

**VICTORIAN
INSPECTORATE**

SPECIAL REPORT

**IBAC's referral and oversight of Emma's
complaints about Victoria Police's
response to family violence
by a police officer**

OCTOBER 2022

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Ordered to be published by the Victorian Government Printer PP No 388, Session 2018-2022

ISSN 978-0-6484319-0-9 (Print)

ISSN 978-0-6484319-1-6 (Online)

This report may also be downloaded from the Victorian Inspectorate's website at www.vicinspectorate.vic.gov.au

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Letter of transmission

To

The Honourable President of the Legislative Council

and

The Honourable Speaker of the Legislative Assembly

Under section 87 of the *Victorian Inspectorate Act 2011* I present to each House of the Parliament the Victorian Inspectorate's report on IBAC's referral and oversight of Emma's complaints about Victoria Police's response to family violence by a police officer.

Yours sincerely



Eamonn Moran PSM KC
Inspector

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Preface

Section 87 of the *Victorian Inspectorate Act 2011 (VI Act)* empowers the Victorian Inspectorate (VI) to transmit to each House of the Parliament a report on any matter relating to the performance of its duties and functions.

A key object of the VI Act is to assist in improving the capacity of the Independent Broad-based Anti-corruption Commission (IBAC) and IBAC personnel in the performance of their duties and functions and the exercise of their powers.¹

Because of the nature of our respective roles and the need for confidentiality in the conduct of our operations, the work the VI does in its independent oversight of IBAC is for the most part done behind closed doors through confidential exchanges between IBAC and VI officers. The relationship is a constructive one and the valuable input provided by the VI has been privately acknowledged on a number of occasions by the IBAC Commissioner.

On only two occasions across the almost 10 years that the VI has been in existence, has it exercised its power under section 87 of the VI Act to table a special report.

The first occasion was its October 2018 special report on [Welfare of witnesses in IBAC investigations](#). The VI's oversight body, the Integrity and Oversight Committee of Parliament, has in its recent report on [Performance of the Victorian integrity agencies 2020/21: focus on witness welfare](#) described that report as 'seminal' and noted that 'IBAC disputed the soundness of the VI's own motion investigation and inquiry, which were the basis of the report'.²

Unfortunately, 4 years later, on the very next occasion on which the VI has proceeded to table a special report, IBAC has adopted the same approach.

It has provided the VI with a two-part response which it has requested be reproduced in this report. The VI regrets this approach which it regards as counter-productive to the object that all integrity agencies should have of seeking to improve the integrity system. Nevertheless, the VI has decided to comply with this request. IBAC's response is contained in full in **Appendix A**.

An unfortunate aspect of the IBAC response is to reproduce and comment on elements of an earlier draft of this report forwarded to IBAC on 26 May 2022 as part of the extensive procedural fairness process in which the VI has engaged. It is standard process for any integrity agency, including IBAC, to consider issues raised about adverse material and to adjust a report where appropriate. This was the course taken by the VI. While not required to reproduce responses to earlier drafts of this report, the VI has chosen to reproduce IBAC's response in full. Save for a few amendments³, the VI strongly rejects all aspects of IBAC's response and sees no merit in engaging in public discourse about it.

The VI does not wish a difference in opinion between integrity agencies on process to detract from the really important issues that this report deals with; that is, the need for victims of family violence perpetrated by police officers to feel safe to come forward to both Victoria Police and IBAC.

1 VI Act section 5(b).

2 At 1.3.2 of the *Performance of the Victorian integrity agencies 2020/21: focus on witness welfare* report, page 7.

3 The amendments relate to IBAC's response at its paragraphs 10.2, 11.2, 14.1, 23.1, 23.3(a) and (c) and 25.2(a)-(c).

Despite the language of IBAC's response, IBAC has accepted the four recommendations made by the VI. That fact gives the VI confidence that, when the recommendations are implemented, victims of family violence perpetrated by police officers can feel safer in approaching Victoria Police and, should issues arise in the police handling of the matter, IBAC.

A handwritten signature in blue ink, appearing to read "Eamon Alon".

Inspector

Executive Summary

IBAC commenced operations in 2013. IBAC is the statutory agency 'responsible for preventing and exposing public sector corruption and police misconduct' in Victoria.⁴

The VI has a statutory duty to monitor IBAC's compliance with the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (**IBAC Act**) and other laws and to assess the effectiveness and appropriateness of its policies and procedures. This special report is presented in discharge of that duty.

Responsibility for police oversight is currently the subject of a systemic review in Victoria.⁵ This review was launched by the Victorian Government in 2021, in line with recommendation 61 of the Royal Commission into the Management of Police Informants and the 2018 IBAC Parliamentary Committee's 'Inquiry into the external oversight of police corruption and misconduct in Victoria'. The IBAC Committee, in the report on its inquiry, raised the importance of striking a balance between police responsibility for managing complaints about their members and oversight by an external agency.⁶

When the Inspector appeared before the IBAC Committee as part of that inquiry on 5 February 2018, the Inspector noted that there is a category of complaint that IBAC itself should look at.⁷ The VI remains of the view that some complaints, due to the nature of the allegations, or perhaps the risks associated with ongoing elements of those complaints, simply must be looked at by IBAC itself.

IBAC investigate only about 2% of serious police misconduct complaints, with the rest referred by it for investigation to the Chief Commissioner of Police (**Chief Commissioner**).⁸ This is despite IBAC's own 2016⁹ and 2018¹⁰ reports into Victoria Police's complaints handling at a regional level and by Professional Standards Command (**PSC**) highlighting serious issues, including failure to adequately identify and manage conflicts of interest.

In October 2019, the VI published an Integrity Report following a Monitoring Project on [IBAC: Police Misconduct Complaints](#), which included a recommendation, which IBAC accepted, that IBAC's referral decisions are supported by recorded analysis as to why allegations must be referred to the Chief Commissioner for investigation rather than be investigated by IBAC.

4 'About Us', IBAC website, www.ibac.vic.gov.au/about-us.

5 See [Victoria's systemic review of police oversight](#).

6 Parliament of Victoria Independent Broad-based Anti-corruption Commission Committee 2018 report 'Inquiry into the external oversight of police corruption and misconduct in Victoria' (IBAC Committee 2018 Report) [IBACC_58-06_Text_WEB_2wVYTGrf.pdf](#) (parliament.vic.gov.au), page xvii.

7 IBAC Committee 'Inquiry into the external oversight of police corruption and misconduct in Victoria' transcript Mr Eamonn Moran, Victorian Police Inspectorate, 5 February 2018. www.parliament.vic.gov.au/images/stories/committees/IBACC/Transcripts/police_oversight_transcripts/IBACC_5_February_2018_External_oversight_of_police_VI_closed.pdf page 17.

8 Evidence to Integrity and Oversight Committee on the Performance of Victorian Integrity Agencies, 2017/18-2018/19, Parliament of Victoria, 17 August 2020, 1-2, Hon Robert Redlich AM, QC, Commissioner parliament.vic.gov.au/images/stories/committees/IOC/Performance_of_Victorian_Integrity_Agencies_201718201819/Transcripts/01_IBAC_-_Final_Transcript_Performance_of_Victorian_Integrity_Agencies_2017-18_2018-19.pdf page 1.

9 IBAC 'Audit of Victoria Police complaints handling systems at regional level' September 2016 www.ibac.vic.gov.au/docs/default-source/reports/audit-of-victoria-police-complaints-handling-systems-at-regional-level.pdf?sfvrsn=3c86e75_5.

10 IBAC 'Audit of complaints investigated by Professional Standards Command, Victoria Police' June 2018, www.ibac.vic.gov.au/docs/default-source/research-documents/report_audit-of-complaints-investigated-by-professional-standards-command-victoria-police_june-2018.pdf?sfvrsn=f9e27675_2.

It is against this background that the VI publishes this special report. It is a report on the handling by IBAC of Emma's case. The issues with IBAC's handling of Emma's case are so serious and long running, and the consequences so devastating, that it is worthy of consideration and public comment.

Emma, not her real name to protect her anonymity, suffered family violence at the hands of her then partner, a Victoria Police officer. The offending first came to the attention of Victoria Police after a significant act of violence. In the period that followed, Emma experienced a police response that was riddled with problems.

Emma made a complaint to IBAC about the way she had been treated by Victoria Police. In the complaint, Emma set out in explicit and unambiguous terms her view that the issues were systemic. Emma stated that the outcome she wanted '*most of all*' was a process change at Victoria Police to ensure that police spouses who are the victims of family violence have their matters handled by a family violence unit that is not in the division where the perpetrator works and is not staffed by the perpetrator's colleagues (**divisional separation**).

Emma's allegations potentially involved corrupt conduct or police misconduct. Most seriously, Emma alleged that a police officer leaked her plan to leave the relationship – and to escape the family violence – to the perpetrator's colleagues and friends. As a result of the perpetrator finding out about her escape plan, Emma felt unable to safely leave the relationship. The safety and welfare risks to Emma and her children were substantial.

IBAC identified her complaint as a protected disclosure complaint, treating the alleged conduct as potential police misconduct. Rather than investigating it as potential police corruption and considering the systemic issues she had raised about police investigating their own colleagues, approximately one month after receiving it, IBAC referred Emma's complaint to PSC for investigation. IBAC identified the matter for review, asking police to provide its investigation file at the conclusion of the investigation. The referral was not supported by a recorded analysis as to why it was more appropriate for Emma's allegations to be referred to police for investigation rather than be investigated by IBAC itself.

PSC allocated the investigation to a police member in the same division as the members who were to be investigated (**the local police investigator**). Emma's matter was also narrowly construed by Victoria Police's investigation as an individual privacy matter.

When Emma contacted IBAC to complain about apparent bias on the part of the allocated local police investigator, IBAC told Emma to raise her concern with PSC, explaining it would consider the issue when it reviewed PSC's investigation.

In its investigation report, PSC approved the finding of the local police investigator, who determined the allegations to be unfounded¹¹, despite finding that confidential information was disclosed.

Emma was again exposed to harm by her then partner when a letter containing the complaint outcome was sent by Victoria Police to her residential address instead of the PO Box she had asked IBAC to use.

¹¹ Unfounded is defined as 'the available evidence clearly establishes that there are no grounds for the complaint whatsoever'.

PSC took four months to send the investigation report to IBAC, and IBAC did not commence its review for another seven months. IBAC did not appear to recognise or address the systemic issues (e.g., the need for divisional separation) and serious conflicts of interest raised in the initial complaint to IBAC until two years later when it reconsidered its draft review. This occurred after the matter was reported in the media and Emma had directly emailed the IBAC Commissioner.

Many systemic issues were uncovered by Emma herself, who throughout the complaint process, and despite ongoing trauma, undertook significant research and provided IBAC with a substantial volume of relevant information and analysis. The importance of divisional separation was identified by Emma two years prior, in her IBAC complaint form.

After IBAC's review identified and raised strategic issues for consideration by Victoria Police, IBAC sought a response within six weeks. Victoria Police undertook a re-investigation, which was again impacted by delays.

By the time Emma's matter was re-investigated by Victoria Police, the statute of limitations for a possible summary charge against the officers accused of leaking her escape plan had passed.

While her matter was being re-investigated by Victoria Police, Emma made a second complaint to IBAC alleging, among other things, detrimental treatment from Victoria Police in relation to the handling of her family violence matters.

IBAC again found the complaint sufficiently serious to be a public interest complaint but, despite having identified conflicts of interest, delays and inappropriate findings in the PSC investigation of the first referred complaint, IBAC referred this second complaint to Victoria Police. Again, this referral was not supported by a recorded analysis as to why it was more appropriate for this complaint to be referred to police for investigation rather than be investigated by IBAC itself. The referred investigation has not concluded.

The consequences for Emma have been so serious, that the VI considers it necessary to make public recommendations to IBAC to ensure that IBAC undertakes careful written analysis of whether it is more appropriate to refer a matter to Victoria Police for investigation rather than investigate it itself, and where there are clear and ongoing risks to safety, this assessment includes consideration of how IBAC will manage those risks.

This special report reveals the inadequacy of IBAC's response to Emma's complaints, and how IBAC's referral to, and oversight of Victoria Police with regard to Emma's complaint left the systemic issues largely unexamined and unaddressed for two years. IBAC's process for referring Emma's complaint about police to Victoria Police fundamentally affected her ability to obtain independent investigation of serious allegations against police. It impacted on IBAC's, and therefore Victoria Police's, ability to identify and address any potential corruption in Emma's case.

The central issue in Emma's allegations, namely the unwillingness of police to act against their own in cases of family violence, was effectively overlooked.

In Emma's case the referral of her complaints back to Victoria Police had very real impacts on the quality of the integrity system's response. It contributed to a situation in which there were serious conflicts of interest in the investigation process, which impacted the independence of the investigation.

Due to the lengthy process, and delays by both agencies, the opportunity for considering summary charges against relevant officers was lost. The delays also had substantial negative impacts on Emma and her children. The VI found IBAC's written records did not contain an adequate consideration of risk and the need for protection of Emma's welfare and the welfare of her children. When Emma complained to IBAC about its conduct, IBAC failed to properly notify the VI as the body with oversight of IBAC's work.

This report illustrates how serious the consequences can be when there is a lack of independence and objectivity in the handling of complaints about police.

Potential improvements to the operation of Victoria's integrity system include an increased robustness of the police oversight environment. This is an environment where 'corrupt conduct' and 'police personnel misconduct' should not be viewed as mutually exclusive terms; an environment which demands IBAC's careful written consideration of who is 'more appropriate' to investigate matters than IBAC itself¹²; an environment which requires IBAC to assess whether clear and ongoing risks will be exacerbated by a decision to refer; and an environment where victims of family violence perpetrated by police officers should feel safe to come forward, to both Victoria Police and to IBAC.

This special report makes four (4) recommendations, which aim to improve the effectiveness of IBAC's oversight of police and ensure that before referring a case for investigation, detailed written analysis is recorded as to why it is 'more appropriate' for the Chief Commissioner or another body or person to investigate the matter than IBAC.

The VI is pleased that IBAC has accepted these recommendations. However, IBAC has raised concerns about the resources it will take to implement the VI's recommendations. The VI considers IBAC's allocation of resources to be a matter for IBAC — if IBAC considers more resources are required to implement the VI's recommendations, that is a matter for IBAC to raise with the Victorian Government in the context of the Government's review of police oversight.

The VI will continue to work with IBAC to help strengthen the integrity system and to help ensure that the recommendations are applied in relation to Emma's second complaint and any victims of family violence perpetrated by police who complain to IBAC.

¹² This case highlights the importance of IBAC implementing the recommendations in the VI's October 2019 Integrity Report on *IBAC: Police Misconduct Complaints*.

Introduction

Our role

The VI is the key oversight body in Victoria's integrity system. It was established to provide oversight of other integrity agencies and their officers, including IBAC. The VI is an independent body that has a statutory duty to monitor IBAC's compliance with relevant law, to assess the effectiveness and appropriateness of IBAC's procedures, and to assist in improving the capacity of IBAC and IBAC personnel to perform their duties and functions and exercise their powers. The VI has powers under the VI Act to receive complaints about IBAC. The VI has powers to request relevant documents from IBAC in relation to a complaint.

The VI is empowered by section 87 of the VI Act to produce a special report at any time on any matter relating to the performance of its duties and functions.

The VI in this report makes four recommendations to IBAC under sections 78(1) and (2) of the VI Act aimed at preventing the conduct identified in this report from occurring in the future.

This report focusses on the actions of IBAC as the VI does not have oversight of Victoria Police investigations.

