsistencies and a lack of transparency in the Ombudsman's evidence to the IOC about our feedback and the VO's private commitment to implement numerous changes; and
 - that some serious issues raised in 2021 were raised again by the VI in 2023.
- 10.5 In this context, the VI considers a special report is necessary to inform the Parliament of the benefit of the notification requirements, provide transparency about the VO's engagement with the VI and its private acknowledgement of improvements needed, ensure the VO conducts a review of its quality assurance framework and the related allocation of resources to achieve compliance.
- 10.6 As explained in the foreword, information included in this report could not be shared with government during a consultation process on Recommendation 10 or with the IOC at a hearing. It could only be included in a report to Parliament. The response timeline rendered the VI's annual report due in October 2024 too late for this purpose.

146 Transcript – Integrity and Oversight Committee – Performance of the Victorian Integrity Agencies 2021/22 (14 August 2023), p 10.

10.7 The VO's procedural fairness response stated:

The VI asserts that a recent recommendation of the Integrity and Oversight Committee (the IOC) is the reason for this special report. However, its justification for tabling a special report on this matter is not clear. As the VI has noted, the IOC recommended that the government review the effectiveness and efficiency of the coercive powers notification scheme, including the requirement that all exercises of coercive powers be notified to the VI. We understand the government is currently considering its response to this recommendation. The VI states that it has decided to produce a special report under s 87(1) of the VI Act because it is concerned that the IOC's recommendation 'directly impacts the functions of the VI', on which basis the VI makes the claim about 'access to complete information' referred to above. While the VI may wish to protect its position in terms of any impact on its functions, the VO contends that such a goal does not justify this special report as it is framed.

10.8 The VI is not seeking to protect its position in terms of any impact on its functions. As explained in the foreword and in Section 10, the information included in this report could not be shared unless included in a Report to Parliament. The government's response timeline for Recommendation 10 rendered the VI's annual report due in October 2024 too late for this purpose.

10.9 The VI has explained the VO's pushback or resistance to providing information about the two summonses discussed in Section 5. It is the role of the VI to assess issues and to do so independently. If we simply accept what a body tells us, that is no longer oversight. The VO's response in the procedural fairness process stated that there are times following repeated discussion about an issue, where the VO does not accept the position put by the VI, that there seems no point in continuing the discussion. Further stating

that this is not a failure to accept oversight but a divergence of views.

10.10 However one describes the VO's pushback to providing information about the incomplete summonses, the VI's persistence in seeking information has resulted in the VO reviewing the scope of the impact of this issue.

10.11 Such independence of enquiry is fundamental to oversight because '*...internal control mechanisms may lack independence and objectivity in investigating wrongdoing. Therefore, both internal and external oversight mechanisms are necessary to ensure a comprehensive oversight scheme for all public bodies.*'¹⁴⁷

10.12 In comments to the IOC, the Ombudsman indicated that the mandatory notifications scheme, through which we oversee the VO's use of coercive powers, creates a significant workload, and that this workload takes resources away from the VO's 'core work' and causes unnecessary delays in the performance of its primary functions.¹⁴⁸

10.13 Whilst the new periodic reporting scheme was foreshadowed in March 2023, the VI accepts feedback from the VO and a relevant VO officer that the concentration of seven months feedback over a 7-week period made greater than usual demands on the VO. As this may not have been anticipated, diverting resources to that feedback would have temporarily created internal challenges at the VO. The VI provided extensions of time in response to the VO's requests, and soon adjusted to providing feedback on a bi-monthly rather than a monthly basis.

10.14 However the VI considers that compliance plays a central role in supporting the work of integrity bodies: if a body has exercised a power and not complied with the law, there can be significant consequences for any investigations using information obtained through that power.

147 OECD Public Integrity Handbook Chapter 12: Oversight '12.2. What is oversight?'

148 Page 113, IOC Report Performance of the Victorian Integrity agencies 2021/22 (Nov 2023).

- 10.15 There can also be significant consequences for the witnesses involved in those investigations. Where there is insufficient focus on preventing compliance issues, more resources must, in time, be diverted to address those issues. This is what has now occurred at the VO.
- 10.16 The VI has seen in our oversight of other bodies, that in recognition of the significant flow on effects of compliance issues, compliance is viewed as part of the investigative process. This occurs with a view to proactively minimise issues to protect the integrity of operations and reduce any subsequent impact on core work.
- 10.17 An example of this approach was seen through our engagement with OVIC. Despite using its powers infrequently, we reported in our 2022–23 annual report that it engaged proactively with us on the feedback provided and its response demonstrated a clear vision for refining its processes to promote the fair and reasonable use of coercive powers.¹⁴⁹
- 10.18 The VI acknowledges the statements in the VO's procedural fairness response that the exercise of coercive powers should rightly be subject to appropriate checks and balances, both internal and external. Further, that the VO welcomes oversight of its exercise of coercive powers as a critical public interest safeguard, that the VO is committed to continuous improvement and welcomes appropriate feedback, and that VI feedback has resulted in improvements.
- 10.19 However the VO also raised concerns about the extent, utility of and even the VI's jurisdiction over, aspects of the VI's oversight activities, stating that staff in a number of instances have agreed to the VI's suggestions simply because the burden of constantly disagreeing with them became too great. The response states, *'The VI is wrong to suggest that this is evidence of the VO's agreement as to their utility'*.
- 10.20 The VI accepts that the VO will not agree with all suggestions from the VI. Nonetheless, the VI sees merit in sharing with agencies observations during reviews that it considers may strengthen the integrity system. The VI will use the proposed regular meetings and MOU with the VO to listen to the VO's context, and to help improve the VO's understanding of the VI's purpose.
- 10.21 However, if the VI identifies an issue that relates to compliance with the law, the VI will continue to seek information to ensure compliance and if required, seek further information and action. Section 5 is one example. The VO's review and change of process demonstrates the VO's commitment to properly understanding the extent of the issue, which was the VI's goal.
- 10.22 Our oversight is focussed not only on serious issues, but those that are systemic. When administrative, technical or compliance errors are identified more frequently, it is an indicator that a body may not have a robust compliance or quality assurance framework capable of preventing or identifying errors – that is a systemic issue. This heightens the potential for non-compliance and elevates the risk of significant errors. In the context of coercive powers that infringe on the rights and freedoms of people, errors can have a very real impact.
- 10.23 While IBAC exercises its powers more frequently than the VO, and in more complex investigations, we did not identify the same type and number of issues with IBAC's coercive power notifications during 2023. This can be attributed to IBAC responding to issues raised in 2021–22 with a greater focus on compliance, not only in its resourcing, but as an organisation. In appointing dedicated compliance staff, IBAC has demonstrated a strong understanding of the importance of accountability and compliance in the exercise of coercive powers.

¹⁴⁹ In our Annual Report, we had noted that while we did identify some issues, we considered that these reflected the developing nature of OVIC's investigative process, rather than any compliance concerns. Many of the matters raised addressed minor inconsistencies with information provided to witnesses and clarified some practices such as the administration of oaths or affirmations. We also raised considerations about the application of the SEP Act and OVIC advised it would amend its coercive powers policy to address this matter.

- 10.24 Encouragingly, as set out earlier in this report, the VO has recently committed to implementing improvements and engaging about notification issues at a senior management level through regular meetings. This approach has been effective in our oversight of complaints and, supported by the proposed MOU, is encouraging. However to sustain and build upon this improvement, the VO must review its quality assurance framework and its allocation of resources to that framework to ensure compliance.
- 10.25 This report has outlined the Ombudsman’s decision not to implement 93 of our 97 suggestions from 2021–22, the Ombudsman’s recent public commentary about the triviality of the issues raised and their insignificant impact, and the ongoing pushback on the time that must be diverted from ‘core work’ to make coercive power notifications and respond to the VI’s requests.
- 10.26 For transparency, Appendix A clearly outlines the nature of the VI’s observations and the nature of the improvements agreed to by the VO.