Methodology and procedural fairness

In accordance with its standard approach to assessing complaints, the VI requested the complaint files from IBAC. After reviewing and considering all material provided by IBAC, the VI identified shortcomings in the content of the IBAC file that warranted recommendations to IBAC. The VI did not commence an investigation and interview IBAC officers as the VI's recommendations arise from the issues identified within IBAC's written records. The findings relate to IBAC; no adverse comments are made about individual officers and the report makes no suggestion that they did not follow IBAC's processes.

In the context of the Victorian Government's review of police oversight, it is in the public interest for the VI's findings and recommendations to be tabled in a special report under section 87 of the VI Act. This approach is in accordance with the VI's [Integrity Response Guidelines](#).

The VI prepared a draft of this report, setting out its proposed findings and recommendations which were provided to relevant parties to ensure natural justice.

To ensure compliance with section 87(8) of the VI Act, and to ensure that the VI does not identify the complainant or cause unreasonable damage to the complainant's safety or wellbeing by publishing this special report, the VI provided the draft report to the complainant for review on the same day it was provided to IBAC. The complainant's feedback, where appropriate, was incorporated into the report.

If a report produced by the VI is to include adverse findings about a person or public body, the VI must provide an opportunity for them to respond, and to fairly set out each element of the response in the report.

The VI provided the draft report to IBAC and Victoria Police for their review and response, in accordance with its obligation to accord procedural fairness under section 87(2) of the VI Act.

The VI reviewed and carefully considered the substance of responses made. Victoria Police's response is set out below. Where appropriate, IBAC's responses have resulted in amendments to the report. As foreshadowed in the Preface, IBAC's response is reproduced in full in **Appendix A**.

The findings of fact in this report are made on the civil standard, namely the balance of probabilities, based on the principles set out in *Briginshaw v Briginshaw*.¹³

Response of Victoria Police to this Special Report

Victoria Police has chosen not to comment on the factual background in the report for legal reasons. However, Victoria Police provided the following information.

Victoria Police launched a specialist investigation unit in November 2021 to improve organisational responses to employee-related family violence incidents. The establishment of the Sexual Offences and Family Violence Unit (SOFVU), which sits within Professional Standards Command (PSC), complemented a new stand-alone Victoria Police Manual policy issued on 15 September 2021.

PSC worked closely with Family Violence command (FVC) on the introduction of VPM *Family Violence involving Victoria Police employees*. This VPM mandates that PSC is to be notified when members respond to family violence incidents where a Victoria Police employee is the alleged perpetrator.

SOFVU's aim is to minimise re-traumatisation associated with the reporting and investigation of employee-related family violence offences utilising a victim-centric approach. SOFVU

investigate all employee-related sexual offences and family violence incidents which are complex or involve indictable criminal offences. Complex family violence cases may include incidents involving strangulation, repeat, persistent or patterns of behaviour which are assessed as an escalation of risk, have a requirement for specialist services and necessity for independence.

Investigators undertake daily oversight functions and provide a 24/7 organisational response capability focusing on victim safety to ensure all incidents are recorded, allocated and investigated to safeguard timely response and action. Any employee aware of employee-perpetrated family violence, sexual offences and sexual harassment (including predatory behaviour) must be reported as per the VPM *Complaint Management*. Oversight mechanisms intrusively manage investigation objectivity and conflict of interests. With the support of the Witness Support Unit (WSU), referrals for support are made to aid victim survivor recovery from the said incident.

¹³ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

IBAC'S role in complaints about police

IBAC is established under the IBAC Act. The objects of the IBAC Act are set out in section 8. They include to provide for the identification, investigation, and exposure of:¹⁴

- corrupt conduct; and
- police personnel misconduct.

Corrupt conduct and police personnel misconduct are each defined in the IBAC Act.

'Corrupt conduct' is defined in section 4 to include:

- conduct of any person that adversely affects the honest performance by a public officer or public body of their functions; or
- conduct of a public officer or public body that involves the misuse of information acquired in the course of the performance of their functions, whether for the benefit of the public officer or public body or any other person.

The conduct must be conduct that would constitute a relevant offence, defined as an indictable offence or specified common law offences including misconduct in public office.¹⁵

'Public officer' is defined in section 6 to explicitly include a member of Victoria Police personnel.¹⁶

The meaning of 'police personnel misconduct'¹⁷ includes:

- (a) in relation to a public officer who is a police officer or protective services officer—
 - (i) an act or decision or the failure or refusal by the public officer to act or make a decision in the exercise, performance or discharge, or purported exercise, performance or discharge, whether within or outside Victoria, of a power, function or duty which the public officer has as, or by virtue of being, a police officer or protective services officer;
 - (ii) conduct which constitutes an offence punishable by imprisonment; or
 - (iii) conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or
 - (iv) disgraceful or improper conduct (whether in the public officer's official capacity or otherwise).

Accordingly, for the purposes of the IBAC Act, a Victoria Police officer can engage in corrupt conduct in addition to police personnel misconduct.

¹⁴ IBAC Act section 8(a).

¹⁵ See IBAC Act section 3.

¹⁶ See paragraph (i) of the definition of 'public officer' in section 6(1) of the IBAC Act.

¹⁷ IBAC Act section 5.

IBAC'S power to investigate

IBAC's powers to carry out investigations are set out in Part 3 of the IBAC Act.

Sections 51 and 52 of the IBAC Act provide that a person may make a complaint to IBAC about corrupt conduct and police personnel conduct respectively.

After receiving a complaint about corrupt conduct or police personnel conduct, IBAC is required by section 58 to do one of three things:

- dismiss the complaint;
- investigate the complaint; or
- refer the complaint to another body.

IBAC'S power to refer to other bodies

Pursuant to section 73 of the IBAC Act, IBAC is required to refer matters to other relevant bodies in some circumstances. Section 73 states:

73 Referral of complaint or notification for investigation by another person or body

- (1) The IBAC must refer to a person or body specified in subsection (2) a complaint or notification to the IBAC if, at any time, the IBAC considers that—
 - (a) the subject matter of the complaint or notification is relevant to the performance of the duties and functions or the exercise of powers of that person or body; and
 - (b) it would be more appropriate for the complaint or notification to be investigated by that person or body rather than by the IBAC.

Subsection (2) lists the bodies to which IBAC may refer matters including the Chief Commissioner of Police, the Ombudsman, the Auditor-General, the VI, and a range of other specialist bodies.¹⁸

If IBAC refers a matter to the Chief Commissioner of Police, the Chief Commissioner must investigate the complaint under the *Victoria Police Act 2013* (Vic) (**VP Act**).¹⁹ Under section 175 of the VP Act, the Chief Commissioner must investigate every public interest complaint referred by IBAC.

IBAC'S power to withdraw a referral

If IBAC makes a referral under section 73 of the IBAC Act, it has the power to withdraw the referral under section 79. Section 79(2) provides that at any time after making a referral, IBAC may determine to investigate the complaint under Division 4 of Part 3 of the IBAC Act and may withdraw the referral by providing written notice to the body to which it was referred.

IBAC'S power to require information about a referral

Pursuant to section 78(2) of the IBAC Act, IBAC also has the power to require, from the person or body to whom a referral is made, information about the investigation and/or any action taken in respect of a referred matter.

Pursuant to section 78(3), the relevant body or person must provide the required information to IBAC within the timeframe specified by IBAC.

¹⁸ IBAC Act section 73(2).

¹⁹ IBAC Act section 73(5).

Benefits of recording reasons for administrative decisions

The VI does not consider IBAC has a legislative requirement to provide written reasons for decisions made under section 73 to dismiss, refer or investigate a complaint. The principles of natural justice do not require administrative decision makers to provide reasons for their decisions, although that duty may arise in 'special or exceptional circumstances'.²⁰

However, it is evident from the authorities²¹ that it would be considered best practice to set out the reasons or rationale for a decision.

The benefit of reasons was articulated by Justice Kirby in a dissenting judgment in a High Court case (citations omitted)²²:

The rationale of the obligation to provide reasons for administrative decisions is that they amount to a "salutary discipline for those who have to decide anything that adversely affects others". They encourage "a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making". They provide guidance for future like decisions. In many cases they promote the acceptance of decisions once made. They facilitate the work of the courts in performing their supervisory functions where they have jurisdiction to do so. They encourage good administration generally by ensuring that a decision is properly considered by the repository of the power. They promote real consideration of the issues and discourage the decision-maker from merely going through the motions. ... By giving reasons, the repository of public power increases "public confidence in, and the legitimacy of, the administrative process".

20 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.

21 *Re Ward and Secretary to the Department of Social Security* (1985) 7 ALN N66; *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* (1983) 3 NSWLR 378 at 386.

22 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at page 242 (105).

Overview of Emma's two complaints to IBAC

Background to complaints: Family violence

Emma is a victim and survivor of serious family violence perpetrated against her and her children by a former partner, who at the time was a serving member of Victoria Police.

The violence perpetrated against Emma came to the attention of police after a significant family violence incident. The family violence both pre-dated and continued after this incident. The family violence perpetrated against Emma included attempted choking, sexual assault and threats toward her and her children.

Emma's former partner was prosecuted and sentenced for family violence offences. An issue relating to the sentence is discussed later in the report.

Overview of Emma's allegations

Emma made serious allegations to IBAC about Victoria Police's handling of the matter. Across the life of the complaints, the allegations and information provided to IBAC included that:

- the family violence matter was handled by the perpetrator's colleagues;
- confidential information relating to Emma's reports to police was provided to the perpetrator and/or his colleagues and friends (**alleged leaked information**). For example, Emma's plan for leaving the relationship to escape the family violence was allegedly leaked by police members to colleagues and friends of the perpetrator (**escape plan disclosure**);
- police members attempted to dissuade her from putting her concerns in writing and warned her not to make a statement on the basis that this may cause further offending;
- police members suggested that she allow the perpetrator back into her home, and that she should be 'more supportive' of the perpetrator;
- the perpetrator's boss, a police member, released information to the perpetrator without forewarning Emma which resulted in an aggressive confrontation;
- Victoria Police failed or refused to add Emma's children to the application for a Family Violence Intervention Order (**FVIO**);
- the perpetrator's boss sat in on a meeting between Emma and a family violence worker;
- the perpetrator remained a Victoria Police member and, for at least some of that time, retained access to weapons. It is alleged that the offending continued throughout the time the perpetrator retained weapons access; and
- the Victoria Police members who took the family violence complaint noted on the report '*nil complaint of any criminal offence*' and '*nil criminal offences identified*', despite very serious allegations being made about family violence offending.

Emma makes first complaint to IBAC

The first complaint to IBAC included a detailed description of issues via IBAC's online complaint form and characterised some conduct as 'corrupt conduct'.

The complaint alleged instances where the perpetrator's colleagues had disclosed confidential information to him or his friends which resulted in high levels of risk, and indeed aggressive confrontations between the perpetrator and Emma. One example of information disclosed was the escape plan disclosure – Emma's plan for leaving the relationship to escape the family violence.

In the IBAC complaint form, Emma described the impact of the conduct as resulting in a complete lack of confidence in Victoria Police. She said that she felt unable to make a statement to police without her privacy being breached or her safety being compromised and that she felt unable to leave her partner.

In relation to 'desired outcomes', Emma explicitly sought a process change at Victoria Police to ensure that police spouses who are the victims of family violence have their matters handled by a family violence unit that is not in the division where the perpetrator works and is not staffed by the perpetrator's colleagues. Emma also sought disciplinary action against the officer or officers responsible for the alleged leak.

IBAC refers Emma's complaint to Victoria Police

Approximately one month after receiving Emma's first complaint, IBAC referred it to Victoria Police's PSC for investigation (**PSC investigation**). In accordance with its process at the time, IBAC did not summarise or particularise the allegations. IBAC provided PSC with a copy of the IBAC complaint form, leaving the interpretation of the allegations as a matter for Victoria Police. IBAC's referral letter requested that Victoria Police provide it with the complete investigation file, including any additional information about any action or proposed action, at the conclusion of the investigation.

IBAC advised Emma in writing that:

- *'after consideration of the information'*, IBAC had made a decision to refer the complaint to PSC for investigation;
- the complaint had been assessed as a 'protected disclosure complaint' under the *Protected Disclosure Act 2012*; and
- IBAC will request a report on the results of PSC's investigation and any action taken or proposed to be taken and review the report.

From the outset, there were issues with the PSC investigation.

First, PSC allocated the investigation to a local police member working in 'general duties' (**the local police investigator**) in the same division as the members who were to be investigated. The local police investigator was due to commence two months of leave within the investigation period.

Additionally, the local police investigator was appointed and briefed by a colleague who was involved in the provision of the alleged leaked information that was a subject of the complaint. In that context, it is noteworthy that the colleague's accompanying briefing memo trivialised the very serious subject matter of the complaint and included a significant amount of information about the welfare concerns held for the perpetrator.

Emma raises conflict of interest concerns about the PSC investigation

After Emma was contacted by the local police investigator assigned to her case, she formed a view that that investigator had a clear conflict of interest and/or bias. She complained to IBAC that the investigator appeared to have pre-judged the case. She asked IBAC to consider re-assigning the case to somebody without a conflict of interest.

In response, IBAC said any concerns should be raised with PSC directly. IBAC noted that the matter had been 'flagged for review'²³ by IBAC, and that concerns about the investigation could be raised with IBAC when the matter was being reviewed. At this time, Emma continued to live in high-risk family violence circumstances.

PSC finalise the investigation with findings of 'Unfounded'

PSC signed off on the investigation that had been allocated to the local division and produced an investigation report (**PSC investigation report**) four months after IBAC referred the matter to PSC. The PSC investigation report described the allegations as two instances of leaked information. While the PSC investigation found that there were indeed disclosures of Emma's confidential information, both allegations were determined to be 'unfounded'.²⁴ Unfounded is defined as 'the available evidence clearly establishes that there are no grounds for the complaint whatsoever'.

In the PSC investigation report, the local police investigator stated that the flow of information was appropriate and reasonable during early intervention and formalisation of full intervention orders for protection of (Emma) and her family and also regarding welfare concerns for (the perpetrator).

Outcome letter sent to Emma's residential address

After finalising the investigation, Victoria Police sent Emma a letter regarding the outcome. Emma had informed IBAC that any correspondence in relation to her complaint should be sent to her PO Box to avoid the perpetrator having access to it. IBAC provided her complaint form, which included Emma's PO Box, to Victoria Police as part of the referral. Victoria Police sent the letter to Emma's residential address instead.²⁵ The letter had been opened when Emma found it.

23 An IBAC review would occur after Victoria Police had finalised its investigation.

24 See definition of determination of 'unfounded' in IBAC's 'Audit of Victoria Police complaints handling systems at regional level' September 2016 www.ibac.vic.gov.au/docs/default-source/reports/audit-of-victoria-police-complaints-handling-systems-at-regional-level.pdf?sfvrsn=3c86e75_5 page 59.

25 PSC claim that IBAC had failed to pass on information that no correspondence should be sent to the residential address. This matter is discussed further in this report at 'Issue 3 – IBAC's handling of the complaints'.

IBAC'S review of the PSC investigation

PSC provided the investigation report and file to IBAC for review four months after it had finalised the investigation report.

IBAC commenced its review seven months after receiving the investigation report and file from PSC. By the time the IBAC review was finished, the PSC investigation had been finalised for over a year, and almost two years had passed since Emma submitted her first complaint to IBAC.

IBAC acknowledged the delay in conducting its review and apologised to Emma for the delay.

Throughout the course of PSC's investigation and IBAC's review Emma reported to IBAC that she continued to experience both ongoing family violence and inadequate police responses to her family violence issues. Emma alleged that police members facilitated a breach of the FVIO by passing on a message from the perpetrator to Emma. Additionally, Emma noted an ongoing failure by Victoria Police to investigate or prosecute breaches of the FVIO by the perpetrator.