11. Recommendation

- 11.1 The VI acknowledges the general acceptance of oversight by the Ombudsman and the commitment of VO officers to compliance, continuous improvement and continuous learning in their procedural fairness responses.
- 11.2 The proposed MOU and the agreed regular meetings between managers about the VI's monitoring of coercive powers are valuable steps forward. Given the productive and positive relationships between senior officers, and the effectiveness of meetings in the VI's oversight of complaints, these steps are expected to result in a better understanding of the VO's context and the VI's purpose.
- 11.3 The VI notes the VO's commitment in its 2023–24 Annual Plan to review '*...the currency and efficacy of the Quality Assurance Framework, including to ensure outcomes of quality assurance activities are channelled into constructive feedback and learning and development*'.
- 11.4 To ensure that the organisation commits sufficient internal resources to support staff to improve quality assurance and compliance, we make the following recommendation to the VO:
- Recommendation 1:** The Victorian Ombudsman complete by 31 March 2025 a review of its quality assurance framework and resources for supporting compliance when exercising coercive powers. This should be aimed at ensuring the VO allocates sufficient resources to support proactive and effective quality assurance, training and policy, and with a view to increasing the Victorian Ombudsman's capacity to comply with its legislative obligations.
- 11.5 The VO's procedural fairness response described the VI's recommendation as a matter for the incoming Ombudsman, noting it recommends future commitment of resources.
- 11.6 In its procedural fairness response the VO rejected what they described as apparent adverse findings, comments or opinions embedded or assumed in the recommendation:
- 1 *that the VO's framework and resources for ensuring compliance when exercising coercive powers is inadequate;*
 - 2 *that the VO is not already reviewing its compliance framework with regard to the exercise of coercive powers;*
 - 3 *that the VO does not have 'proactive and effective quality assurance, training and policy' with respect to compliance regarding coercive powers; and*
 - 4 *that the VO does not adequately 'comply with its legislative obligations and respond to requests from the VI'.*
- 11.7 The VO stated the recommendation was '*unnecessary given the various steps the VO has taken, and is taking on a continuous basis to improve compliance with the law. The recommendation unduly focusses on the VI's view that the VO's responses to requests from the VI are inadequate; even though there is dispute about whether the VI's requests are onerous, are reasonable, are legally justified or authorised, and may detract from the VO's ability to fulfil its core functions. In addition, the recommendation is premature. Ample opportunity exists for consultation on this issue after any response by the government to the IOC's recommendation*'.
- 11.8 The Ombudsman repeated her public comments to the IOC about the VI's function in overseeing the VO's exercise of coercive powers:

At the Committee’s public hearing with the VO on 14 August 2023, the Victorian Ombudsman, Ms Deborah Glass OBE, expressed concern about the efficiency and efficacy of the coercive powers notification scheme and the significant impost on her office of making and responding to the VI’s oversight of such notifications.

The Ombudsman explained that the scheme creates a significant workload for the VO, which has increased over time as the VI has diverted more resources to monitoring notifications. The Ombudsman’s view is that the workload relating to notifications takes resources away from the VO’s ‘core work’ and causes unnecessary delays in the performance of its primary functions.

The Ombudsman queried the public utility of the scheme, highlighting that, in 2021/22, despite receiving no complaints about the exercise of its coercive powers, the VO nonetheless made 185 notifications to the VI and responded to the VI’s questions and requests for information about them.¹⁵⁰

11.9 The VO has not provided any evidence that a review of its compliance framework is underway. The VI considers the importance of a review is demonstrated by the volume of issues and observations evidenced in this report and the Ombudsman’s own commentary about the lack of utility in diverting resources away from core work to address issues raised by the VI.

11.10 In the conclusion to the VO’s procedural fairness response, the Ombudsman stated:

Having listed numerous examples of alleged non-compliance, many of which the VO rebuts as set out in [its response], the VI concludes that the Ombudsman is defensive and resistant to feedback. The VI implies also that I am a hypocrite in criticising defensiveness in the agencies I oversee, and that its adverse opinion (in relation to which I and the office disagree) must

accordingly be published via the VI’s special report.

I have publicly stated my views on the importance of collaborative oversight, which the IOC quoted in its report:

[W]hen I came into the [Ombudsman] role one of the things I was really keen to do was establish a collaborative way of working with agencies without compromising my independence, because I think that is a tension that always exists between the overseer and the overseen. It is an important tension. What I have always been mindful of is that if you want to achieve improvements in public administration, and that is a key purpose of my office, you have got to take people with you. You cannot just land on them, because they might pay lip service to your recommendations, they might tick the box to make you go away, but nothing is going to change.¹⁵¹

I maintain that this approach is appropriate for any body providing oversight. This is how I hoped my own office would be overseen. As expressed in this [response], that hope did not materialise.

Finally, aside from my overall observations about this special report, it is difficult to see any useful purpose in the VI tabling it at the very end of my term of office. If the VI is genuinely committed to ‘bringing about improvements to our integrity system’ as it claims, it would not be publicly airing its ongoing and unresolved disagreements with the VO, but would be privately taking them up in a constructive spirit with the incoming Ombudsman.

11.11 The VI expresses support for the importance of collaborative oversight. However the IOC’s Recommendation 10 results from the Ombudsman’s public submissions to the IOC criticising the mandatory notification scheme

150 IOC Report Performance of the Victorian Integrity Agencies 2021/2022, p 113.

151 IOC, Report on Performance of the Victorian integrity agencies 2021/22, November 2023, p 142.

and the VI's implementation of that scheme. In this report we are providing factual evidence of our oversight of the VO's exercise of coercive powers. Such evidence can only be made public in a report, and the response timeline for government of May 2024 rendered the VI's annual report due in October 2024 too late for this purpose.

Appendix A – Observations and improvements

Detailed below are thematically grouped observations made to the VO in the five periodic reports provided to them in 2023. They relate to notifications received predominantly between November 2022 and August 2023.

Details of the significant compliance issue relating to summonses, discussed in Section 5, are not repeated here. The VO's change of process in relation to the issuing of a summons and its decision to conduct a 12-month review are major improvements, however this compliance issue is still being addressed with the VO.

Alongside the observations below, we have detailed the VO's response to those observations, and the action it has taken or proposes to take, including where it has committed to making procedural improvements or undertaking training activities. These improvements have been reflected below as either a **Procedural Improvement** or a **Training Improvement**.

Where the improvement is only under consideration, this is noted. The improvement numbers can be cross-referenced with the improvements in Table 4 of Section 9. To provide further context, the VI has also included observations which were communicated to the VO for its information, consideration and to request additional information required to support meaningful oversight. Not all of these observations identify an error.

We note for some recurring observations VO may not at the time have had the opportunity to reasonably implement changes to mitigate the issue.

Observations – potential non-compliance with legislation

1. Failure to consider interstate service of summons obligations

Observation and VO response

See Snapshot 2 in section 8.

Improvements influenced

Procedural improvement 1: VO to update procedures based on the VI's Guidance Note on interstate service.

Procedural improvement 2: VO staff reminded by email that all summonses must contain a physical address and to consult internally in respect of any interstate service of summonses.

Training improvement 1: VO to incorporate training on the SEP Act into planned training about summonses and confidentiality notices.

While this training and procedures were being updated, the VO advised that it would continue to monitor this issue when reviewing individual summonses.

2. Informal variation of summons

Observation

We identified that VO extended a summons by agreement, rather than a formal revocation and variation, where it originally did not provide the required 7 days to respond to a summons.

VO response

VO agreed with our suggested action and indicated that it will consider a revocation and the re-issuance of a summons should a similar instance occur. VO further advised that relevant staff training will be completed.

Improvement influenced

[Training improvement 2](#): VO training on confidentiality notices and summonses to include variation of summonses and when a summons can be varied as opposed to revoked and reissued.