Notably, while IBAC was reviewing the PSC investigation, the perpetrator received a reduced sentence on appeal, at least in part due to an '*absence of recent offending*'. Emma informed IBAC of her view that the reduced sentence for the family violence conviction was a result of Victoria Police's failure to investigate or prosecute breaches.

Twenty-one months after Emma made her first IBAC complaint, she emailed the IBAC Commissioner directly regarding the '*delays and failures*' of the process in relation to her first complaint. She also informed the Commissioner that she had gone to the media.

IBAC refers the matter back to Victoria Police after reviewing the PSC investigation

IBAC's review of the PSC investigation took six months to complete. From its review of the IBAC file, the VI observed the following:

- Before Emma emailed the IBAC Commissioner indicating that she had spoken to the media, draft documents on the IBAC file indicate that IBAC was tending towards finding that the PSC investigation and findings were '*reasonable and evidence-based*';
- After Emma spoke to the media and emailed the IBAC Commissioner directly, IBAC's approach changed, and it identified significant issues with the Victoria Police investigation;
- IBAC ultimately determined that the allegations were not fully explored, there were conflicts of interest, and that the findings of '*unfounded*' were not appropriate;
- IBAC noted two systemic issues around Victoria Police's management of family violence complaints involving police members and sought action on one; and
- IBAC referred the matter back to PSC and asked PSC to note the deficiencies and reconsider the outcome of the investigation. IBAC sought that PSC undertake the required action within five weeks.

PSC appoints a different investigator to undertake re-investigation

Upon receiving the outcome of IBAC's review, PSC appointed a different police member to re-investigate the complaint.

From the outset, there were issues with PSC's re-investigation. The appointed member did not work for PSC; again, they were in the same division as the officers under investigation, which was also the perpetrator's former division. Again, the officer appointed to investigate the matter had weeks of leave planned during the investigation period, which resulted in a six-week delay in the finalisation of the investigation.

IBAC engaged with PSC in an attempt to improve the timeliness of the re-investigation. IBAC also began to actively engage with the complainant.

Emma provides IBAC with information obtained under the FOI Act

While PSC's re-investigation was underway, Emma provided information to IBAC that had been released under the *Freedom of Information Act 1982 (FOI Act) (FOI information)*. The FOI information:

- consisted of Victoria Police documents on the issue of family violence incident-related crime and responses to criminal matters involving Victoria Police employees as respondents;
- highlighted a key concern of Victoria Police as *'there is evidence to suggest we police ourselves differently'*;
- appeared to have been used by Victoria Police in discussions about desired improvements within Victoria Police;

- indicated that Victoria Police's response to family violence matters involving employee respondents was significantly inconsistent with responses that did not involve employee respondents; and
- indicated that Victoria Police was grappling with how the organisation should respond to evidence demonstrating that Victoria Police were *'policing the community differently to how they police themselves'* in order to improve responses to family violence involving employees.

Overall, the FOI information supported the assertions in Emma's complaint that there was a significant systemic problem in the way police responded to violence allegedly perpetrated by police.

IBAC write to Victoria Police about 'Family Violence involving Victoria Police employees'

During PSC's re-investigation, the IBAC Commissioner wrote to the Chief Commissioner referencing Emma's case and noting some of the issues identified by IBAC in its review of the first investigation. The IBAC Commissioner acknowledged the *'work undertaken by Victoria Police to improve gender equality, police culture and family violence policing'*, and sought *'advice'* outlining Victoria Police's *'work addressing issues associated with family violence perpetrated by police employees'*. IBAC's request for advice from Victoria Police was just months after Emma informed IBAC that she continued to be denied appropriate police responses to ongoing family violence by Victoria Police.

Victoria Police's response to IBAC focussed on the positive work underway in relation to police perpetrators of family violence and did not reference any of the statements in the FOI information regarding evidence that police were policing themselves differently.

Outcome of PSC's re-investigation

PSC's re-investigation took place in two stages.

First, the investigating officer produced a re-investigation report (**re-investigation report**).

PSC finalised its re-investigation report six weeks after the deadline imposed by IBAC, which was more than two years after Emma's first IBAC complaint.

The re-investigation report found that *'the quality of the investigation and final report was lacking and failed to identify key issues'*. Contrary to the findings of the first PSC investigation, the complaint regarding the escape plan disclosure was substantiated. A recommendation of a *'no complaint'*²⁶ finding was made in relation to another alleged disclosure, as it was said to be sanctioned by law.

Second, the re-investigation report was reviewed by a more senior officer (**Superintendent review**). The Superintendent review noted that the initial PSC investigation did not sufficiently evidence whether the police officers who released the information would be able to articulate the lawful basis on which they did so. The report also found that:

- criminal offences under the *Victoria Police Act 2013* (Vic) should have been considered, but were now statute barred;
- the actions of the Victoria Police officers that the allegations related to should have been established as breaches of discipline;
- there were issues regarding police failing to take an accurate report or record of a family violence incident and obscuring the investigation (action was recommended regarding those matters); and
- Family Violence Command should continue work undertaken to deal with employee family violence.

The recommendation in the final point above illustrates that this PSC re-investigation and report took a more systemic approach than had previously been the case. However, the scope of the Superintendent's review was limited by the narrow scope of the task set by IBAC, and the timeframe to respond to IBAC's review.

IBAC'S assessment of the re-investigation

Two months after IBAC received the outcome of Victoria Police's re-investigation, and more than two years after Emma's first IBAC complaint, IBAC wrote to Emma to advise of the outcome of its review of PSC's re-investigation.

IBAC advised Emma that it was satisfied that Victoria Police had *'appropriately and adequately addressed the issues highlighted'*. IBAC also noted that the re-investigation of the complaint was *'of good quality'* in that *'all relevant legislation and policy was considered, applied and analysed'*.

26 A determination of 'no complaint (sanctioned by law)' is defined as 'a query or complaint by a person that is subsequently found to be an action sanctioned by law', see IBAC's 'Audit of Victoria Police complaints handling systems at regional level' September 2016 www.ibac.vic.gov.au/docs/default-source/reports/audit-of-victoria-police-complaints-handling-systems-at-regional-level.pdf?sfvrsn=3c86e75_5 page 59.

Emma's second IBAC complaint: Detrimental treatment

Almost two years after her first IBAC complaint, and while that complaint was being re-investigated by PSC, Emma informed IBAC that she had continued to receive detrimental treatment from Victoria Police in relation to the handling of her family violence matters.

IBAC told Emma that her concerns would need to be pursued by a second IBAC complaint. IBAC confirmed that it would accordingly treat the information Emma had provided regarding detrimental action as a second complaint to IBAC (**second IBAC complaint**).

In the second IBAC complaint, the allegations about Victoria Police were categorised as:

1. failure to obey instructions or policies and exhibit the expected duty of care towards Emma and her children;
2. inappropriate allocation of PSC file for investigation to a general duties member with no family violence experience and nearly two months of leave booked during the investigation;
3. failure to investigate FVIO breaches; and
4. detrimental action.

IBAC refer Emma's second complaint to Victoria Police

A few weeks later, despite the referral of the first complaint taking more than two years to finalise, and despite the very significant issues IBAC had identified with the PSC investigation, IBAC determined to refer Emma's second complaint to Victoria Police as the more appropriate body to investigate it.

IBAC referred matters 1, 3 and 4 to Victoria Police for investigation and marked the file for review. Matter 2 was dismissed on the basis that it had already been investigated as part of Emma's first IBAC complaint.

Against each allegation in the IBAC decision documentation is a recommendation along the following lines:

Recommend the complaint be referred to Victoria Police who are best placed to confirm the veracity of the allegation and marked for review. It is also noted that the alleged conduct is identified as a current IBAC strategic issue and is of current media interest.

The documentation contains no analysis of why these factors make Victoria Police more appropriate to investigate the complaint.

Having decided to refer the matter, IBAC wrote to Emma to advise of its decision and seek her 'consent' to its referral to Victoria Police, failing which there will be no investigation. Relevant extracts follow:

IBAC considers it appropriate that Victoria Police be given the opportunity to investigate and address your concerns, particularly in light of the further work done, and undertakings given by Victoria Police in respect of its (previous) investigation. It is IBAC's intention to review the Victoria Police investigation of allegations 1, 3 and 4 once completed.

Given that your complaint has been determined to be a public interest complaint, IBAC is required to secure your consent to refer allegations 1, 3 and 4 to Victoria Police for investigation. Please advise whether you give your consent for this referral by ...

If you do not consent ... IBAC has determined that it will not take any further action in relation to these matters as they do not meet the threshold for IBAC to investigate and there is no other body to which the matters can be referred for investigation ...

Issues identified by the VI

ISSUE 1 IBAC'S referrals to Victoria Police

IBAC's decision to refer the first complaint to Victoria Police resulted in a substantial failure in its investigation about the conduct of Victoria Police members.

Despite the very significant issues IBAC had identified with the PSC investigation, and the consequences of the referral of the first complaint taking more than two years to finalise, IBAC referred Emma's second complaint to Victoria Police.

It is the VI's view that if IBAC's process had required a careful written examination of the relevant issues relating to whether it was more appropriate for Victoria Police, rather than IBAC, to investigate the complaints, IBAC may have identified that there were risks involved in referring Emma's matter to Victoria Police.

Decision to refer the first complaint to Victoria Police

IBAC's referral of the first complaint to Victoria Police took place without careful written examination of the relevant issues.

IBAC's referral power is set out in section 73 of the IBAC Act. Under section 73(1), IBAC must refer the matter to a person or body if IBAC considers that:

- a. the subject matter of the complaint or notification is relevant to the performance of the duties and functions or the exercise of powers of that person or body; and
- b. it would be more appropriate for the complaint or notification to be investigated by that person or body rather than by the IBAC.

Section 73(1)(b) imposes a high threshold before a matter is to be referred. That section requires not only that it be appropriate for the organisation to investigate the complaint, but that it be more appropriate for the complaint to be investigated by that organisation than by IBAC.

IBAC's application of section 73 of the IBAC Act in relation to Emma's first complaint

As noted above, in reviewing IBAC's handling of Emma's complaints, the VI has sought all relevant documents from IBAC. Despite the recommendations made in the VI's Integrity Report [IBAC: Police Misconduct Complaints](#) and accepted by IBAC, there is almost no information on the IBAC file regarding the process of or reasons for IBAC's decision. Specifically, in support of IBAC's decision to refer, there was no evidence of:

- any documentation demonstrating that IBAC turned its mind to whether Victoria Police was the more appropriate body to investigate the complaint, as is required by section 73(1);
- any contemporaneous documentation evidencing the basis on which IBAC made the decision to refer;
- IBAC considering whether the decision to refer would have any impact on the complainant's welfare (or that of her children); or
- IBAC considering the impact on relevant rights or obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) including their rights to recognition and equality before the law;²⁷ privacy and reputation;²⁸ and the protection of families and children.²⁹

²⁷ Section 8 of the Charter.

²⁸ Section 13 of the Charter.

²⁹ Section 17 of the Charter.

Without interviewing the decision makers, the VI cannot draw an inference that IBAC gave no consideration to these issues. However, the purpose of this report is to highlight that had IBAC undertaken written analysis of whether it was more appropriate to refer the complaint, there were factors that may have become clearly apparent and may have resulted in a different decision:

- at the complaint's core was an alleged inability or unwillingness of Victoria Police to impartially investigate and act against its own members;
 - Emma's first complaint alleged that the police conduct was a matter of systemic importance; Emma had explicitly raised systemic issues with police procedures and policies;
 - the family violence experienced by Emma was ongoing. There were very serious risks to the safety of the complainant and her children, and it may have been foreseeable that new matters might arise as police continued to handle the family violence matters;
 - consideration of the complainant's welfare, including the very real and serious family violence risks, the trauma that the complainant had experienced, and the impact of IBAC not considering the matter until Victoria Police had completed an investigation;
- there was a risk of actual or perceived conflicts of interest on the part of members of Victoria Police who were tasked with investigating their colleagues. This was an ongoing and known issue highlighted by IBAC in its [2018 Audit of complaints investigated by PSC](#) which stated that in 95% of files audited there was no evidence the investigator had considered conflicts of interest at any time during the investigation.³⁰ An earlier IBAC audit identified that 17% of investigators assigned to complaints were not appropriate to be assigned the case due to conflicts of interest.³¹ The issue of conflict of interest in police undertaking investigations in relation to their own members was raised in the IBAC Committee's 2018 Report;³²
 - IBAC cannot control whether PSC refers an investigation back to the local region, so it is relevant to consider the possibility that a local region will investigate a referred matter, and to also consider the potential consequences if a conflict of interest materialises. The risk was heightened in Emma's case as her complaint involved the alleged leaking of confidential information with resulting consequences for her safety.
 - The matter was complex, sensitive and ongoing; and

30 IBAC 'Audit of complaints investigated by Professional Standards Command, Victoria Police' June 2018 www.ibac.vic.gov.au/docs/default-source/research-documents/report_audit-of-complaints-investigated-by-professional-standards-command-victoria-police_june-2018.pdf?sfvrsn=f9e27675_2 page 25.

31 IBAC 'Audit of Victoria Police complaints handling systems at regional level' September 2016 www.ibac.vic.gov.au/docs/default-source/reports/audit-of-victoria-police-complaints-handling-systems-at-regional-level.pdf?sfvrsn=3c86e75_5 pages 36-37.

32 For example see IBAC Committee 2018 Report, comments submitted by St Kilda Legal Services [IBACC 58-06 Text WEB 2wVYGrf.pdf \(parliament.vic.gov.au\)](#) page 232.

- IBAC’s Operation Dawson, an own motion investigation, was underway. While the report was not finalised at the time of the decision to refer, the investigation was well underway, and it is likely that IBAC was alive to the factors subsequently noted in the report.³³ The report discusses ‘poor complaints management by PSC’,³⁴ specifically raises ‘inappropriate classification’ of matters and states that IBAC had repeatedly raised concerns with Victoria Police about the management of conflicts of interest in the context of complaint handling.³⁵

For completeness, the VI notes that IBAC had flagged Emma’s first complaint for review. To the extent that this was intended to be a safeguard against any perceived risks associated with referral, it was unlikely to – and did not – ameliorate the above factors. If an IBAC review identified defects in the Victoria Police investigation, the response would result in a foreseeably lengthy and difficult process for the complainant, reducing the chances of a more immediate improvement to Victoria Police’s response to serious and ongoing family violence.

Decision to refer the second complaint to Victoria Police

Considering the significant issues IBAC observed in Victoria Police’s handling of the first complaint, and which it raised in its review, IBAC’s decision to refer Emma’s second complaint to Victoria Police may not have resulted in a conclusion that it was more appropriate for the second complaint to be investigated by Victoria Police rather than by IBAC itself if careful written analysis of that referral decision had been undertaken.

As with the referral of the first complaint, the IBAC file, with respect to the processes leading to the referral of the second complaint, does not evidence any written assessment of whether Victoria Police was the more appropriate body to investigate the complaint, or any written analysis of the potential impacts on the complainant’s welfare that may result from such a decision.

The factors set out in relation to the first complaint that were relevant to whether referral was the appropriate decision apply equally to the second complaint.

33 IBAC Operation Dawson ‘An investigation into alleged misconduct by a former Victoria Police Superintendent’ report December 2021, page 7.

34 IBAC Operation Dawson ‘An investigation into alleged misconduct by a former Victoria Police Superintendent’ report December 2021, page 11.

35 Similar issues had also been raised in IBAC’s audits of police complaints handling at a regional level and by PSC, which were published in 2016 and 2018 respectively. See IBAC ‘Audit of Victoria Police complaints handling systems at regional level’ September 2016 www.ibac.vic.gov.au/docs/default-source/reports/audit-of-victoria-police-complaints-handling-systems-at-regional-level.pdf?sfvrsn=3c86e75_5 and IBAC ‘Audit of complaints investigated by Professional Standards Command, Victoria Police’ June 2018 www.ibac.vic.gov.au/docs/default-source/research-documents/report_audit-of-complaints-investigated-by-professional-standards-command-victoria-police_june-2018.pdf?sfvrsn=f9e27675_2.