3. Summonses – ‘7 clear days’ notice to respond not provided

Observation

We identified for 5 summonses, that despite the summonses not requiring immediate attendance, that VO did not provide recipients with the required minimum ‘7 clear days’ notice to respond to a summons as required by section 18A(1) of the Ombudsman Act.

In one of these instances, VO had varied a summons that initially provided the required 7 days to respond to bring forward the response date to an earlier date at the request of the recipient. For this, we noted that there is no provision under the Ombudsman Act, which allows VO to compel attendance earlier than 7 days, even with the consent of the recipient.

We informed VO that to ensure that a summons is validly issued when considering a response date, witnesses must be provided at least 7 clear days after the summons is served. This was reflective of the requirements outlined in section 44(1) of the *Interpretation of Legislation Act 1984 (Vic)*. For example, a summons issued and served on a Monday must provide a response date no earlier than the following Tuesday.

VO response

VO accepted the VI’s interpretation of the requirements to provide 7 clear days and indicated that it would make changes to both its procedures and training.

Improvements influenced

[Procedural improvement 3](#): VO to make changes to any necessary policies, procedures and templates to make the service requirements clear.

[Training improvement 3](#): VO training to incorporate service requirements, including the requirement for the date of an appearance to be at least 8 days after the date of service.

The VO’s further response during the procedural fairness process

The VO acknowledged this procedural error, and, in the interests of accuracy and fairness, asked the VI to include the following contextual information:

- *The number of days by which each of these notices failed to meet the 7 day notice requirement in each case was less than one day, due to a misunderstanding about*

the need to provide 7 ‘clear’ days, rather than the earliest appearance date needing to be at least seven days from the date of service.

- *For welfare reasons, it is VO’s usual practice to consult with witnesses about a convenient time for them to make an appearance under summonses and reach agreement wherever possible. There is no evidence to suggest the procedural issues identified here adversely impacted witnesses – if anything, they were the result of seeking to accommodate witnesses.*

Whilst the VI notes this context, not providing a witness with 7 clear days is not compliant with the legislative requirement and the summons may not be enforceable.

4. Summons not served on recipient

Observation

We identified a summons was served on a person who was not the recipient named in the summons.

As the summons was directed to a specified person the summons was only enforceable against that named person.

VO response

VO stated that in this case the summons was served on the proper officer of a department (a body corporate), not personally, and therefore is enforceable.

VO advised that an action implemented in respect to an observation reported in the fifth periodic report, namely an update in the cover letter attached to summonses to provide information where a summons is addressed to a proper officer of a body corporate, will assist with this observation.

VI will further engage with the VO on this matter, noting that a Department represents the Crown, and is not a body corporate under the *Public Administration Act 2004*.

The VO’s further response during the procedural fairness process

The VO stated that for the sake of clarity, it should be noted here that:

- *The person to whom the summons was addressed was a Secretary of a department, and the summons was directed to them in their capacity as Secretary of that department.*
- *The summons was served on an individual acting in the role of Secretary of that department at the time of service.*

The VI reiterates that as the summons named the person, the summons was not enforceable against the Acting Secretary.

5. Incorrect summons issue date

Observation

We identified one instance where VO had incorrectly recorded a summons issue date. In this instance, the issue date was one day after the summons had been served.

We also noted that the affected part of the summons (including the Ombudsman’s name, position, and the issue date) was highlighted, without clear reason.

We suggested to VO that to ensure a summons is validly issued that a summons should be accurately completed, and asked why the summons contained 'highlighting'.

VO response

VO confirmed that the summons issue date was a typographical error, that the highlighting was an oversight and that this issue will be addressed in training.

Improvement influenced

[Training improvement 4](#): VO to incorporate training that will address the importance of completing a final review of notices prior to service.

6. Delegation to provide report under section 18D

Observation

Section 18D of the Ombudsman Act sets out the legislative basis requiring the Ombudsman to provide a notification report to the VI on the issuance of a witness summons.

Section 11(1) allows the Ombudsman or the Acting Ombudsman, by instrument in writing, to delegate all or any of the powers or functions of the Ombudsman (except this power of delegation) under this or any other Act to any person and may in like manner revoke or vary such delegation.

We reported on two occasions where VO provided four reports as required under section 18D, that the reports had been made by staff in positions not delegated under section 11(1) of the Ombudsman Act.

After raising this, the VI received the updated reports which were completed by staff with the appropriate delegation.

VO response

In relation to an update in its procedures the VO reissued these notifications. VO also noted that three of the reports referenced in the fifth periodic report were provided prior to a reminder being sent to staff.

Improvement influenced

[Procedural improvement 4](#): Email reminder sent to staff confirming that all letters containing statutory notifications to the VI must be reviewed and signed by staff with appropriate delegation.

Improvement under consideration

VO noted delegations currently in place for particular staff may need to be altered to better support VI notification processes.

7. Summons not served by delegated position

Observation

We identified a summons was served by an officer who was not delegated to do so. In line with this we noted that although the attendance date for the summons had already passed, if the officer was not attached to an authorised position, the VO would need to consider the impact this error may have on the information received under this summons.

VO response

The VO acknowledged that at the time the summons was served it did not delegate the role of the serving officer the power to serve a summons and that this delegation has now been updated. It also stated that the summons was complied with by the summons recipient.

The VO further stated that it could also be argued that the decision to have a summons issued and served was that of the appropriately delegated team/person and that it could be considered that the serving officer was carrying out the instructions of the relevant team leader.

Improvement influenced

[Procedural improvement 5](#): VO updated its instrument of delegations to give an officer in another team all the powers of an Investigations Officer in the Investigations team.

The VO also noted that it had reviewed other notices served by particular staff and advised that other than this summons and its variation, there were no other notices impacted by this delegation issue.

8. Amendment to a prescribed form

Observation

We identified on 4 occasions for 10 confidentiality notices that the VO amended the notice (a prescribed form) to specify persons in the restricted matters table, despite the persons not being listed in the prescribed form. These amendments meant that VO had not met the requirements of section 26C(2)(a) – a confidentiality notice (CN) must be in the prescribed form.

We also noted that there was no legislative mechanism through which VO may specify additional persons not listed within section 26F(2) when stating to whom restricted matters must not be disclosed.

VO response

VO advised that the amendments were intended to provide greater clarity to witnesses regarding the restrictions already imposed, acknowledged that these additions were outside the prescribed wording and that there is no provision to specify additional persons outside those listed in section 26F(2)(e) and (f) of the Ombudsman Act.

VO has indicated changes to its procedure and training to mitigate this issue.

The VI does not agree that the amendments added clarity. We advised VO that we will monitor the effectiveness of the changes implemented in further assessments.

Improvements influenced

Procedural improvement 6: VO updated the Confidentiality Notice letter template to provide staff the option of providing further clarifying information (where applicable) to the recipient, instead of amending the CN.

Training improvement 5: VO to incorporate training that will address the use of the prescribed options in the restricted matters table.

The VO's further response during the procedural fairness process

The VO suggested that a clearer description of what had occurred was that the VO had used wording that was *'outside the prescribed wording in section 26F(2)(e) and (f) of the Ombudsman Act'* and that it had been *'closely monitoring the issue of use of prescribed wording in confidentiality notices since the issue was raised by the VI'*.

The VO also noted that it was not seeking to *'extend the classes of persons permitted to be listed in the confidentiality notice' because 'the specified people already fell within the permitted classes of persons referred to in section 26F(2) of the Ombudsman Act'*.

The VI acknowledges the VO's earlier response that it made the changes to *'provide greater clarity to witnesses'*. However, the VI's concern remains that there was no legislative mechanism for the VO to make those amendments, and rather than provide greater clarity, the amendments had potential to do the opposite.

9. Inconsistency with requirements for a Confidentiality Notice (CN)

Observation

We identified issues with how VO recorded the restricted matters in a CN, which may have caused the recipient to be unclear as to what matters were being restricted. We noted that if the notice was still in effect, the VO may wish to consider reissuing it.

VO response

As a result of this issue VO advised the recipient that the CN no longer applied due to invalidity.

Improvements influenced

Procedural improvement 7: Recipient was advised that their confidentiality notice was invalid.

Training improvement 6: VO training to include the need for the description of restricted matters to be consistent.

10. Specificity in Confidentiality Notices (CN)

Observation

In 2021, in *Beckingham v Browne* [2021] VSCA 362, the Victorian Court of Appeal considered whether confidentiality notices given by the IBAC were valid due to the manner in which the restricted matters were set out and whether they were clearly stated without uncertainty.

Following this decision, the VI has had close regard to the specificity of the restricted matters in confidentiality notices issued by agencies. In particular, we consider whether the restricted matters are appropriately confined and that a CN is clear on its face as to what matters are being restricted.

In our reviews of CNs, we identified on four occasions in relation to six confidentiality notices that the restricted matters contained various issues affecting their specificity and suggested that VO consider whether these notices were valid considering *Beckingham v Browne* [2021] VSCA 362. We note two of these CNs were issued, but not served on recipients.

VO's response

VO noted the observations made and indicated that the issues raised with respect to the two CNs in the second periodic report did not make the notices invalid and that the investigation pertaining to the CN referenced in the third periodic has concluded and the confidentiality notice will be cancelled.

11. Removal of Public Interest Disclosure (PID) Marking - Confidentiality Notices (CN)

Observation

In previous correspondence to VO in March 2021, we noted that confidentiality notices had not included a marking identifying that the matter was a Public Interest Disclosure as required under 26C(2)(ca)(i) of the Ombudsman Act. This marking advises a CN recipient that where the investigation relates to a Public Interest Complaint, additional obligations under the *Public Interest Disclosures Act 2012* may apply.

We again identified this issue for three CNs in the second periodic report, where despite the recipients being informed that the investigation related to a Public Interest Complaint, the CNs did not include this marking. Due to this, the VO did not meet the requirements set out in 26C(2)(ca)(i) and we advised the VO that it may wish to consider whether the CNs should be reissued to avoid the risk of invalidity.

VO response

VO noted that the removal of the relevant markings was an error and had subsequently cancelled all three CNs.

Improvement influenced

Procedural improvement 8: cancellation of three likely invalid confidentiality notices.

Observations – procedural fairness

12. Scope of summons

Observation

Under section 42AA(2)(b) of the VI Act, the VI is required to assess whether VO has reasonably required a person to produce documents or things to achieve the purposes of the investigation.

In our first periodic report we sought information relating to summonses that required the production of an extensive range of documents and VO's processes to manage these. In our response to VO's comments on this observation in September 2023 we requested that where VO makes extensive requests, it would be beneficial in the reports VO provides to the VI accompanying summonses that it documents consideration of scope and management of unrelated information.

Following our initial observation relating to extensive summonses, we noted two additional occasions, (in our fourth and fifth periodic reports) where VO required extensive information in a summons.

For these instances, we requested that the VO also provide additional information on the scope of extensive summonses.

VO response

VO provided additional context relating to the scope of these summonses and why it had sought information in particular matters, including to avoid concerns of a recipient colluding about particular information, prejudice to the investigation, as well as reputational damage.

In one instance VO indicated that the allegations were broader than those set out in the report accompanying the summons.

Improvement influenced

Procedural improvement 9: additional information to be provided in the report to the VI that accompanies summonses. This assists the VI's oversight with respect to assessing whether the VO has reasonably required a person to produce documents or things to achieve the purposes of the investigation.

13. Requests for documents in interviews

Observation and VO response

See Snapshot 5 in Section 8.

Improvement influenced

Procedural improvement 10: VO updated its compulsory interview script to inform witnesses that documents requested can be provided voluntarily.

Improvement under consideration

VO indicated that it would consider whether any further updates to its interview script are required.

14. Management of a person of interest

Observation

In reviewing a voluntary interview, we identified that the witness, a subject of the investigation, was provided with broad information relating to the allegations and was advised that they would be provided with the full details once sworn in.

To ensure that the witness was provided with procedural fairness and that VO complied with section 18N(1)¹, the VI sought clarification as to why the witness was provided with high-level information and why they were required to be sworn in prior to receiving further information.

To better enable our assessments, we also requested that VO, where it has restricted the explanation to a witness of the nature of the matters in respect of which questions will be asked, provides additional context within the VI report to highlight and record its reasons.

1 'Within a reasonable time before a person makes a voluntary appearance, the Ombudsman must advise the person of the nature of the matters in respect of which the person is to be asked questions', unless the Ombudsman considers 'on reasonable grounds that this may prejudice the conduct of the investigation to which the appearance relates or may be contrary to the public interest'.

VO response

The VO advised that additional information was provided to the witness via telephone and letter prior to the interview.² VO also noted that the process undertaken in this case is not unusual and most interviews will involve disclosing further information during the interview including after the person had been sworn in.

VO further indicated that it was prepared to consider providing additional contextual information in VI reports.

Improvement under consideration

VO to consider providing additional information in the report to the VI to explain why the VO has restricted the detail in the summons of matters about which a person will be questioned. This will support the VI's oversight when considering whether the VO has met its obligations.

15. Clear statement on whether summons recipient's conduct being examined

Observation

In one instance we identified that the cover letter provided to the witness and VI Report did not make it explicitly clear whether the recipient's conduct was being examined by the VO, as is the usual practice for VO.

We noted that while contextually it appeared that the witness was not a subject, and the VO may have provided oral advice on this matter, it is important that formal correspondence to a witness addresses their status in the investigation.

Accordingly, we suggested that VO confirm the status of this witness, and that it ensures it clearly advises witnesses of their status in the investigations in formal correspondence.

VO response

VO initially stated that it is not the practice of the VO to routinely advise a recipient in writing whether they are a subject of the investigation where they have been summoned to produce documents in their capacity as the principal officer.

In response to the VI's fourth periodic report, VO confirmed that it had made changes to the covering letter attached to the summons to respond to this observation.

Improvement influenced

Procedural improvement 11: VO to include a new paragraph in the summons cover letter template, which can be used as applicable, when summoning a principal officer in that capacity to produce documents that clarifies that the summons has been directed to them as the proper officer of a body corporate (not in a personal capacity).

16. Potential presupposition of outcome

Observation

We observed for twelve summonses across two observations relating to a particular investigation that the VO indicated to witnesses that they would be asked about two questions during their interviews which could be construed to imply that the matter in question had been substantiated.

We also identified in one instance that the VO did not qualify the intended line of questioning and noted that there is a greater risk that the question could be construed that a particular outcome has been reached.

We noted that while the VO may have legitimate reasons for asking the related questions, it is preferable questions put to a witness do not presuppose a particular conclusion. We also suggested that where VO is seeking a witness' observations or comments on a matter subject to an investigation, that it appropriately qualifies the matters set out in a summons to ensure that it does not imply, or presuppose, a particular outcome in the investigation.

VO response

VO did not agree with the VI's observations and stated that the way the question was set out, did not imply that the matter under investigation was substantiated.

We noted VO's views but maintain that such questions should be carefully qualified to ensure that it cannot be implied that an outcome had been reached or that such concerns had been substantiated.

17. Scope of summons

Observation

We noted in an interview a legal representative raised a concern about the scope of the summons.

To ensure that questions were put fairly to the witness, we requested that VO advise the VI of the nature of the concerns raised by the legal representative and any action taken, or considered by the VO, as a result.

VO response

VO provided a response relating to the issue and indicated that it had responded to the legal representative's concerns.

² The VI considered that based on VO's response the witness had been provided with sufficient explanation of the matters prior to the interview.