In addition, at the time IBAC made the decision to refer Emma's second complaint, it had had the opportunity to witness the PSC investigation process that had resulted from the decision to refer the first complaint. IBAC had also received a substantial volume of information and analysis from the complainant. As set out below, it is uncontroversial that PSC's investigation had significant failings, which substantially impacted upon both the investigation of the complaint and the welfare of the complainant. Some specific relevant factors include that:

- Significant conflicts of interest were evident in the investigation of the first complaint. This was noted by IBAC when they referred the first complaint back to Victoria Police following its review;
- IBAC's review identified evidence that police members had attempted to undermine Victoria Police's investigation into the first complaint, where police members involved said they were 'confused', or 'got their wires crossed' about how they learned of the complainant's plan to escape the family violence by leaving the relationship. This was further supported in PSC's re-investigation report, which highlighted 'obscuring behaviours' by police in relation to their handling of the family violence matter. IBAC noted that Victoria Police had created investigation files in relation to some Victoria Police members;
- at the time of the decision to refer Emma's second complaint, IBAC was in possession of the FOI information that confirmed that Victoria Police itself was concerned that they 'police themselves differently' in relation to family violence. The FOI information indicated that despite having 'many employees who experience family

violence, many employees who commit family violence and some employees who are 'repeat perpetrators', Victoria Police did not have a clear approach to perpetrators who were employees'. These concerns both highlight a risk that the complaint would not be investigated impartially or adequately, and go to the core of Emma's complaints;

- The process in referring the first complaint for investigation by Victoria Police, and the subsequent review by IBAC resulted in significant delays that impacted on the complainant's welfare. Approximately two months before it made the decision to refer Emma's second complaint (and as the first complaint approached the two-year mark), IBAC emailed Emma to specifically acknowledge the very long delays and the adverse impacts that the delays had had on her. Despite its power under section 78 of the IBAC Act to require information within a specified timeframe, IBAC suggested that it could not address or prevent the delays, noting that 'IBAC cannot direct or enforce an immediate response from Victoria Police'; and
- Emma had repeatedly stated that she had been subjected to detrimental action, such as inadequate police responses to ongoing family violence, because of the first IBAC complaint. Having Victoria Police members investigate the second complaint may have increased the risk of detrimental action and therefore increased ongoing risks related to family violence. This formed a central part of the second complaint.

IBAC's process did not, but should have, required a careful written examination of relevant issues relating to whether it was more appropriate for Victoria Police, rather than IBAC, to investigate the second complaint.

Referral to Victoria Police not withdrawn

There were points at which it was appropriate for IBAC to at least consider withdrawing the referral of the first complaint to Victoria Police pursuant to section 79(2).

The IBAC Act gives IBAC the broad power to withdraw a complaint that is referred under section 73. Section 79(2) states that:³⁶

- (2) At any time after the IBAC has made a referral to which this section applies of a complaint or notification to the IBAC, the IBAC may—
 - (a) determine to investigate that complaint or notification under Division 4; and
 - (b) withdraw that referral by providing written notice to the person or body to which the complaint or notification was referred.

One such point occurred three months after IBAC received the first complaint, when the complainant raised concerns with IBAC about the investigator assigned by PSC. She told IBAC that, *'the investigator knows some of the individuals concerned with my complaints, is currently working in the division where my complaint arose, and has in dealing with me been condescending, and dismissive – appearing to already pre-judge and make conclusions about my complaint'*. As a result, the complainant had no faith in the integrity of the investigation on the basis of an apprehension of bias.

The IBAC file does not record whether IBAC considered exercising the power under section 79(2) in response to Emma's concerns, or whether it escalated the concerns to a more senior officer for consideration. The file records IBAC's response to Emma stated that any concerns about PSC's investigation should be raised with PSC directly.

Interviewing IBAC officers may have revealed that the approach was discussed. However, it is the VI's view that IBAC ought to have a process for escalating issues of conflicts of interest or bias allegations raised by complainants whose complaints have been referred for investigation to Victoria Police. If IBAC's process required recorded analysis about whether to withdraw the referral at that point or engage with PSC about the allocation of the matter, this would help ensure an independent investigation.

In its 2018 report, the IBAC Committee presented its view in relation to IBAC's power to withdraw a referral, stating that:

Best practice principles require the fair, impartial, thorough and timely investigation of complaints; global oversight of all investigations by an external agency; and the authority of that agency to intervene and undertake its own investigation where necessary. The Committee believes, as part of the process of ensuring the adequacy of Victoria Police investigations of complaints, that IBAC be required to withdraw a referral from Victoria Police when IBAC considers that Victoria Police is not investigating a complaint fairly, thoroughly and without unreasonable delay. In those circumstances, IBAC would be required to take over responsibility for the complaint and investigate it itself.³⁷

³⁶ Section 79(1) contains an exemption that does not apply in this case.

³⁷ IBAC Committee Report 2018 [IBACC_58-06_Text_WEB_2wVYTGrf.pdf \(parliament.vic.gov.au\)](#) page 236.

The IBAC Committee made a recommendation³⁸ that the IBAC Act be amended to require IBAC to withdraw a complaint in certain circumstances,³⁹ however the recommendation was not implemented.

ISSUE 2

No written assessment of welfare risks

At times, IBAC's process did not result in active management of the risks posed to the welfare of Emma and her family.

Welfare consideration at first referral

The documents provided to the VI do not demonstrate that IBAC undertook a written assessment or analysis of the clear and ongoing welfare risks in connection with the decision to refer the matter. The risks were clear and ongoing as Emma identified in her first complaint that there were steps she could not take if she felt unsafe as she had lost confidence in Victoria Police due to the alleged leak.

It is the VI's view that IBAC needs a policy or procedure that requires consideration of welfare risks when IBAC makes a decision to refer in circumstances where there is a clear and ongoing risk to safety.

In Emma's case, referring the complaint to Victoria Police had negative consequences for Emma and her family. The complaint related to Victoria Police's conduct during an investigation into serious and ongoing family violence and revolved around concerns that Victoria Police was not taking appropriate action in relation to that violence. This left the

complainant and her children in danger. This danger was ongoing at the time of the referral.

In the VI's view, risks to Emma that may have been foreseeable at the time included ongoing risk of harm to the complainant and her children including possible threats to life from the perpetrator, the potential welfare impacts of a protracted investigation of the complaint, the potential that police would view Emma's complaint unfavourably and take adverse action in the context of her ongoing need for family violence policing, and the very real risk that Victoria Police's investigation would not be independent.

ISSUE 3

IBAC'S handling of the complaints

The way IBAC handled the complaints and managed contact with the complainant impeded the quality of the oversight response. Collectively, these deficiencies impacted the welfare of the complainant in circumstances where she continued to suffer trauma associated with family violence.

Communication issues

There were several points at which communication issues impacted Emma. For example:

- During the first Victoria Police investigation into Emma's first complaint, the investigator sent the outcome letter to the complainant's residential address, rather than to a secure PO Box (the address provided to IBAC by the complainant).

38 Recommendation 34: That the Victorian Government seek the amendment of s 79 of the IBAC Act 2011 (Vic) to require IBAC to withdraw a complaint it has referred to Victoria Police—that is, take it over and investigate the complaint itself—when IBAC considers that Victoria Police is not investigating the complaint fairly, thoroughly and without unreasonable delay.

39 *IBAC Committee Report 2018*, recommendation 34 [IBACC 58-06 Text WEB 2wVYTGrf.pdf \(parliament.vic.gov.au\)](#) page 236.

The letter had been opened when it was found by Emma. This was a significant breach of privacy and, in light of the serious family violence the complainant was experiencing, had the potential to put her and her children in danger. PSC subsequently alleged that IBAC had failed to notify PSC that correspondence should not be sent to Emma's residential address. The VI notes that in IBAC's 'Review Findings', IBAC lists this issue as a '*learning for both organisations*' and recommends that Victoria Police contact IBAC to obtain complete information for a referred complaint. However, the VI considers that IBAC should have played a more proactive role, given the welfare implications for the complainant.

- Approximately 18 months after the first complaint was made to IBAC, Emma's social worker informed IBAC that Emma felt '*fragile*' and '*overwhelmed*', was '*vulnerable*', lacked support, and needed notice of any correspondence or conversation so that she could seek a support person. Three months later, IBAC emailed the complainant, without the warning Emma was expecting, to advise that IBAC had determined that the decision to refer her first complaint to Victoria Police was '*open and reasonable*'. Emma reported that she became suicidal after receiving that email and that she '*spiralled for the better part of a week*'; and
- One month later, IBAC again contacted Emma, without the warning she was expecting, to advise that it had decided, in response to her request, not to provide her a copy of the outcome letter that was sent to Victoria Police. The documents available to the VI in the IBAC file evidence that the complainant's mental health appeared to decline, and that she subsequently discussed suicide in her emails.

The VI acknowledges that IBAC had taken some care in its communications with Emma during this later period and that IBAC intended for these communications to be in accordance with Emma's requests. However from Emma's perspective, the manner of communication appeared to be dismissive and impacted her welfare.

Delays

The handling of Emma's complaints was marked by substantial delays – some by Victoria Police and some by IBAC.

When the first complaint was made to IBAC, the matter was dealt with relatively promptly; IBAC referred the first complaint to Victoria Police within six weeks. Following the decision to refer that first complaint, however, there were substantial delays, as follows:

- The first significant delay was by Victoria Police and was the result of PSC providing its investigation outcome and file to IBAC four months after the PSC investigation was finalised;
- Despite the four-month delay in PSC providing the report to IBAC, IBAC did not commence its review for approximately seven months. This occurred in the context of ongoing welfare risks to Emma and her family;
- It does not appear that Emma was provided with any substantial updates on the progress of the complaint until after she approached the media and contacted the IBAC Commissioner directly; and
- After IBAC's review of the first PSC investigation commenced, it was not finalised for approximately six months (more than a year after receipt of the PSC investigation report, and almost two years after IBAC received the first complaint). There does not appear to be any adequate justification for these delays.

The delays continued with Victoria Police's re-investigation. Relevantly:

- When IBAC referred the first complaint back to Victoria Police, it stated that the relevant actions were to be undertaken within five weeks. Emma was told about this deadline;
- PSC appointed an officer to re-investigate. However, the officer was due to take three weeks' leave upon receipt of the file. Almost a month after Emma had received notification that the matter would be referred back to PSC, PSC emailed her to advise (incorrectly) that the investigation file had not been received by PSC. Emma raised this via email with IBAC and IBAC subsequently resolved the issue with PSC. Given the short deadline given to Victoria Police and communicated to Emma, this delay indicates a communication breakdown;
- PSC did not provide its re-investigation report to IBAC until more than two years after Emma's first complaint was submitted to IBAC, and two months later than the deadline that IBAC had set (and communicated to Emma); and
- Emma highlighted the impacts that the delay had on her in an email to IBAC. Importantly, it led to potential charges against the officers involved becoming statute barred; the PSC re-investigation report concluded that there may have been summary offences committed under the *Victoria Police Act 2013* (Vic), but the time limit for commencing such charges had expired.

The VI acknowledges that not all the delays were directly caused by IBAC. Several periods of delay were caused or contributed to by Victoria Police processes. However, in light of the potential risks to Emma, it is the VI's view that even where these delays were not directly caused by IBAC, having made the decision to refer, and to review the investigation by

Victoria Police, it is reasonable to expect a greater level of proactive engagement and liaison. IBAC's active engagement with Victoria Police did not commence until Emma went to the media and complained directly to the IBAC Commissioner. IBAC provided its review outcome within a month after that direct complaint and there is documentary evidence of IBAC's regular engagement with Victoria Police from that time about PSC's re-investigation of the first complaint following IBAC's review.

Contact with Emma

The totality of the documents available to the VI illustrate that, especially in relation to the first complaint, IBAC failed to regularly update Emma and appeared generally unresponsive to her concerns about PSC's approach to the investigation. Regular engagement did not begin until Emma went to the media and emailed the IBAC Commissioner directly with her concerns.

IBAC also refused to provide documents sought by Emma. It is arguable that this refusal was not consistent with the IBAC Act. However, in the event that it was, a flat refusal was not proper in the circumstances; if IBAC decided to refuse requests, it should have at least sought to provide more information about the contents of the documents.

For example, when IBAC sent Emma a letter summarising its findings from the review of PSC's investigation, IBAC did not provide a copy of the letter it sent to PSC or provide detail of the recommendations it said it had made. Emma subsequently emailed IBAC requesting a copy of the 'recommendations'.

In response to Emma's request, IBAC sent an email advising that an IBAC officer would consider the request in relation to the outcome letter and cited that there were 'procedural fairness and policy issues associated with providing the complainant a copy'.

Shortly afterwards, IBAC concluded that there was no obligation to provide the letter that was sent to PSC if Emma had been provided with information about the 'recommendations'. IBAC refused to provide a copy of the outcome letter that it sent to PSC. Following a request from Emma for IBAC to re-articulate its reasons for not providing the PSC outcome letter, IBAC decided that the letter already provided to her fulfilled IBAC's obligation to provide information about 'recommendations' made.

In the VI's view, it is not clear that IBAC was in fact prohibited from providing Emma details of what was sent to PSC.

Even if IBAC was not required to provide the PSC outcome letter, in circumstances where there is no bar to doing so, IBAC could have provided more detail in line with the following best practice principle recognised in the 2018 IBAC Committee's Report:⁴⁰

Public scrutiny: procedures and decision making should be open and transparent in order to ensure accountability.

Further, IBAC's response appears to demonstrate insufficient regard for the very real basis for Emma's request for fuller information regarding a process that was at that stage drawn-out and in circumstances in which the handling of the matter had led her to distrust the process.

It is the VI's view that if IBAC did not wish to provide the full outcome letter to Emma, IBAC could have provided her with further information such that Emma was able to understand more about IBAC's communications with PSC about her complaint.

Refusal to provide reasons for the decision to refer

Emma raised concerns about IBAC's decision to refer the first complaint to Victoria Police. In response, IBAC told her that the decision was '*open and reasonable*'. IBAC does not appear to have provided any further meaningful information about why its decision was open and reasonable.

The VI does not consider that IBAC was required to provide formal reasons for the decision. However, even if IBAC was not strictly required to provide reasons, it would have been preferable for IBAC to provide some level of information regarding the reasons for that decision from a welfare perspective.

If IBAC had made a careful written determination of the factors relevant to a decision as to whether Victoria Police were the more appropriate body to undertake the investigation, rather than IBAC itself, IBAC may have identified the systemic issues raised by Emma and the conflict of interest risk associated with a referral.

Complaint fragmentation

IBAC's handling of Emma's complaints led to a complex fragmentation of the complaints.

After the first complaint was referred to PSC, Emma raised concerns with IBAC about deficiencies in police process for investigating the complaint about police. IBAC responded by telling her she should raise these matters directly with PSC, or alternatively, raise them with IBAC when it was reviewing the PSC investigation. The practical effect of this was that Emma then communicated with two separate bodies about the handling of the complaint. This was an additional burden on

40 IBAC Committee Report 2018, 2.4 Best practice principles [IBACC_58-06_Text_WEB_2wVVTGrf.pdf \(parliament.vic.gov.au\)](#) page 43.

Emma in circumstances where family violence, and Victoria Police's investigation of that violence, was ongoing.

IBAC's practice at the time, which was followed in good faith, was to refer complaints in full.

However, in not confirming or particularising the first complaint before referral, in conjunction with the decision to refer, there was a risk that the complaint would be narrowly construed. IBAC's failure to confirm with Emma that the first complaint was complete and that it had correctly understood her concerns meant that she sought to provide further information as the investigation progressed. Because the matter had been referred and was in progress, further information could not be added to the original complaint. This created fragmentation and complexity that made the process more difficult for Emma and reduced the overall standard of the investigation.

Failure to properly act on issues with Victoria Police's first investigation

The decision to refer and the fragmentation caused by it was compounded by the fact that IBAC did not take a comprehensive or thorough approach to reviewing or following up on issues with Victoria Police's first investigation.

The IBAC file contains documents drafted by IBAC during the first three months of IBAC's review of Victoria Police's investigation that provide noteworthy insight into the approach that IBAC appeared to be taking prior to Emma engaging with the media.

These are documents marked with 'draft' or 'superseded', so some caution must of course be taken with the conclusions that can reasonably be drawn from them. However, they appear to indicate that IBAC was on a path of endorsing the outcome of the first Victoria Police investigation before the complainant went to the media. IBAC's proposed approach, containing comments and changes made in the weeks preceding the media attention, included:

- that IBAC should approve the findings that the complaints were 'unfounded';
- referring to the issue of 'victims of family violence connected to serving members' as a 'peripheral issue';
- that IBAC was of the view that the purpose of the complainant's ongoing engagement with IBAC was 'unclear' and referred to an investigation under a different agency's remit;
- treating issues regarding 'misuse of information' as a privacy issue;
- framing the issue as a problem of 'unclear role of a family violence victim to assist police'; and
- noting the issue of a potential conflict of interest regarding the role that the officer, who provided the briefing to the first investigator, had in the investigation but limiting that to a 'perceived conflict' because the officer had signed the conflict of interest form for the investigating officer. In doing so, IBAC ignores that officer's inappropriate role in appointing and briefing the investigating officer given that officer was involved in the events being investigated; a far more significant conflict of interest, and also the fact that conflicts of interest are to be managed, not merely disclosed on a form.

The apparent change in IBAC's approach is reflected in the complainant's own words contained in one of her emails to the IBAC Commissioner five months after IBAC's review commenced:

... IBAC seemingly only became interested in picking up my complaint to review (and started reviewing it) when I advised IBAC that the matter ... had hit the press ... the same complaint file that IBAC had essentially done nothing with for 2 years ... I do not believe ... (IBAC's) behaviour meets community expectations or IBAC's external representations about its role and function. I note that it was a near miss for IBAC that the (media) opted not to feature IBAC's failures in my case as part of its story ...

After Emma spoke to the media and emailed the IBAC Commissioner directly, IBAC took a more robust approach to the complaint than that which is indicated by the documents discussed above.

Four weeks after Emma's email to the IBAC Commissioner, IBAC sent a letter to PSC and the complainant with findings from IBAC's first review. IBAC raised issues with the first investigation, which included:

- that the allegations framed as 'gossip' rather than unauthorised disclosure of information inappropriately narrowed the scope of investigation;
- consideration was not given to breach of Information Privacy Principles;
- the above resulted in a finding of 'unfounded', despite the investigation revealing that personal information was disclosed, and a failure to take action against the members concerned;
- there had been a failure to properly investigate and interview relevant subjects of investigation;

- there had been a failure to name relevant members who were listed as 'unknown', even though the outcome was sent to them, indicating that they were known;
- there were conflicts of interest in the handling of the complaint and in its referral; and
- there was a lack of divisional separation between the members handling the victim's welfare and those handling the employee's welfare.

Given the changes to the relevant documents, the VI's view is that IBAC reconsidered its response to the complaint after Emma approached the media and the IBAC Commissioner directly.

Lack of rigour in addressing issues with the Victoria Police re-investigation

After PSC provided the outcome of its re-investigation to IBAC, IBAC's review of the re-investigation evidences a lack of rigour in analysing the appropriateness and correctness of the re-investigation.

In the early stages of IBAC's review, issues with the PSC re-investigation were noted, as follows:

- IBAC noted the legal position was not black and white and decided that rather than exploring how various legislation could have affected the outcome, the soundness of the recommendations by Victoria Police would be the focus; and
- internal IBAC advice identified issues with the PSC report relating to the re-investigation. Among other concerns, the internal advice noted issues with the analysis in relation to:
 - the application of the *Privacy and Data Protection Act 2014*;
 - the analysis of the viability of charges under the *Victoria Police Act 2013*, including that neither of the officers

writing the reports considered the possibility of indictable charges, which would not have been statute barred;

- consideration of human rights; and
- the applicability of the breach of discipline result.

However, the documents do not evidence any subsequent analysis of the issues raised above or what, if any, action by IBAC they might warrant.

A few weeks later, IBAC wrote to Emma to advise that Victoria Police had *'appropriately and adequately addressed the issues highlighted'*, that the investigation of the complaint was *'of good quality'*, and that *'all relevant legislation and policy was considered, applied and analysed'*. The position described to Emma appears to be in direct conflict with IBAC's own internal advice and analysis referred to above.

IBAC's response to Victoria Police's re-investigation appears to demonstrate a relatively superficial level of oversight of the complaints process. The VI is of the view that very significant issues and defects identified with the re-investigation were not addressed. This included a failure to investigate the possibility that charges could be viable against the relevant officers and a failure to further consider defects in the Victoria Police investigation regarding the applicability of the provisions of key legislation including the Charter.

IBAC did not frame allegations as part of its referral to Victoria Police

As noted above, in accordance with its practice at the time, IBAC did not define or particularise the first complaint when it referred it to Victoria Police. Instead, IBAC simply forwarded the completed complaint

form. This is despite an ongoing IBAC investigation ([Operation Dawson](#)) which highlighted the concerns with Victoria Police about the inappropriate classification of matters and poor complaints management by PSC.⁴¹

The PSC investigation report demonstrates that the complaint was assessed narrowly and inappropriately as an issue involving *'gossip'*. Victoria Police documents also refer to the matter as confidential information *'circulating at police stations re her relationship issues with police member'*.

This characterisation by PSC simultaneously minimises the seriousness of the allegations that led to the complainant's safety being jeopardised, obscures the systemic issues involved in the matter, and precludes any real examination of potential corrupt conduct by officers involved. The issue complained about was plainly and explicitly a systemic one. However, it was framed by PSC as an issue involving individual instances of misuse of information.

IBAC's own characterisation of the first complaint in its internal records limited the subject of the first complaint to the two examples Emma provided under the heading *'corrupt conduct details'* on the IBAC complaint form. Both of these examples involved disclosures of information that Emma felt endangered her and her children.

The remainder of the information contained in the complaint, described under the headings *'complaint details'*, *'impact'* and *'desired outcomes'*, appears not to have been considered. IBAC does not appear to have considered the complaint holistically, which resulted in mischaracterising the complaint as a *'privacy matter'* in the IBAC records. In doing this, IBAC either failed or declined

⁴¹ IBAC Operation Dawson 'An investigation into alleged misconduct by a former Victoria Police Superintendent' report December 2021, page 11.

to address the systemic issues that were both specifically raised by Emma and evident from the conduct that she alleged.

The failure on the part of IBAC to specify allegations in the referral to Victoria Police also likely contributed to at least some part of the lengthy delays in the finalisation of the first complaint. For example, one of the areas of concern identified in IBAC's review of the first Victoria Police investigation was that PSC's investigation was *'inappropriately narrowed'*. This led to the matter being referred back to Victoria Police (the re-investigation) and subsequently IBAC's second review.

The VI acknowledges that IBAC reports that it introduced a practice of providing PSC with drafted allegations in 2019 and considers this a positive approach.

IBAC's letter to Emma about the referral of her second complaint to Victoria Police states:

... we do not propose to refer specific allegations to Victoria Police. Instead, IBAC will include your complaint email dated ... to Victoria Police so they understand the nature of your complaint as described by you.

The VI accepts IBAC's representation that it referred the whole complaint for the benefit of the complainant. However, in light of IBAC's finding in its review that PSC had inappropriately narrowed the scope of the investigation of the first complaint, it was foreseeable that this could happen again.

The advantage of IBAC particularising the allegations is to ensure that all aspects of the complaint are carefully considered. IBAC's articulation of the allegations will also influence the scope of the investigation, even if IBAC uses the complainant's articulation of the allegations. That is, IBAC's adoption of a complainant's allegations will carry more weight.

ISSUE 4

Consideration of corrupt conduct and detrimental action in complaints about Victoria Police

Failure to consider corrupt conduct

A further and fundamental issue in IBAC's handling of these matters is that IBAC characterised the allegations as police misconduct for the purposes of the protected disclosure assessment but did not record analysis or a conclusion about whether the conduct described by the complainant may meet the definition of 'corrupt conduct' under the IBAC Act. IBAC states that it did consider this issue, but there is no written evidence of the process IBAC undertook to consider whether the conduct was 'corrupt conduct', and no decision recorded on the file.

IBAC has primarily treated the complaint as a police misconduct issue regarding the misuse of information.

Corrupt conduct is defined in section 4 of the IBAC Act to include conduct of any person that adversely affects the honest performance by a public officer of his or her functions. It can also include the misuse of information whether for the benefit of the officer or for any other person. 'Public officer' is defined in section 6 of the IBAC Act to include a member of Victoria police personnel.⁴² The conduct must be conduct that would constitute a relevant offence, defined as an indictable offence or specified common law offences including misconduct in public office.

42 See paragraph (i) of the definition of 'public officer' in section 6(1) of the IBAC Act.

In the VI's view, the pattern of behaviour by Victoria Police officers described by the complainant warranted analysis as allegedly corrupt conduct because Emma's claim, which met IBAC's threshold for a protected disclosure complaint, raised for consideration:

- whether the relevant police officers did not honestly perform their duties, in that they applied different standards or processes to the perpetrator than they would have applied to a person who was accused of the same offences but was not a member of Victoria Police; and/or
- whether the relevant police officers misused information received from the complainant to the benefit of the perpetrator.

It is somewhat difficult to ascertain precisely how IBAC approached the matter initially, because IBAC did not seek to confirm its understanding of the complaint at the outset and its engagement with Emma was minimal. However, in the absence of a recorded decision, the VI cannot be satisfied that IBAC gave meaningful consideration to whether the complaint was a potential corruption issue.

Emma reported to IBAC that when she raised concerns about IBAC's handling of her case, and expressed that she felt *'family violence was not of importance to IBAC'*, she was told that IBAC prioritised *'far more important issues of corruption'*. Whilst it may not have been IBAC's intention to suggest that her matter was not about corruption, this experience gave Emma the impression that IBAC did not see the behaviour described in the complaint as corruption.

IBAC also failed to action the issue as a systemic one until two years later, after completing its review of PSC's investigation. Importantly, systemic corrupt conduct is a matter that is to be prioritised under the IBAC Act. Had IBAC undertaken written analysis of the decision to refer the first complaint, and addressed whether the conduct alleged was corrupt and / or systemic, IBAC may have formed the view that it was more appropriate for IBAC to investigate Emma's complaint.

The decision to refer the first complaint to Victoria Police and the subsequent issues with PSC's characterisation of the complaint had real and detrimental impacts on the quality of the investigation, on the welfare of the complainant and her children, and arguably on their safety.

There were serious conflicts of interest throughout the investigation, which could have been avoided if IBAC had undertaken the investigation, and may also have been avoided if the nature of the complaint and the associated risk for Emma had been discussed with PSC at the time of the referral. In relation to the first complaint to IBAC, PSC assigned an investigator who was briefed, in a manner that appeared to trivialise the subject of the matter, by a member who had been involved in the chain of communication that resulted in the disclosures that were a subject of the complaint.

Similarly, in PSC's re-investigation, the file was allocated to an investigator who was in general duties in the same division as the officers under investigation and, formerly, the perpetrator.

The way IBAC handled the complaints failed to ensure that there was an independent investigation of the complaints, including whether the complaints involved corrupt conduct and/or detrimental action toward the complainant.

ISSUE 5

IBAC'S lack of focus on systemic issues

In her first complaint, under the heading 'desired outcomes', Emma explicitly sought a process change at Victoria Police so that where a police spouse is a family violence victim, their matter is handled by a family violence unit that is not in the division where the perpetrator works and that is not staffed by the perpetrator's colleagues. Emma identified that that would eliminate the moral hazard that appears to have materialised here – and ensure that what has happened to her does not happen to anyone else. Emma also sought disciplinary action against the officer or officers responsible for the alleged leak.

When IBAC referred Emma's first complaint, there was a lack of focus on these key systemic issues; it is possible that the decision to refer and the process for referring contributed to this lack of focus. By referring Emma's complaint to Victoria Police without raising systemic issues, IBAC missed an opportunity. IBAC's review of the PSC investigation sought action on the geographical (divisional) separation issue that Emma had raised two years earlier in her complaint and also noted the systemic issue of giving primacy to the family violence victim when balancing employee welfare and victim welfare.

The PSC investigation was narrow in scope and IBAC limited its review to that scope. The outcome of IBAC's narrow review scope and timeline for re-investigation was that there was never any substantial examination of the systemic issues that were explicitly raised in Emma's first complaint.

It is plain that IBAC considered the investigation by police was unduly narrow; this was acknowledged by IBAC when it referred the matter back to Victoria Police (who then undertook the re-investigation). The investigation report characterised the complaint as two separate allegations that *'information was leaked...as gossip'* despite the information that was disclosed presenting significant risks to welfare on both occasions, and the disclosures occurring in the context of serious and ongoing family violence.

In relation to the first complaint, IBAC noted issues with the investigation and asked Victoria Police to reconsider the findings of *'unfounded'*. The outcome of the PSC re-investigation was that breaches of discipline should have been established against the relevant officers, and that consideration should have been given to charges under the *Victoria Police Act 2013*. This re-investigation highlighted substantial flaws with the first investigation. Importantly, in the circumstances of the case, it is the VI's view that the flawed first investigation was arguably a reasonably foreseeable product of the IBAC decision to refer. This consequence should have become apparent to IBAC after Emma brought the apprehension of bias to its attention. Unfortunately, after issues regarding the scope of the investigation had been raised by IBAC and the matter referred back to Victoria Police, the re-investigation continued to consider the matter as an issue of privacy breaches, rather than a potential systemic issue as outlined in the original complaint submitted to IBAC by the complainant.

ISSUE 6

Failures in IBAC'S dealings with the VI

Failure of IBAC to notify the VI of Emma's complaint about IBAC

Under section 71 of the IBAC Act, IBAC has an obligation to notify the VI of any complaint or notification to IBAC that involves conduct of IBAC or any IBAC officer.

Four months before IBAC notified the VI that Emma had complained about IBAC, Emma emailed the IBAC Commissioner directly to complain about the way that her matter had been handled. While she had expressed to IBAC general dissatisfaction with the complaint process beforehand, it appears that most of the grievances before this email related to the conduct of the PSC investigation. The VI views the complainant's email to the IBAC Commissioner as a complaint that clearly comes within the scope of section 71. IBAC did not notify the VI of this complaint.

Two months later, Emma again emailed the IBAC Commissioner to complain about both IBAC and PSC's handling of her complaint, stating:

... The PSC and IBAC delays of years will result in the member responsible for leaking my safety and escape plan to (the perpetrator's) supporters, not being held to account or facing discipline consequences, despite admissions, strong electronic evidence, and the proven consequences of that unlawful disclosure upon my (family) and upon me. Given what I have been put through by IBAC and PSC, all of this is extremely disappointing. I no longer have any faith whatsoever in the integrity of IBAC or 'the system' ...

Emma went on to discuss 'failings of IBAC'. Again, IBAC did not notify the VI of what was undoubtedly a complaint about the conduct of IBAC or an IBAC officer.