18. Subject of the investigation

Observation

We noted in a voluntary interview the witness' legal representative questioned whether the witness was a subject of the investigation and in what context the interview's questions were being asked.

As the VI did not receive the required email and attachments sent to the witness prior to the interview, we sought confirmation from VO whether the witness was advised of their status in the investigation prior to their interview.

VO response

VO's response, and the documents provided, clearly indicated that the witness had been advised of their status.

19. Legal representation

Observation

We noted at the conclusion of an interview, a witness asked whether a particular person could be their legal representative to which VO indicated that they would seek clarification relating to this and would advise the witness accordingly.

We noted this occurred in the context of the interviewer not wanting to provide misleading advice to the witness and appeared well-intentioned. However, given a witness' right to be legally represented in an Ombudsman investigation by a legal representative of their choice, unless the Ombudsman gives a direction that they cannot be represented by a particular legal practitioner,³ it was noted that it would be preferable that witnesses are advised that the seeking of legal representation is a matter for them. We also advised that it is also important that such enquiries relating to legal representation are answered during the interview.

VO response

VO reflected on the VI's observation that the response provided by the interviewer occurred in the context of not wanting to mislead the witness and that it encourages staff to ensure discussions around legal representation occur prior to the interview. VO also indicated in this instance that it was comfortable with the approach taken by the interviewer.

20. Jurisdictional issues

Observation

In a compulsory interview, we identified that a legal representative referred to a jurisdictional issue that had seemingly been discussed prior to the interview.

To understand whether there were any issues relating to scope and procedural fairness we asked that VO advise the nature of the jurisdictional issue raised and how any concerns were mitigated.

VO response

VO provided a response in relation to this enquiry.

21. Nature of the allegations (and investigation)

Observation

Under section 18(2)(b) of the Ombudsman Act, subject to section 18(3), the VO is required to inform a person summonsed to give evidence details of the nature of the matters about which they will be required to give evidence.

In reviewing two compulsory interviews we identified in the preamble of the interview that witnesses from the same investigation were advised of apparently more serious matters than had been initially provided in the summons and cover letter.

We also noted at the conclusion of one of the compulsory interviews that a legal representative asked whether VO could email the wording of the allegations. The VO responded that the wording would be contained in a report however subsequently agreed to repeat the allegations when requested by the legal representative so they could be documented.

To confirm VO's compliance with section 18(2)(b) we sought information from VO as to why the witnesses were initially only provided with a high-level description of the investigation as opposed to the specific allegations. We also sought clarification as to why VO did not provide the allegations in writing but agreed to provide them orally to allow the legal representative to document them.

We further identified a related issue in an interview reported on in the fifth periodic report where the allegations under investigation were not put to the witness in a clear manner – even after the witness' legal representative had sought clarification. As a result, it was unclear which allegations were being made against the witness and which alleged actions were attributable to them. We also identified a witness in another interview for the same investigation was provided with a detailed explanation of the investigation.

VO response

VO advised it understood the importance of providing witnesses with sufficient details about which they will be questioned and does so unless the disclosure 'would prejudice the investigation or be contrary to the public interest'. VO advised in the two related interviews witness collusion was a concern.

VO indicated that given the allegations were provided to the witness during the interview, the reluctance to confirm the allegations in writing prior to the draft report may have been unwarranted.

VO provided information about the considerations it makes where prejudice to the investigation is identified to allow for due process, including informing witnesses whether they are

³ Section 18M(3) of the Ombudsman Act includes that the Ombudsman may direct a person not to seek legal advice or representation from a specified legal practitioner in certain circumstances.

a subject of the investigation as well as sufficient particulars relating to their attendance. VO did, however, acknowledge that additional guidance was required to support staff with identifying the degree of information required to be provided.

In response to one observation of this kind, the VO advised that it was satisfied that the matters under investigation were made clear to the witness and that the witness's lawyer was provided with material before the interview that fully covered the same allegations. It also stated that the additional information provided to another witness from the same investigation was in response to the witness' specific enquiries.

Improvement influenced

Procedural improvement 12: VO to update pre-interview information templates and the Investigations Procedure to include guidance relating to providing allegations in writing.

22. Imprecise questioning

Observation

We observed questioning from an interviewer that appeared unduly broad or imprecise, including referring to general comments or seeking general comments as well as responses to 'hypothetical' questioning.

These observations often corresponded with concerns from the witness and legal representative that questions included insufficient substance.

We acknowledged that some questioning may have been presented as evidence and to provide procedural fairness, for instance framing some questions broadly to avoid presupposing a particular conclusion. However, the absence of precision or reference to a source for a supposition or allegation, created a risk of leaving the witness to speculate on broad statements.

We also noted in this interview at times questions were also repetitive, without reference to evidence already provided, which at times appeared to be inadvertent.

We suggested that where VO is questioning a witness that it presents questions which are reasonably clear and contained.

VO response

VO noted the VI's comments.

23. Relevance and Scope

Observation

We identified in an interview that questioning went beyond the stated matters in the summons.

While we noted that the subject was volunteered by the witness, the VO indicated its intention to ask about the topic and proceeded with follow up questioning.

VO response

VO stated that it was reasonable to ask the witness to expand on the comments made by the witness as they were relevant to the investigation and the matters included in the summons.

Observations relating to practice

24. Explanation of relevant provisions - Confidentiality Notices (CN)

Observation

In practice we identified that when a CN is issued, VO provides witnesses with a copy of the relevant provisions and some additional information in cover letters that explains those confidentiality obligations. However, we also identified four CNs where a complete explanation of the effect of the required provisions had not been provided (a requirement under section 26C(2)(c)).

Noting the strict requirement set out in section 26C(2)(c), we suggested that VO consider whether the current explanations provided to CN recipients are sufficient to ensure compliance with section 26C(2)(c).

VO response

VO indicated that the prescribed form is intended to satisfy the requirements of this section and that this matter could be considered further.

Improvement under consideration

VO giving consideration as to whether the wording in the prescribed form is sufficient to comply with legislative obligations.

25. Amendment to grounds for issue of Confidentiality Notice (CN)

Observation

We noted on two occasions relating to four CNs that VO amended the reasons for which the CN had been issued (the VO had removed the reference to 'safety' as listed under 26C(1)(a) 'the safety or reputation of a person'.)

We stated that while the amendment appeared to be minor and may provide clarity around the reason why the confidentiality notices were issued, the basis for the issuing of a confidentiality notice must be consistent with section 26C(1)(a).

In line with this, we noted that such an amendment also does not appear consistent with the prescribed form and suggested that VO ensures that the grounds for issuing a CN accurately reflect the matters set out in section 26C(1)(a) of the Ombudsman Act.

VO response

VO indicated it had amended the form in this way, due to relevance and the consideration that the reference to the safety of a person could cause unnecessary concern.

We acknowledged and support VO's proposal that 'safety of a person' and the 'reputation of a person' be listed separately in the form. VO also advised that it intends to raise the drafting of this relevant section for further consideration.

26. Amendments to Prescribed Forms: Summons and Statement of Rights and Obligations of a Person Attending a Compulsory Appearance

Observation

During our reviews, we identified that VO amended the prescribed form template of summonses and the statements of rights and obligations by removing or adding select text.

We determined that there were no compliance concerns with the amendments made aside from one typographical error which misstated a section number (section 18P).

As the typographical error had taken place in a template and would have been repeated, we suggested that VO clarified the nature of the error and amend it accordingly.

In the VI's fourth periodic report, we noted that despite VO indicating it had updated the form to reference the correct provision, four notifications received after the time of response continued to reference the incorrect section and suggested that VO remind relevant staff of using the most recent and correct version of the form.

VO response

VO confirmed that it had incorrectly referenced the identified section and that it had amended the prescribed form template accordingly as of 6 July 2023.

With respect to the additional forms referencing the incorrect provision, VO advised that these summonses related to an investigation using custom templates and that the custom template had been updated accordingly.

Improvement influenced

[Procedural improvement 13](#): VO amended the summons template to reflect the correct provision.

27. Specificity in request for telecommunications records

Observation

During our reviews, we identified two instances where the VO had sought telecommunications records (call records) from a telecommunications carrier. In one of those instances, we advised the VO that its request was unclear as to whether it was attempting to request the content of a communication (which it cannot do) or data about a communication.

VO response

The VO acknowledged that it should be more specific in its requests.

Improvement influenced

[Procedural improvement 14](#): VO to be more specific in its requests for telecommunications data.

28. Swearing in witnesses

Observation and VO response

See Snapshot 7 in Section 8.

Improvement influenced

[Procedural improvement 15](#): VO amended templates for documents provided prior to the interview which can be referred to by staff to ensure appropriate responses are provided. VO also indicated it will remove reference to 'Bible' from explanation.

29. Request to turn off mobile phones

Observation

In reviewing interviews, we noted that witnesses were asked to turn off their mobile phone or alternately to switch it on silent, with the preference to have it switched off if the witness is not expecting a call.

In line with this we sought further information about the VO's approach to asking witnesses to turn off their mobile phones, including whether advance notice was provided and what steps it would take should a witness refuse to do so.

In response to VO's comment in the fifth periodic report, noting that this request had been made of voluntary witnesses and VO confirmed that it did not provide witnesses with advance notice of this requirement, we advised VO that it was better practice to inform witnesses of this request in advance, so they are able to make appropriate arrangements if required to be contactable. This was also considered to minimise any perceived pressure to comply with this request which may be unexpected and to avoid undermining the voluntary nature of the interview.

VO response

VO stated that making such requests was reasonable as the witnesses were attending an interview under the Ombudsman Act, due to concerns surrounding witnesses potentially making their own recording and unnecessary interruptions. It also stated that the request during voluntary interviews did not undermine the voluntary nature of the interview.

With respect to the enquiry relating to VO's actions, if a witness refused to comply with the request VO indicated the matter would be considered on a case-by-case basis.

VO however has agreed to consider informing witnesses of this requirement in the information provided prior to the interview.

Improvement under consideration

VO to consider adding information to pre-interview material about mobile phones and recording devices.

30. Examination recording issues

Observation

We enquired whether VO rectified an issue relating to a voluntary interview where an interviewer was inaudible in one of two recordings. VO advised there was a technical issue which resulted in the audio not being recorded.

We noted that this interview was conducted remotely and had used a different system to typical VO remote interviews; however, to ensure there is a suitable redundancy in place, we suggested that VO may wish to consider additional mechanisms so that audio continues to be captured where the primary recording methods fail.

VO response

VO confirmed that the audio in this instance was unable to be recovered and it appeared as though a backup recording was not made in this case.

It also indicated such an issue was uncommon, and despite it not being a procedural requirement officers generally did make back-up recordings. VO in turn indicated it would consider amending its procedures to require two methods of recording for interviews.

Improvement under consideration

VO to consider updating its Investigations Procedure to require officers to record interviews with two recording methods.

31. Confidentiality marking

Observation

We identified an administrative error in a summons which included the statement that the recipient's *'right to disclose the existence of this witness summons may be limited by the attached confidentiality notice'*, although the recipient was not issued with a confidentiality notice under this investigation.

We noted that while this appeared to be an administrative error, that VO should ensure that it consistently removes statements that do not apply so that witnesses receive complete, clear, and accurate information.

VO response

VO confirmed the reference to the confidentiality notice was an administrative error and that the feedback was noted and provided to the relevant team.

Improvement influenced

Procedural improvement 16: VO provided feedback to staff to ensure that witnesses receive complete, clear and accurate information.

32. Provision of Part 7 of the PID Act

Observation

We identified for two confidentiality notices that VO provided recipients with a copy of Part 7 of the *Public Interest Disclosures Act 2012* (PID Act), despite the investigation not relating to a public interest disclosure.

We note there was no other reference to public interest disclosure requirements in the prescribed form and therefore did not assess this as a compliance issue.

However, noting the importance of a recipient receiving accurate and clear information, we suggested that VO should ensure unrelated information is not provided to recipients.

VO response

VO noted these comments.

33. Recording issues

Observation

In our reviews of interview recordings, we identified recording issues including where either one or both interviewers were at times not visible, as well as an instance where a witness' face was not visible.

We noted that while these are not compliance issues, being able to see both interviewers and witnesses is important for either engagement purposes or for the VI to monitor welfare concerns. In two of the reported instances, the witnesses had attended remotely and would have experienced these recording issues (not being able to see either one or both of the VO interviewers).

For the instance raised in the VI's fifth periodic report, this occurred alongside the VI noting that the witnesses were cropped out of the video, and one VO officer being barely visible for most of the appearance, due to the way the VO had displayed exhibits.

VO response

VO noted these observations. In respect of the instance in the fifth periodic report, the VO advised that this was one of the examples where it had concerns about the materiality of the observation. The VO noted that the ability of the interviewee to easily view exhibits was of prime importance although it resulted in a reduction of the participant's faces. The VO further advised its view that the recording of the witness' evidence was not impacted.

The VI will further engage with the VO on the completeness of recordings.

34. Explanation of Part 7 of PID Act to Disclosers

Observation

In our review of interview recordings, we noted in the first periodic report that four witnesses who made assessable disclosures under the PID Act were provided with an explanation in the interview preamble that could be interpreted as though they were bound by Part 7 of the PID Act. This was despite the VO's Public Interest Disclosures Procedure stating, 'there are no legislated confidentiality requirements for the discloser'.⁴

In the fifth periodic report we again noted an instance where the explanation relating to whether a witness was bound by Part 7 of the PID Act was unclear.

To eliminate ambiguity and to provide witnesses clarity we suggested that VO update and tailor any interview scripts, specifically around the explanation of PID obligations to disclosers.

VO response

After internal consideration the VO noted that the issue of what a discloser may disclose is still pending review however that it had updated its scripts to provide guidance to disclosers and non-disclosers, which includes informing disclosers that they are not required to keep the content of their disclosure confidential however doing so may be beneficial for the investigation as well as to reduce the risk of detrimental action.

Improvement influenced

Procedural improvement 17: VO amended the interview scripts relating to PID investigations including informing PID disclosers that they do not need to keep the information confidential however it would be beneficial to do so.

35. Location of interview

Observation

VO's Investigation Procedure states that interviews are usually conducted at VO's office or remotely via Microsoft Teams or audio link. However, if it is more convenient to conduct the interview offsite e.g. at a library or state government office, a Principal Investigator (or equivalent delegate) should be consulted.

In our review of a voluntary interview, we noted that the interview was conducted at the witness' place of residence, and we requested VO advise its considerations about the location of this interview.

VO response

VO provided reasons why the interview was conducted at the witness's residence and indicated that it was satisfied that the location of the interview did not conflict with its policies and procedures.

36. Confidentiality Notices (CN) potentially identifying witnesses

Observation

We identified a related issue to the observation about the VO amending the restricted matters table in the CN where in an interview a witness, who was a subject of a public interest complaint investigation, indicated specific people were likely involved in the investigation due to VO amending the prescribed form and naming specific people in the CN.

We noted, although a witness becoming aware of other witnesses may in some cases be unavoidable, given that the CN had unnecessarily listed specific people it had inadvertently provided a clear indication of their involvement.

VO response

VO stated that it had accepted the VI's earlier feedback about not amending the restricted matters table in the prescribed form (the CN) and that it had in turn created optional wording in the covering letter attached to the CN, which allows staff to specify persons or classes of persons, to whom information is already restricted.

VO confirmed that the information provided may be perceived to confirm the involvement of witnesses in the investigation and reflected on the VI's comments that witnesses becoming aware of other witnesses may be unavoidable. However, the VO also noted that it considered that doing so was outweighed by the risk of prejudice to the investigation if it was not clear with the witnesses about who they could not disclose matters to.