IBAC verbally foreshadowed that it would be notifying the VI of a complaint under section 71 but did not provide detail of the complaint to the VI. It is the VI's view that a verbal 'notification' without detail of the complaint would not meet the requirement in section 71. The longstanding, embedded process is for IBAC to make detailed and written disclosures to the VI of a complaint or notification involving conduct of IBAC or IBAC Officers.

Nine days later, IBAC advised Emma that the VI had been notified of her complaint about IBAC's handling of the matter. However, the VI did not receive the formal notification until five weeks later, after prompting by the VI.

At that time, the VI raised the delayed notification with IBAC and acknowledges that IBAC confirmed in writing that IBAC had overstated their position when they represented to Emma that the notification had been made to the VI about her complaint, given sufficient detail (e.g., the 'actual details of the complaint') was not provided to the VI until several weeks later.

IBAC stated in its notification letter to the VI that it was the complainant's preference 'not to have another agency become involved'. However, in the audio recording of Emma's conversation with IBAC, Emma told IBAC that they should not treat her matter any differently regarding notification to the VI. In any event, a complainant's wishes cannot override the very clear statutory obligation set out in section 71 and IBAC acknowledges its obligations under section 71.

Conclusion

Based on its review of IBAC's complaint files, it is the VI's view that by making complaints to IBAC, Emma sought the following:

- An improved police response for police spouses to ongoing family violence by police;
- An independent investigation of alleged corrupt conduct by police involved in the disclosure of her confidential information that put Emma and her children at risk of serious harm;
- An independent investigation into detrimental action which she alleged involved delays, inappropriate assignment of her matters to police members inexperienced in family violence matters, conflicts of interest amongst the members dealing with the matters and assignment of her complaint investigations to police members who were to have a significant period of leave during the investigation period; and
- An independent investigation of the system, policies and procedures that enabled these circumstances to exist for spouses of Victoria Police members who are victims of family violence.

Instead, IBAC's oversight and referral of Emma's two complaints to Victoria Police had the following consequences:

- The possibility of corruption by police was not pursued;
- Serious conflicts of interest at Victoria Police impacted the independent investigation process;
- The first complaint was narrowly construed as an individual privacy matter;
- The alleged unwillingness of police to act against their own was effectively overlooked;
- The opportunity for considering summary charges against relevant officers was lost;
- There were negative impacts on Emma and her children's welfare; and
- Emma did not receive a better police response in the context of serious, and ongoing, family violence.

The VI views these consequences as a fundamental failing of the integrity system and has determined to make several recommendations to strengthen the integrity system.

The VI is pleased that IBAC has accepted these recommendations.

The VI will continue to work with IBAC to help ensure that the recommendations are applied in relation to Emma's second complaint and any other victims of family violence perpetrated by police who come forward to IBAC. If the integrity system can be strengthened, more victims may feel safer to come forward to Victoria Police and to IBAC.

Recommendations

Recommendation 1

That IBAC amend its formal processes to provide for better recording and documentation of its consideration of whether to refer a matter to an external body or person under section 73 that includes:

- a) consideration of whether it is more appropriate for the other body or person to investigate the complaint or notification rather than IBAC;
- b) consideration of the impact of such a decision where there are clear and ongoing risks to the complainant;
- c) consideration of any relevant rights or obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic);
- d) for police complaints, consideration of whether any alleged conduct could be a breach of section 227 of the *Victoria Police Act 2013* (Vic), which relates to unauthorised access to, use of or disclosure of police information; and
- e) a written record of the considerations.

Recommendation 2

Given the frequency of referrals to Victoria Police, that IBAC develop a policy and/or guideline in line with recommendation 1 to support:

- consideration of whether allegations in a complaint about police misconduct, considered together, may constitute a pattern or system of detrimental action and/or corrupt conduct;
- consideration of whether to refer matters to Victoria Police; and
- consideration of the risks raised by this report in referring matters to Victoria Police, such as conflict of interest, risks to health and safety and matters which may require prioritisation (for example, complaints involving ongoing risks such as family violence).

Recommendation 3

That IBAC develop and implement policies and/or guidelines outlining:

- circumstances in which IBAC officers should consider withdrawing a referral under section 79 of the IBAC Act; and
- factors that may tend towards it being appropriate to withdraw a referral.

Recommendation 4

That IBAC develop guidance to ensure that it notifies the VI at the earliest opportunity of any complaint or notification involving the conduct of IBAC or an IBAC Officer in line with section 71 of the IBAC Act.

Appendix A

IBAC's Response

Special Report: IBAC's referral and oversight of Emma's complaints about Victoria Police's response to family violence by a police officer

Response by the Independent Broad-based Anti-corruption Commission

Part A: Procedural issues and legal considerations

1. Introduction

- 1.1 In providing this response to the Victorian Inspectorate's (VI) Special Report, the Independent Broad-based Anti-corruption Commission (IBAC) acknowledges that acts of family violence perpetrated by Victoria Police officers are entirely unacceptable. The particular allegations of misconduct by police in responding to this matter have been taken very seriously by IBAC at all stages of its dealings and interactions with Emma, including during the process of referring, reviewing and handling Emma's complaints, during the Victorian Police investigation of her complaints, and throughout the course of the VI's review leading to this Special Report.
- 1.2 Emma's welfare remains of significance to IBAC in providing its responses to the VI's findings and review, including in its support for reform that will enhance the ability of IBAC and Victoria Police to protect victims of police misconduct.
- 1.3 IBAC confirms its commitment to appropriate regulatory oversight, which ensures transparency and accountability of the way in which both Victoria Police and IBAC address complaints. IBAC is also committed to continuous improvement towards a strengthened integrity system, in which people impacted by family violence perpetrated by Victoria Police officers feel safe to come forward to both Victoria Police and IBAC, and public trust in the IBAC review process is ensured.
- 1.4 Further, with these objectives in mind IBAC has, from the outset of this matter, supported the purpose of the VI recommendations to improve IBAC's ability to perform its role to the maximum possible extent.
- 1.5 It is also with these commitments and purposes front of mind, and its awareness of the importance of Emma's welfare, that IBAC expresses its significant disappointment with the fundamental flaws and inadequacies in the approach the VI has adopted in the conduct of this review.
- 1.6 The VI's review commenced on the flawed basis that IBAC has a "default approach" of referring complaints about police conduct to Victoria Police based on its resourcing constraints and that the referral of Emma's complaints was "likely contrary to law" for considering these resourcing

constraints. IBAC objected to this finding on the basis that the VI had incorrectly concluded that the decision to refer was made only on the basis of resourcing constraints and failed to recognise that there were no legislative criteria guiding IBAC's decision to refer. In the absence of interviewing the relevant decision makers or providing reasons for this finding which would enable IBAC to respond, the VI has resiled from this finding. However, the report continues to contain inferences that this is IBAC's approach to Victoria Police complaints.

1.7 To summarise, the failings include:

- (a) The VI's insistence on limiting its review to IBAC's file, and the resultant flawed reasoning in the Special Report that findings about the IBAC decision-makers' rationales and reasons could be deduced from a paper based file review, without interviewing or speaking to those officers responsible for the decisions to refer Emma's complaints to Victoria Police. For the reasons set out in this response, the VI's process of reasoning was fundamentally unsound resulting in a number of illogical conclusions that are not legally open to be made on the material before the VI. The persistent refusal to interview and take evidence (or provide IBAC with the opportunity to obtain statements) from any of the IBAC decision-makers whose decisions are the subject of scrutiny, suggests that the VI was disinterested in obtaining information from them that would prevent the VI from making his intended findings.
- (b) A failure to understand IBAC's decision making processes and the significant work that is undertaken to analyse and make recommendations in relation to each complaint and allegation.
- (c) Selective use of IBAC documents to reach particular conclusions. IBAC recently provided the VI with an additional 40 documents not previously in the possession of the VI. A number of these documents evidence communications between IBAC and Victoria Police about Emma's matters. It is difficult to see how the VI could rely on and maintain the same key findings set out in an earlier draft of the Special Report that did not consider those additional documents.
- (d) Despite the VI's previous acknowledgment about the impact IBAC resourcing has on the number of matters it can investigate itself, the relevance of these resourcing constraints on the number of complaints IBAC refers back to Victoria Police, and the lack of criteria in section 73 of the *Independent Broad-based Anti-corruption Commission Act 2011 (Vic) (IBAC Act)*, the VI has retained the position in the Special Report that resourcing is simply a matter for IBAC, and otherwise dismissed it in his consideration of IBAC's handling of Emma's case. Both the legislative mandate and resourcing considerations that IBAC is constrained by are centrally relevant to understanding the various issues which have been identified by the VI in the Special Report. Simply ignoring those factors in the process of making findings about IBAC's decision making processes in this case inevitably leads to

unreliable and unhelpful findings, comments and opinions which detract from the purpose the Special Report is intended to achieve.

- (e) The VI, who was aware that it has never been the practice of IBAC to record in the files of the hundreds of complaints per year that are referred to Victoria Police for investigation, significant detail of the reasons why the referral is made, chose to draw conclusions from the absence of written information on IBAC's file that certain matters had (or had not) been taken into account, rather than interview relevant IBAC officers. From the outset the error in drawing any conclusions from the absence of particular information on a file was raised with the VI. Having been expressly pointed out by IBAC in its prior responses, the VI has now recognised that *"[w]ithout interviewing the decision makers, the VI cannot draw an inference that IBAC gave no consideration to these issues"*. The VI then nonetheless maintained this faulty inferential reasoning process concluding that an absence of evidence on the IBAC file supports the conclusion that particular matters were not taken into account adequately or not taken into account at all by the relevant IBAC decision-makers. The VI has effectively entrenched the procedural unfairness IBAC had drawn its attention to in response to previous iterations of this Special Report.
- (f) The manner in which the VI has conducted the review gives rise to a reasonable apprehension that the VI has not brought an impartial mind to the resolution of the issues relevant to the review, and of bias against IBAC. In addition, the VI's purported urgency in tabling the Special Report at the expense of completing a thorough investigation and allowing adequate time for IBAC to respond where there is otherwise no rush to do so or any reasonable justification in the form of potential prejudice to the VI's review, is inexplicable.
- (g) The VI's various findings to the effect that there were foreseeable perceived conflicts of interest which should have led to a decision by IBAC to investigate Emma's complaints itself, rather than refer them to Victoria Police, fails to address the inevitability of such perceptions and the risk of actual conflicts of interest in circumstances where the legislative framework within which IBAC operates requires that IBAC refer the vast majority of complaints it receives that fall within its jurisdiction to Victoria Police.
- (h) The VI has failed to take into account its natural justice and welfare obligations to current and former IBAC officers involved in handling Emma's complaint. IBAC raised with the VI that the individuals, both past and present senior officers, who made the decisions now the subject of scrutiny have not been spoken to, or otherwise afforded an opportunity to respond. By failing to provide those IBAC officers whose decisions are scrutinised critically in the Special Report with an opportunity to provide explanations and information to the VI, the VI has not adequately protected the welfare of IBAC officers in the management of this complaint.

1.8 These matters are further detailed below.

- 1.9 In the context of a genuine desire to improve its processes, IBAC, on multiple occasions, first invited and then requested that the VI address these failings. The VI has chosen not to do so.
- 1.10 As a consequence, the Special Report has been prepared without the benefit of all relevant information. If the path suggested by IBAC had been taken, the Special Report would have more adequately illustrated the factors which need to be considered and addressed in order to ensure a strengthened integrity system for the benefit of victims of police misconduct.
- 1.11 The procedural and content deficiencies IBAC has identified in relation to the Special Report in its previous responses, and in this response, are to such a serious and obvious extent that IBAC considers that if the Special Report is finalised in its current form, it will be affected by the following grounds of jurisdictional error:
- (a) IBAC will have been denied procedural fairness in that:
 - (i) the IBAC decision-makers have at no stage been interviewed by the VI on the iterations of the adverse findings contained either in the first draft, foreshadowed second draft or the reframed third draft of the Special Report;
 - (ii) the reframing of alleged deficiencies in the decisions made by the IBAC decision-makers are such that an opportunity ought be provided for those decisions-makers to respond as a matter of fairness;
 - (iii) the alternative to interviewing the IBAC decision-makers would be to allow a reasonable opportunity to them to prepare and submit (through IBAC) witness statements responding to the reframed adverse findings; and
 - (iv) The VI has refused to allow an opportunity for IBAC to obtain and submit witness statements responding to the matters in the reframed adverse findings, without any reasonable justification in the form of potential prejudice to the VI's review;
 - (b) the reframed adverse findings – purportedly made by the VI on the *Briginshaw* standard - are not legally open to be made by the VI on the basis of the material before it without either conducting an interview or allowing an opportunity for witness statements to be obtained or submitted; and
 - (c) the refusal to grant a reasonable period for IBAC to obtain witness statements responding to the reframed adverse findings is unreasonable and plainly unjust in the sense described by the High Court in *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332.
- 1.12 IBAC has consulted on these matters with King's Counsel and believes that it has strongly arguable grounds to obtain relief on the basis of jurisdictional error.
- 1.13 IBAC considered and rejected the course of commencing an application for judicial review, however, because IBAC considered that it would not be in the public interest for two of Victoria's major integrity institutions to be involved in litigation and at the public's expense. Accordingly, IBAC

has refrained from issuing an application for judicial review in the Supreme Court in respect of the legal deficiencies contained in the Special Report, but considers it necessary, for the purposes of properly understanding its contents, that those procedural and content deficiencies be identified in this response.

1.14 IBAC has significant concerns that as a result of the errors in the VI's approach and the consequential illogical and unfair findings and conclusions, the VI's process has not furthered, but hindered, his stated desire to improve the Victorian integrity processes and functions that IBAC strives to strengthen.

1.15 We now turn to each of the failings identified above in more detail.

2. A paper based review, no interviews

2.1 The critical importance of the subject matter addressed by the Special Report – the protection of the welfare of victims of police misconduct – not only warranted but made it essential the VI interview the former and current IBAC officers involved in the handling and oversight of Emma's complaints before completing a review based on matters which are only within the knowledge of those persons.

2.2 In circumstances where the serious criticism levelled at the particular IBAC decision makers was directed to failings in the making of their various decisions throughout the course of handling Emma's complaint, the VI denied itself the opportunity to ascertain from them what matters they had actually taken into account.

2.3 Until information and evidence is obtained from those decision makers, the key findings in the Special Report which criticise those decisions:

- (a) are not reasonably open to be made on the material under consideration by the VI; and
- (b) have been the product of a process which failed to afford procedural fairness to both IBAC and the individual decision makers whose decisions are the subject of scrutiny.

2.4 IBAC repeats its significant disappointment that the VI has not conducted any interviews or taken any evidence from the relevant IBAC decision makers responsible for the decisions to refer matters to Victoria Police. Of real concern is the VI's refusal to allow IBAC sufficient time to obtain a detailed account by past and present senior officers in light of the VI's failure to do so as part of this review.

2.5 There is no known reason why this further time could not have been provided to IBAC to undertake this important step, particularly having regard to the importance of the Special Report's subject matter. The VI's unreasonable refusal to provide IBAC time to furnish it with their reasons before the Special Report is tabled is inexplicable.