VO also stated that aside from confidentiality requirements in relation to disclosers under the PID scheme, after assessing the risks and rights involved it can provide information which may identify (or be seen to identify) other witnesses in an investigation if it serves a legitimate investigative purpose.

37. Inclusive and respectful language / informality in interviews

Observation and VO response

For the full detail on the types of issues raised about language and formality, and the VO's response, see Snapshot 1 in Section 8, paragraphs 8.36 to 8.41.

4 VO Public Interest Disclosures Procedure – 31 May 2022, p 17.

Improvement influenced

Procedural improvement 18: VO to remind interviewers to avoid pointing at witnesses to avoid any misinterpretation.

Improvements influenced

Procedural improvement 19: VO to update its Privacy Policy for HPP 5 (Access and Correction).

Procedural improvement 9:⁵ VO to make changes to the VI report document to ensure that information about the scope and management of unrelated information is included when extensive summonses are issued.

38. Variations due to extensive summonses/management of health information

Observation

We identified that 8 out of the 13 summonses relating to an investigation were varied in response to requests or queries made by the recipients, such as indicating that the scope was too wide or that the time permitted was not sufficient.

In this case, all variations extended the response time, and four variations reduced the scope relating to a request to produce complete email accounts.

Given the large number of variations made for this investigation in a short period of time and potential procedural fairness implications, we requested information including what considerations VO had to the scope and the extent of information summonsed and in determining the timeframes provided for recipients to respond. To assess consistency of practice, we also sought specific information about one variation and the scope of the summons which had been agreed to.

We further sought information relating to how VO filters and manages irrelevant information received and how it complies with the *Health Records Act 2001*, with specific regard to Health Privacy Principle 4 (Data Security and Data Retention) and Health Privacy Principle 5.1 (Openness), including any VO policy on the management of health information.

Additionally, to assist our assessments in instances where VO makes extensive requirements, we indicated that it would be beneficial that VO documents consideration to the scope and management of unrelated information in its reports to us.

VO's response

VO provided a detailed response on its processes including noting that the timeframes and scope of the information requested were considered on a case-by-case basis, alongside the resource impacts of the recipient's ability to respond to the summons. It also provided additional context relating to our specific request about a variation where we sought to confirm consistency across practices as well as information on how it filters and manages the information received and the VO further stated that it is developing a Privacy Impact Assessment template for use during investigations and that it will update its Privacy Policy for Health Privacy Principle (HPP) 5 (Access and Correction), following our query on health records.

39. Informal variation of summons

Observation

We observed a summons response date had been reduced to less than 7 days via email rather than via a formal instrument of variation and advised that it would be appropriate to do so by formal variation or through reissuance of the summons, where the response time has been reduced.

VO advised that it may vary or revoke a summons by further written notice, which does not require the use of a particular form. We agreed that VO may vary or revoke using such a mechanism; however, we noted that given section 18(4) of the Ombudsman Act, it is less clear that such a process is compliant when VO is shortening rather than postponing the attendance date.

In any case, while this variation was by agreement and at the request of the recipient, the service of this summons did not comply with section 18A, as it had provided less than 7 clear days' notice.

We will continue to monitor whether the VO provides witnesses with the required 7 days' notice to respond to a summons.

VO response

VO noted the VI's comments, however stated that the variation could have been made in this manner and that the witness had no concerns with complying with the varied summons.

5 Procedural improvement 9 applies to multiple observations and has been included elsewhere in the report, see observation 12.

Observations relating to witness welfare

40. Limited welfare enquiries at the start of interviews

Observation and VO response

See Snapshot 4 in Section 8.

Improvement influenced

Procedural improvement 20: VO to update its interview scripts to include questions relating to witness welfare, which can be deleted when not required.

41. Witness welfare

Observation

We noted in an interview a legal representative requested that VO amend a witness confidentiality notice to allow discussion with another person in order to reduce the stress felt by the witness.

We noted that the CN was cancelled approximately six weeks after the interview however due to the related welfare implications, we asked the VO whether this request was considered.

VO response

VO advised that 5 days after the request, after close consideration by investigators, the witness was provided written authorisation under section 26F(2)(a) of the Ombudsman Act to disclose specific restricted matters to that person.

42. Insufficient breaks and right to adjournments

Observation

While it is VO's practice to inform witnesses that they can request an adjournment in the interview's preamble, we identified two occasions where VO had not.

In one of these instances, we noted no break was taken despite the interview being approximately 1 hour and 53 minutes long. In the other instance, the interview had a duration of approximately 4 hours and 42 minutes, and the witness was advised that a break would be taken in between different interview topics for about 10 to 15 minutes.

We noted in these instances while it appeared that the witnesses were either happy to proceed or a break was not required, it is important that witnesses are aware and reminded of the ability to request an adjournment. We note in one of these instances, breaks were taken and offered to the witness.

We also identified that in the interview with the approximate duration of 4 hours and 42 minutes, only

two relatively short breaks were taken totalling approximately 15 minutes and despite the interview expanding over lunchtime. We made a similar observation to this in the fifth periodic report where despite the interview estimate being 2 to 3 hours, the interview spanned approximately 3 hours and 40 minutes, again through lunchtime, with total breaks of approximately 17 minutes. We note, in this instance the witness was reminded that they may request a break and did not request one.

We noted that while estimating an end time is difficult that VO should also consider mandatory breaks of sufficient duration for long interviews, especially where they span lunchtime. It is noted we have previously raised the issue of insufficient breaks with VO in our letter dated 20 August 2021 where VO stated that VO's procedures take into account the requirement to provide adequate breaks and either VO or witnesses or their legal representative or support person can request a break.

VO response

VO indicated that it had observed through its quality assurance processes that interviewers generally provide consistent and appropriate advice relating to the right to an adjournment in the interview's preamble.

In respect to the VI's suggestion that VO should consider setting mandatory breaks of sufficient duration for long interviews, VO stated that in the interview with the duration of 4 hours and 42 minutes that the witness was offered four breaks. It also said that it considers mandatory breaks should be considered on a case-by-case basis, breaks should remain at the discretion of the witness and interviewers and that the duration of the interview is a guide and is at times impacted by external factors.

The VI will continue to monitor the issue relating to sufficient breaks as despite VO advising witnesses a break can be taken, given the dynamic of the interview a witness may be uncomfortable in requesting a break on their own volition.

43. Witness welfare

Observation

Under section 18P(8) of the Ombudsman Act, should a person appearing provide satisfactory medical evidence of having a mental impairment or the presiding officer believes the person has a mental impairment, an independent person must be directed to be present during the appearance.

We identified in an interview's preamble that factors were noted that may have given rise to section 18P(8). We also noted that the witness was legally represented during the interview.

We asked whether VO had considered the application of this section and the need for an independent person to be present.

VO response

VO indicated that it had considered the possible application of section 18P(8) and it had formed the view that reasonable adjustments to the interview were made to negate any impacts on the witness. VO also stated that it had taken into

account the witness's own assessment, work experience and the fact that they were legally represented.

44. Conclusion of an investigation

Observation⁶

We identified two occasions in interviews where witnesses asked whether the VO would confirm that the investigation had concluded or when the investigation would conclude. The VO advised that it did not necessarily inform witnesses of the outcome or when the investigation had finalised. We also noted in one instance that VO advised that it is difficult to provide a timeframe relating to the conclusion of the investigation as it is dependent on complexity and other matters, although a timeframe had been provided in another investigation.

As keeping witnesses apprised of the progress and outcome of an investigation is a key welfare strategy to manage uncertainty around potential outcomes, we sought clarification on the process VO undertakes for outcome letters and advising witnesses of the conclusion of an investigation. We also sought advice on whether VO provides indicative timeframes for the conclusion of an investigation.