3. Failure to understand IBAC's decision making processes

- 3.1 The Special Report fails to note that IBAC's Deputy Commissioners make their decisions on whether to dismiss, investigate, or refer a complaint based on the analysis of allegations provided by the assessing officer. Given the high volume of complaints, the assessing officer conducts the analysis of the allegations and recommendations are made to the Deputy Commissioner about how the complaint should be handled. In the event that the Deputy Commissioner thinks a different decision is more appropriate, the Deputy Commissioner will record reasons as to why an alternative pathway is preferred. Under this current system, the Deputy Commissioners can see not only the analysis but the original complaint and any additional information provided by the complainant when making their decision. Despite this, the VI seeks to draw adverse findings against IBAC as a result of its current written records. Given IBAC's ongoing engagement with the VI, it ought to have been apparent to the VI that, even if reasons are not recorded in writing in the form expected or preferred by the VI, the decision maker still conducts a detailed consideration of the issue, and in turn, exercises careful judgment and analysis in relation to each referral decision.
- 3.2 Even though limiting its review to a paper-based review, the VI makes no reference to this extensive consideration of the complaint by the assessment team whose recommendation informs the Deputy Commissioner's considerations.
- 3.3 In effect, and broadly speaking, the VI has sought to stand in the shoes of the IBAC decision-makers who were responsible for the decision to refer the complaint to Victoria Police and make findings with respect to:
- (a) whether those decisions ought to have been made;
 - (b) the elements and factors that were and were not taken into account in making them; and
 - (c) the foreseeability of those decisions.
- 3.4 It is not reasonably open to conclude whether a particular decision to refer was reasonable, and what elements and factors were in fact taken (or not taken) into account at the time of making them, without speaking to the relevant decision-makers involved.
- 3.5 As noted above, the VI has attempted to circumvent these issues identified by IBAC in previous iterations of the Special Report by recognising that "*Without interviewing the decision makers, the VI cannot draw an inference that IBAC gave no consideration to these issues*", and then proceeding to reframe the same adverse findings against IBAC on the basis of an absence of a "*careful written analysis of that referral decision*" by IBAC, rather than the actual failure to take certain relevant matters and considerations into account. Similarly, the VI has reframed its previous adverse findings that suggested particular matters were not, in fact, taken into account by IBAC's decision-makers, to now state that "*The referral was not supported by a recorded analysis as to why it was more appropriate for Emma's allegations to be referred to police for investigation rather than be investigated by IBAC itself.*"

4. Selective use of documents

- 4.1 It is also noted that on or about 15 September 2022, IBAC provided the VI with an additional 40 documents not previously in the possession of the VI. A number of these documents evidence communications between IBAC and Victoria Police about Emma's matters. It is difficult to see how the VI could rely on and maintain the same key findings set out in an earlier draft of the Special Report that did not consider those additional documents.
- 4.2 It is also the case that in some parts of the Special Report, it is evident that the VI has been selective in the way it has portrayed IBAC's communications with Emma. Again, in fairness to the relevant IBAC officers these specific instances should have been raised with them by the VI so that context or relevant information could be offered.

5. The importance of IBAC's resourcing in making its decisions

- 5.1 The importance of resourcing was acknowledged in the following submissions made by the VI to the 2018 IBAC Committee inquiry into IBAC's oversight of Victoria Police:

"If the line is moved so as to require the IBAC to conduct more investigations itself, there will necessarily be resourcing implications in order to avoid other areas of the IBAC's work suffering. (at pages 8-9)

The IBAC has advised the VI that PSC have approximately 208 full-time staff and complete around 150 investigations per year. By contrast, as at June 2016, the IBAC had a staff of 102.5. The IBAC opened 34 investigations during the 2015 – 2016 financial year, of which 47% related to Victoria Police members. While this staff resourcing imbalance remains, there will necessarily be difficulty in the IBAC conducting a greater proportion of police misconduct investigations." (at page 9)

- 5.2 It was also pointed out by IBAC that the VI had made similar acknowledgements in evidence before the IBAC Committee on 5 February 2018, including the following statements:

... we are very conscious in the VI of the statutory framework within which IBAC operates and the resources that it has available to it, which would make it difficult for IBAC to operate other than it currently does in terms of the number of complaints that are referred back to the police. (at page 14 of transcript)

Under the legislation — the IBAC Act — IBAC is required to prioritise the investigation and exposure of serious or systemic corrupt conduct. So it is perfectly understandable that they are going to devote the majority of their resources to that task. Whereas with respect to police personnel misconduct, there is no sort of similar obligation. There is no classification of what might be regarded as serious police personnel misconduct or systemic, where a priority could be given to IBAC to then look at that form of misconduct. (at page 15 of transcript)

As I said, when you look at the resources of IBAC at the moment and the range of functions that they have and the number of complaints that they get, you can understand that they are not set up to investigate all complaints that are made about the police. (at page 16 of transcript)

- 5.3 Consistent with IBAC's commitment to regulatory oversight, and the availability of a strong integrity system which ensures accountability in the way in which both Victoria Police and IBAC address complaints, IBAC confirms that, for a number of years, it has been recommending to Government additions to its powers and resources which would enhance its ability to oversight Victoria Police and thereby improve its ability to respond to and support victims of police misconduct, like Emma.
- 5.4 To ensure that any recommended reforms, and the underlying findings which inform them, best achieve their intended purpose of a strengthened integrity system with the trust and confidence of the public, it is important to take into account the heavy restrictions IBAC faces in the form of its legislative mandate and its budget and resource constraints.
- 5.5 Relevantly in this respect, IBAC notes that:
- (a) over the last three years IBAC has continued to experience a significant growth in complaints and notifications, including those it receives in relation to Victoria Police. In 2019/20, **1342** complaints and notifications were received in relation to Victoria Police and approximately 43% of those were considered appropriate to refer for investigation. By 2021/22, this number had increased to approximately **1965** complaints and notifications about Victoria Police and about 45% of those were considered appropriate to refer for investigation.
 - (b) over this period there was no commensurate increase in IBAC's resourcing and funding other than in 2021 when IBAC received some fixed term funding.
 - (c) each complaint and notification is assessed with detailed and individualised consideration given to the decision to dismiss, refer or investigate each allegation contained in the relevant complaint. This function and assessment is necessarily carried out within the scope of IBAC's functions and powers, including under sections 71 and 73 of the IBAC Act.
 - (d) on adopting that legislative framework, Government has actively contemplated, and indeed taken the policy position that Victoria Police can and should investigate its own officers despite there always being, at the very least, a perceived conflict of interest. Government's clear policy mandate is further evidenced by the respective significant resourcing provided to Victoria Police Professional Standards Command compared to IBAC to investigate matters of police corruption and misconduct.
- 5.6 IBAC will accept recommendations in relation to how its policies and processes could improve, but these are the realities of the constraints and parameters within which IBAC operates and within which:

- (a) its decisions must be understood; and
- (b) any improvements must be implemented.

5.7 As noted above, the VI has previously publicly recognised and accepted the relevance of these constraints. Having done so, it is disappointing and unhelpful that the VI has expressly refuted the relevance of these considerations in the Special Report, or otherwise failed to properly take them into consideration in attempting to make findings and recommendations intended to improve Victoria's integrity processes.

5.8 In particular, it is disappointing that the VI has retained the position in relation to its recommendations that *"IBAC's allocation of resources [is]... a matter for IBAC - if IBAC considers more resources are required to implement the VI's recommendations, that is a matter for IBAC to raise with the Victorian government in the context of the government's review of police oversight"*.

5.9 But IBAC's resource capability is relevant to more than just the implementation of any recommendations in the Special Report. Both the legislative mandate and resourcing considerations that IBAC is constrained by are centrally relevant to understanding the various issues which have been identified by the VI in the Special Report.

6. Resourcing impact on IBAC of VI's requirement for "careful written analysis"

6.1 It is of critical relevance to the Special Report that it is made clear that section 73(1) of the *IBAC Act* does not prescribe the factors or matters which must or may be taken into consideration by IBAC in reaching a decision to refer a complaint for investigation by another body, such as Victoria Police. Rather, section 73 is discretionary and a number of factors may be taken into account in making a decision. The factors include, amongst other things, the resources available to IBAC to conduct an investigation, as well as the suitability, expertise and capability of the referred organisation to conduct the investigation.

6.2 The VI's suggestion that detailed written records and careful written analysis (which is now the key underlying premise of the VI's various adverse findings) should be prepared by IBAC's decision-makers for every complaint that is considered for referral pursuant to section 73 of the *IBAC Act*, will impact significantly on IBAC's ability to assess matters in a timely way, without taking into account the significant resourcing implications of such a practice.

6.3 IBAC considers that the recording of any analysis supporting its decisions to refer a complaint is to be considered having regard to the nature and content of the complaint or notification being assessed. Any records or analysis by IBAC to evidence a decision is a case-by-case assessment.

6.4 Ignoring these legislative and resource related factors significantly undermines the utility of the findings, opinions, comments and recommendations set out in the Special Report, because it leaves IBAC with adverse findings that are framed without reference to (and in some respects, with express ignorance of) some of the most significant factors which have impacted upon those findings, and are centrally relevant to any recommendations that are intended to rectify them.

7. The VI's Special Report is based on flawed reasoning

7.1 In order to properly understand the significant shortcomings of the Special Report, it is necessary to understand the procedural background and context in which it has been prepared and finalised.

7.2 IBAC notes the following chronology leading to the Special Report:

- (a) On 26 May 2022, the VI provided IBAC with an initial draft report titled "*IBAC's referral and oversight of complaints about Victoria Police*" (**Initial Draft Report**).
- (b) On 27 June 2022, IBAC responded to the Initial Draft Report raising significant issues with the approach and conclusions formed by the VI.
- (c) On 31 August 2022, IBAC received a table of responses that the VI proposed to include in the Special Report having regard to IBAC's response in (b) above.
- (d) On 7 September 2022, IBAC responded to the VI's proposed table and identified serious deficiencies in the process and conclusions formed by the VI.
- (e) On 8 September 2022, the VI requested additional documents from IBAC and advised that if it reframed the proposed Special Report it would recommence the natural justice process.
- (f) On 15 September 2022, IBAC commenced providing the VI with additional documentation as requested.
- (g) On 28 September 2022, the VI informed IBAC that it had reframed the draft Special Report and that the 'natural justice' process would commence again. It is noted that the VI only provided IBAC with 7 days to respond despite the process "recommencing".
- (h) On 29 September 2022, IBAC requested further time to respond and to provide statements from the relevant IBAC decision-makers to support its response. IBAC raised its concerns again with the content of the draft Special Report.
- (i) On 30 September 2022, the VI refused IBAC's request for further time.

7.3 That procedural background and context demonstrates that the VI prepared a first draft of the special report in May 2022, which contained several significant shortcomings and deficiencies in both reasoning and process. IBAC drew these shortcomings to the VI's attention and requested that they be rectified for the purposes of re drafting the report in a manner that was fair and accurate. The VI, who was aware that it has never been the practice of IBAC to record in the files of the hundreds of complaints per year that are referred to Victoria Police for investigation significant detail of the reasons why the referral is made, was asked to speak with or interview the relevant IBAC decision-makers responsible for the relevant decision over the referral of Emma's complaint, so as to ascertain precisely what matters were, or were not, taken into consideration. From the outset, the error in drawing any conclusions from the absence of particular information on a file was raised with the VI.

- 7.4 Despite conceding in the Special Report that *without interviewing the decision makers, the VI cannot draw an inference that IBAC gave no consideration to particular issues*", and stating that the VI would revisit the natural justice process, it did not do so. Instead the VI has, while purporting to alter the nature of the adverse findings, continued to make the same findings on the basis of a paper based file review only, and the absence of a "careful written analysis" on the IBAC file. A number of these significant adverse findings have effectively been recast in a manner that fails to rectify their underlying shortcomings and deficiencies.
- 7.5 Despite the purported change in approach by the VI from the Initial Draft Report to the current version of the draft Special Report, it is clear that the views formed by the VI in relation to IBAC's handling of the complaint have persisted throughout the various drafting iterations.
- 7.6 The VI has now concluded that had the relevant IBAC decision-makers conducted a careful written analysis, it could have led to different decisions being made in relation to Emma's complaint. This unsound conclusion is then relied upon by the VI to support the adverse findings ultimately made in the Special Report. In the absence of a discussion with the relevant decision makers and understanding what factors they did in fact take into consideration in reaching their decisions, a finding that if thought processes had been written down, different decisions would have been reached, is fundamentally unsupportable. Noting the procedural deficiencies identified above, this changed form in the VI's basis of reasoning is disingenuous and is a poorly designed attempt to conceal that the VI is still inferring that the decision makers did not take relevant matters into account.

8. Legal error and reasonable apprehension of bias

- 8.1 The manner in which the VI has conducted the investigation has also given rise to a reasonable apprehension *that the VI is not open to obtaining evidence from the IBAC decision-makers and is not bringing an impartial mind to the resolution of the issues before it*, in that:
- (a) IBAC has repeatedly requested, in its various responses to the VI, that if the VI Intended to make adverse findings about the individual decision makers, the VI ought to interview those officers;
 - (b) the VI does not meaningfully acknowledge the fact that Emma consented to the referral of the second complaint to Victoria Police;
 - (c) most concerningly, the VI provided the complainant with a copy of the Initial Draft Report prior to providing it to IBAC for response.
- 8.2 This has created, at the very least, a perception of bias on the part of the VI, in that an expectation has been created in the mind of the complainant that the VI will be making the key adverse findings she has now seen and been provided with.
- 8.3 Additionally, the VI's purported urgency in tabling the Special Report at the expense of completing it fully and completely (by taking statements from IBAC's relevant decisions-makers) in

circumstances where there is otherwise no rush to do so and Victoria Police's investigation remains ongoing, calls into question the VI's agenda in the finalisation of this Special Report.

- 8.4 Despite reframing its previous adverse findings from previous iterations of the draft report, the VI has effectively continued to treat the absence of evidence as evidence that things were not taken into account, which is not a permissible approach to the making of adverse findings of this nature to the *Briginshaw* standard. The VI's findings still impugn the motivations, state of mind and subjective elements of the decision making processes adopted by the relevant individual IBAC decision-makers, irrespective of the reframed rationale (i.e. the absence of a "*careful written analysis*" on the IBAC file) - a matter in respect of which the individuals who made the decisions in question would need to be heard.
- 8.5 With those matters in mind and as set out in the Introduction above, IBAC considers that, if the Special Report is finalised in its current form, the VI's Special Report will be affected by the grounds of jurisdictional error identified in paragraph 1.10 above.
- 8.6 The procedural deficiencies in the conduct of the VI's review have also likely resulted in other highly relevant considerations being omitted or not appreciated by the VI.
- 8.7 The reasons why these particular findings are not reasonably open to be made in the present circumstances are set out in Part B below by reference to the particular "Issues" identified by the VI in the Special Report.

9. Misconceived findings relating to conflicts of interest

- 9.1 The VI's various findings to the effect that there were foreseeable conflicts of interest which should have caused IBAC to investigate Emma's complaints itself, rather than refer them to Victoria Police, fails to address the inevitability of such perceptions and the risk of actual conflicts of interest in circumstances where the legislative and resourcing framework within which IBAC operates requires that IBAC refer the vast majority of complaints it receives that fall within its jurisdiction to Victoria Police on the basis that it is the more appropriate body to investigate.
- 9.2 A finding by the VI to the effect that the potential perceived conflicts of interest inherent in Victoria Police conducting an investigation into misconduct by one its own officers or staff requires a decision that it would be inappropriate to refer a complaint to Victoria Police undermines the legislative framework under which IBAC is expected and required to operate, and would render it inoperable in future. Significant legislative reform and a vast addition to IBAC's resources would be necessary in order for IBAC to have the capability to replicate the resources employed by Victoria Police to investigate police complaints.

10. Natural Justice and welfare obligations

- 10.1 In its further responses to the VI dated 7 September 2022, IBAC pointed out that the individuals, past and present senior officers, who made the decisions now the subject of scrutiny, were not spoken to or otherwise afforded an opportunity to respond. Specifically, IBAC noted that in addition

to leading to significant and serious inadequacies and gaps in the VI's review itself and findings, the IBAC had concerns that by failing to provide those IBAC officers whose decisions are scrutinised critically in the Special Report with an opportunity to provide explanations and information to the VI, the VI was not adequately protecting the welfare of IBAC officers in the management of this complaint.