VO response

VO advised that it had already identified that its templates, procedures, and workflows may not support a practice of keeping witnesses informed of the conclusion of an investigation and later advised that it had recently completed a series of changes to its procedures and templates to complement an existing case management workflow, the last of which were finalised in October 2023.

The VO also advised that the second observation occurred prior to the changes that it had implemented.

VO also stated that providing witnesses with timeframes of the conclusion of an interview is considered case-by-case and where there is certainty of a timeframe.

Improvement influenced

Procedural improvement 21: VO has updated a series of procedures and templates to provide advice to witnesses relating to the conclusion of the investigation including:

- updates to the interview script closing remarks
- changes to the VO Investigations Procedure
- a new template letter informing witnesses of the conclusion of the investigation
- a new template letter for acknowledging receipt of responses to draft reports which includes confirmation that the VO will advise the recipient when the investigation is finalised.

45. Reasonable adjustments for witnesses

Observation

We sought clarification on the nature of adjustments considered for a witness who had a hearing impairment.

We also noted a VO officer who was due to ask interview questions did not consider it necessary to swap places as suggested by another officer at the commencement of the interview so they would be directly in front of the witness. However, we subsequently noted that the witness approximately five hours into the interview mentioned having difficulty hearing the interviewer asking questions and suggested to their legal representative that they switch places.

VO response

VO confirmed the adjustments made in this interview which had been discussed prior to the interview. It also acknowledged that it would have been preferable that seating arrangements were adjusted at the commencement of the interview to better accommodate the witness.

In their procedural fairness response, the VO officer noted that they had spoken to the witness' legal representative while arranging the interviews, were aware of the witness' hearing impairment, and had raised matters, such as the layout of the room with the legal representative. They also noted that one interviewer had asked the witness to advise whether they were having trouble hearing questions, and that the interviewers had modified their conduct to facilitate the witness' comments. The VO officer advised that they concurred with the VO's response regarding the adjustments made and seating arrangements at interview.

46. Witness welfare

Observation

We identified in an interview that while the witness appeared emotional, VO had continued with preliminaries, including discussing penalties for a potential breach of Part 7 of the PID Act.

We noted that while at the outset VO was sensitive to the welfare of the witness and had offered breaks, after the witness began to cry it would have been preferable that the VO had checked in with the witness earlier, before continuing the preliminary matters (such as discussing penalties) as this may have heightened the witness' emotional state.

We also noted that the emotional state of the witness could also mean it was less likely this important information was retained.

VO response

VO noted the VI's comments and stated while the comments will be conveyed to the interviewer that it was comfortable with the approach taken by the interviewers.

⁶ The VO has stated that they had already identified this as an issue but it is unclear when exactly this occurred, and to what extent our observation has factored into this.

47. Witness welfare

Observation

We identified that for two interviews, the witnesses advised the initial contact by the VO was a stressful or negative experience. This followed a positive practice where VO had sought advice from witnesses about whether there was anything it could do differently to make the experience less stressful and whether the witness' concerns were sensitively managed by the VO Officer.

We noted while the initial contact may doubtless be difficult, noting the feedback expressed, suggested there may be an opportunity to improve the initial engagement with witnesses.

We also noted for one of these interviews a witness indicated a limited understanding of why the VO was investigating a matter that had already been investigated internally and therefore suggested that there may be an additional opportunity for improvement in how VO explains its role at the outset of an investigation.

VO response

VO indicated that the relevant VO Officer had taken on board the feedback, that it was satisfied with the initial contacts made to the witnesses and that it did not consider any changes to processes were required.

48. Witness welfare

Observation

We noted in an interview although the witness confirmed that they had looked at the information in the Statement of Rights and Obligations, they had not done so thoroughly and had asked clarifying questions.

In such a circumstance, noting the importance of the document which contains the witnesses' legal rights and obligations we suggested that it would have been preferable to provide the witness with a further opportunity to read through the document before questioning commences, as seen in other interviews.

VO response

No specific response was provided by the VO in relation to this instance.

Observations relating to Privacy

49. Erroneous documentation

Observation

In our review of a confidentiality notice cancellation, we identified that we erroneously received a document (email) unconnected to the notification.

VO response

VO confirmed that this was an administrative error, it had created an incident report relating to the data breach and that it was considering whether this matter required notification to OVIC.

50. Privacy Breach

Observation

The VO reported an inadvertent privacy breach that arose when a VO officer was screen sharing during an interview with a witness. We enquired about whether an outcome had been reached and whether any procedural or educational changes had been implemented.

VO response

VO indicated steps were taken at the time of the incident and it had alerted its management group of the need to ensure staff are taking appropriate steps to prevent privacy breaches when screen sharing in interviews. VO also stated that training on data privacy breaches had been provided to relevant staff.

VO advised that due to the VI's enquiry it identified that the incident report had inadvertently not progressed and it had completed a new incident report that would be referred for assessment of reporting to OVIC. VO further noted that it had made changes to the incident reporting systems to support future responses.

Improvement influenced

Procedural improvement 22: VO to make changes to its data breach incident reporting system to allow for automatic internal notification within the VO for assessment as to whether a report to OVIC is required and progression of incident report following the VI raising this matter.

Observations relating to VI notifications

51. Observations relating to requests for documents/information

Observation

Though our periodic reports we made enquiries and reported to VO with respect to documents that were not provided in accordance with legislative obligations or a prior agreement. Without the relevant documentation, our assessments may be limited and in turn, we are not able to make comprehensive assessments of compliance. The VI has an obligation to report in its Annual Report on the extent of the VO's compliance with reporting requirements.⁷

Enquiries relating to outstanding or late documents

These observations were largely recurrent across several periodic reports. For instance, we reported in all five periodic reports that VO had not provided the VI with documents relating to voluntary interviews. Regarding these, we either asked whether VO had provided applicable documents to relevant witnesses or asked that they be provided to the VI. This included an observation in the VI's first periodic report where between December 2022 to March 2023 we had only received documentation relevant to one of 19 voluntary interviews. This was despite VO's Investigations Procedure setting out the requirement to provide the VI with relevant documents for voluntary interviews conducted under oath or affirmation.

We also reflected that between 5 September and 25 November 2022 the VO had not provided the VI with 24 records of service until they were requested. This was again despite the requirement being communicated in VO's Investigations Procedure and the VI earlier writing to the VO on this issue.⁸

Enquiries relating to information and documentation

We also requested that VO provide internal procedures, guidelines and policies as well as other information that would 'ensure we have a complete understanding of VO's approach to exercising coercive powers'.

VO response

To assist with complying with the VI's notification requirements specifically relating to records of service and documents relating to voluntary interviews, VO indicated it had amended its case management database to prompt and remind staff and confirmed that it had updated its internal template outlining the requirements of VI's notifications.

VO also confirmed that because of our enquiries in two public interest complaint cases, it identified that the relevant fact sheet was not provided to the relevant recipients and in turn it had updated the fact sheet to the correct case management action in July 2023 and that staff were also reminded by email to provide the relevant document in relevant situations.

VO further stated that training will include the requirements relating to VI notification requirements and had already delivered training relating to the changes it had made to its case management system.

Improvements influenced

Procedural improvement 23: VO to make changes to its case management database to prompt and remind staff to provide the VI with records of service relating to summonses and documents relating to voluntary interviews.

Procedural improvement 24: VO to update its internal guide relating to the documents required to be provided to the VI relating to records of service and voluntary interviews.

Procedural improvement 25: VO to update its case management system 'action' to include the relevant fact sheet with respect to public interest complaint investigations.

Procedural improvement 26: VO staff reminded by email to provide the applicable fact sheet when confirming interviews relating to public interest complaint investigations.

Training improvement 7: VO training to cover the requirements of VI notifications.

Training improvement 8: VO staff provided with training relating to case management system.

7 VI Act, section 91(1)(k).

8 Letter to VO dated 4 March 2021.

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