- 10.2 IBAC noted, in this regard, that the report contained comments or opinions that were adverse to those individuals, and that they are sufficiently identified for the purposes of s 87(3) of the VI Act, because the staff of IBAC and those familiar with IBAC's method of operation are aware of the seniority of the persons who within IBAC ultimately makes the decisions to refer matters as are those acquainted with them (including family and work colleagues). The fact that they are not identified by name does not exclude the operation of s 87(3), as they would be recognised as the persons whose decisions are the subject of severe scrutiny in the VI's Special Report, and they ought therefore be provided with the opportunity to respond.
- 10.3 Rather than seek to afford those decision-makers that opportunity, the VI has amended the report to make the disingenuous claim that "*The findings relate to IBAC; no adverse comments are made about individual officers:*" so as to relieve the VI of the natural justice obligation to those decision-makers. The Special Report is replete with findings, comment or opinion all of which are adverse to the persons responsible for the decisions which the VI suggests, amongst other things:
- (a) were made without consideration of the complainant's welfare;
 - (b) resulted in foreseeable family violence risks, impacts and consequences to the complainant; and
 - (c) were improperly motivated by media scrutiny, rather than the proper considerations those decision-makers were obligated to take into account.
- 10.4 Despite these significant findings, comments or opinions which are adverse to the persons who made the underlying referral decisions, none of them have been provided with procedural fairness—the reasonable opportunity to respond to the VI's criticisms. This was an opportunity which the VI was obliged to afford them. As stated above, the strong inference arises that the VI has been intent to avoid obtaining their account from them as it would highlight the flawed reasoning in drawing conclusions from the absence of recorded reasons, or alternatively, would require the VI to withdraw findings in relation to IBAC's handling of Emma's case which have already been provided to Emma, likely creating an expectation on her part that they will appear in the Special Report.

Briginshaw standard

- 10.5 In the 28 September 2022 draft of the Special Report, the VI asserts that it is approaching its findings based on the principles set out in *Briginshaw v Briginshaw*, but that it did not commence an investigation and interview IBAC's officers. The VI also found that if IBAC had made a "*careful written examination*" or a "*careful written determination*" of relevant matters relating to IBAC's

decisions to refer Emma's complaints to the Chief Commissioner of Police, then IBAC "*may have*" identified additional matters and made different decisions.

10.6 These aspects of the draft Special Report appear to be fundamental to the criticism that the VI makes of IBAC in its Foreword. In this regard, the conclusions reached by the VI in the draft Special Report are not open to the VI without having heard from the IBAC decision makers concerned, or without giving IBAC an opportunity to obtain and submit statements from those people. That is because, implicit in the findings made on the purported *Briginshaw* standard, there is an assumed finding that the factors, matters or considerations were not taken into account by the IBAC decisions-makers.

10.7 In another disingenuous response, rather than seeking to obtain and take into account that critically relevant information, the VI has simply inserted a statement in the Draft Report to the effect that "*the findings of fact in this report are made on a civil standard, namely the balance of probabilities, based on the principles set out in Briginshaw v Briginshaw*".

Part B: Response to the adverse findings identified in the Special Report

IBAC's response to relevant parts of the Special Report is set out below – using the same headings as identified in the Special Report.

11. IBAC's role in complaints about Victoria Police

- 11.1 IBAC considers that the section setting out the definition of corrupt conduct is incorrect as it fails to note that a critical element of the definition in section 4 of the IBAC Act is that the conduct must also be conduct that would constitute a 'relevant offence'. It is noted that 'relevant offence' is defined as an indictable offence or offences committed in Victoria being attempt to pervert the course of justice, bribery of a public official, perverting the course of justice or misconduct in public office.
- 11.2 It is critical that the Special Report correctly acknowledges the elements of 'corrupt conduct', as this is directly relevant to whether the conduct complained of by Emma would meet this definition.

12. IBAC's power to investigate

- 12.1 The Special Report notes the powers of IBAC to dismiss a complaint, investigate a complaint or refer a complaint to another body. The Special Report should note that there is no express legislative provision empowering IBAC to conduct a review of a matter referred to another body and IBAC's establishment of the review process is a mechanism by which IBAC can monitor and consider the adequacy of a body's investigation.

13. Benefits of recording reasons for administrative decisions

- 13.1 The Special Report finds that it would be considered best practice to set out the reasons and rationale for a decision. The Special Report then quotes from a decision of Justice Kirby.
- 13.2 IBAC requests that it is also noted that as Mahoney JA explained in *Soulemezis v Dudley (Holdings) Pty Ltd*, the law does not require even a court to "make an express finding in respect of every fact leading to, or relevant to, his final conclusion of fact"; "nor is it necessary that he reason, and be seen to reason, from one fact to the next along the chain of reasoning to that conclusion."¹

14. IBAC refers Emma's complaint to Victoria Police

- 14.1 IBAC notes that Emma's first complaint was referred to Victoria Police without being summarised. This occurred because IBAC did not, at the time, want to inadvertently miss any aspect of the

¹ (1987) 10 NSWLR 247 at 271

complaint being referred to Victoria Police. This practice has subsequently changed but it should be noted that IBAC acted in good faith at the relevant time.

- 14.2 To the extent the Special Report notes that the Victoria Police briefing memo trivialised the very serious subject matter of the complaint, it should be noted that IBAC played no role, and had no knowledge of this approach being adopted by Victoria Police.

15. Emma raises conflict of interest concerns about the PSC investigation

- 15.1 IBAC notes that Emma was encouraged to raise her concerns with PSC directly. In circumstances where Victoria Police was involved in the investigation and Professional Standards Command is responsible for overseeing the investigation into the complaint, this is an appropriate process of escalation at first instance.

16. Outcome letter sent to Emma's residential address

- 16.1 For accuracy, this section, including its heading, should be amended to say "*Victoria Police outcome letter sent to Emma's residential address*" and "*After Victoria Police finalised the investigation, the Victoria Police Investigator sent Emma a letter regarding the outcome*".

17. IBAC refers the matter back to Victoria Police after reviewing the PSC investigation

- 17.1 IBAC rejects in the strongest possible terms that its approach changed when Emma emailed the Commissioner of IBAC to raise her concerns. IBAC also strongly rejects the suggestion that it changed its approach after Emma contacted the media. There is no evidence of IBAC changing its approach because of media on this matter. IBAC refers to paragraph 23 below and requires these matters be reflected in this part of the report.
- 17.2 The 5th bullet point in this section of the Special Report should also be amended to include that IBAC referred the matter back to PSC with the consent of Emma.

18. PSC appoints a different investigator to undertake re-investigation

- 18.1 This section of the Special Report suggests or implies IBAC was capable of directing the conduct of investigations undertaken by Victoria Police or manage delays that occurred once the matter had been referred to Victoria Police. IBAC has concerns that those findings do not properly take account of the intended purpose of the referral power that an agency to whom the referral is made is responsible for the investigation of the complaint, not IBAC, and that in any investigation delays can occur for a multitude of reasons.
- 18.2 Nevertheless, since October 2021, IBAC requires Victoria Police to provide regular progress updates in respect of all matters IBAC has marked for review and monitors progress by way of traffic light reports. IBAC also now has an escalation process for matters subject to review where the investigation is delayed within Victoria Police.

19. IBAC writes to Victoria Police about Family Violence involving Victoria Police employees

19.1 The Special Report trivialises the Commissioner's letter to the Chief Commissioner of Police (**CCP**). The correspondence is evidence that IBAC had commenced a process to examine the systemic family violence issues. The letter constitutes the first step in an engagement process with Victoria Police, in which the CCP was requested to provide advice outlining Victoria Police's work addressing issues associated with family violence perpetrated by police employees. Subsequently, IBAC undertook significant work with Victoria Police on the development of its employee-related family violence policy as well as in relation to the establishment of the Family Violence Unit in PSC.

20. Outcome of PSC's re-investigation

20.1 IBAC rejects that it set a "narrow task" for Victoria Police in the re-investigation as suggested by the VI in the Special Report. Relevantly, IBAC asked Victoria Police to action, consider, address and provide an explanation in relation to a number of matters.

20.2 IBAC did ask for the matters to be handled quickly by Victoria Police given Emma's welfare and the previous delays. It is manifestly unfair and inconsistent for the VI to criticise IBAC for delays on one hand, but in the same report to criticise IBAC for requesting Victoria Police to act quickly.

21. IBAC refers Emma's second complaint to Victoria Police

21.1 The Special Report is drafted to suggest that IBAC decided to refer Emma's second complaint back to Victoria Police and that the consultation was not genuine. IBAC had previously informed Emma about the requirement for consent where a matter was a public interest disclosure. Accordingly, Emma was aware that her consent would be required prior to any referral of the matter back to Victoria Police.

21.2 The VI has not taken into consideration or appreciated that several emails confirm that Emma consented to the referral to Victoria Police prior to the letter being sent. The letter referred to by the VI at page 21 of the Special Report was a standard form letter that is sent to complainants, notifying them of the referral and formally requesting consent under the *Public Interest Disclosures Act 2012* (Vic) (**PIDA**). The Section Report also does not clarify or otherwise take into consideration, that since January 2020, the PIDA has required referrals to include consultation and consent of the complainant. This was not done for the first complaint referral as it was not statutorily required at this time, but it was in relation to the 2020 complaint. The Special Report does not make clear that Emma provided her consent for the referral of her 2020 complaint but rather seeks to unfairly draw adverse inferences based on the letter.

22. Issue 1: IBAC's referral to Victoria Police

22.1 The "Issue 1" section of the Special Report makes a finding, comment or opinion to the effect that the decision to refer Emma's first complaint to Victoria Police was not reasonably open to the IBAC decision makers, having regard to the matters known by the IBAC decision makers at the time.

22.2 IBAC's response to these matters is as follows:

- (a) As noted in Part A above, it is not reasonably open to the VI to make these findings without speaking to the relevant IBAC decisions-makers. The VI has failed to obtain available information as to the matters and considerations taken into account when making the decision to refer the complaint to Victoria Police.
- (b) As a consequence, the Special Report does not acknowledge that in deciding to refer this matter to Victoria Police, IBAC took into consideration a range of factors that led it to consider that Victoria Police was the "more appropriate" body to investigate, in particular, that IBAC did not have specialist investigative expertise to deal with family violence related complaints, whereas Victoria Police did / does.
- (c) While the VI has purported to reframe these adverse findings from the Special Report's previous iteration (which relied upon reasoning that was itself contrary to law, and ultimately withdrawn by the VI), they still ultimately amount to the impermissible drawing of conclusions and inferences on the basis of matters not explicitly detailed or analysed in writing on a file.
- (d) In relying upon the premise that "*the purpose of this report is to highlight that had IBAC undertaken written analysis of whether it was more appropriate to refer the complaint, there were factors that may have become clearly apparent and may have resulted in a different decision*", the VI has proceeded to finalise a review that does not address, and indeed attempts to circumvent, the valid response made by IBAC to the effect that a paper-based review is inadequate to the particular circumstances and subject matter under consideration in the Special Report.

22.3 With respect to the VI's opinion that the relevant IBAC decision-makers may have made a different decision had there been written consideration of the complainant's welfare included on the complaint file, IBAC notes as follows:

- (a) Implicit in the above comment is that IBAC did not take into consideration the complainant's welfare in making a decision to refer the complaint. IBAC notes that such a finding is not legally open to be made without interviewing the relevant decision-maker as to the matters that were, and were not, taken into account;
- (b) Had this step been taken, it would have been apparent that the welfare of Emma and her family was in fact taken into consideration in the decisions to refer Emma's first and second complaints to Victoria Police.

22.4 With respect to the VI's opinion that the relevant IBAC decision makers may have identified that *"there was a risk of actual or perceived conflicts of interest on the part of members of Victoria Police who were tasked with investigating their colleagues"*, and consequently a different decision may have been made, had they *"undertaken written analysis of whether it was more appropriate to refer the complaint"*, IBAC responds as follows:

- (a) inherent in the VI's finding, comment or opinion is that:
 - (i) there is an inevitability of a conflict of interest upon referral to Victoria Police; and
 - (ii) IBAC ought to have foreseen that in this particular matter an actual conflict of interest would arise in Victoria Police's investigation.
- (b) Noting IBAC's legislative framework, and the limits of its powers to manage a complaint it has referred, this particular finding leads to an inference or inevitable conclusion that no complaint is appropriate for referral to Victoria Police by IBAC. Such an inference or conclusion is, of course, misplaced. Referral to Victoria Police, despite the potential for conflicts, is enshrined within the integrity system outlined in the IBAC Act. That is, Government, in legislating this framework, took the position that Victoria Police can and should investigate its own members despite there always being, at the very least, a perceived conflict of interest in circumstances where Victoria Police would be investigating its own officers. However, Victoria Police has been set up for this purpose, and Government's position is further evidenced by the respective resourcing provided to Victoria Police and IBAC to investigate matters of police corruption and misconduct. To suggest that the potential for conflicts of interests as a general rule (as opposed to the presence of obvious conflicts in the particular circumstances before IBAC at the time of the decision to refer) weighs against referral is at odds with IBAC's legislative framework.
- (c) IBAC is highly conscious of the risk of conflicts of interest and seeks at all times to appropriately and effectively remind Victoria Police of its obligations to manage them. As the Special Report notes, IBAC has published reports and made recommendations to Victoria Police regarding improving its management of conflicts of interest. In the above circumstances, when making a referral to Victoria Police it is reasonable for IBAC to expect that Victoria Police are cognisant of IBAC's findings/recommendations and are appropriately managing conflicts. Given the extensive work that IBAC has done over a number of years with Victoria Police around conflict of interest management, it could not be foreseen by IBAC that Victoria Police would not appropriately manage any conflict of interest in this particular matter. Attributing blame to IBAC for poor decisions made by Victoria Police with respect to the allocation of investigators, when IBAC has no visibility of who an investigation is allocated to and no power to direct Victoria Police to make alternative arrangements after the referral has been made, relies entirely on the benefit of hindsight, and is unreasonable and unfair.

- (d) Insofar as conflicts that are evidenced in the particular circumstances before IBAC at the time of decision (which IBAC accepts would be a factor weighing against referral), having regard to the specific circumstances *at the time of the decision to refer*, no such evidence existed to a level that warranted, in and of itself, a decision not to refer to Victoria Police in the manner which the VI has suggested in this finding.
- (e) If the VI's various findings in the Special Report were acted upon in their current form, IBAC is concerned that it would effectively be required to:
 - (i) investigate every complaint itself rather than referring to Victoria Police, due to the possibility of a conflict of interest, including a perceived conflict of interest; and
 - (ii) in the process of deciding to refer or not to refer a complaint to another body, IBAC would be expected to consider matters which are not apparent on the information in its possession, thereby imposing a requirement of foresight which is both unfair and unreasonable.
- (f) The significant impediment that an approach to referral of this nature would have on IBAC's resources would be such that the time taken by IBAC to complete each investigation (without significant resource increases) could be many years, rather than months.

23. Issue 2: Insufficient identification of welfare risks

23.1 The "Issue 2" section of the Special Report makes the serious finding, comment or opinion to the effect that IBAC decision makers managing Emma's complaint failed to sufficiently identify, protect or manage the welfare of Emma and her family. This section of the Special Report (in combination with comments made in the Foreword) also makes findings, comments or opinions to the effect that IBAC's alleged failure to identify, protect or manage Emma's welfare had adverse consequences and impacts for Emma that would have been avoided if IBAC investigated the complaint itself.

23.2 IBAC's response to these matters is as follows:

- (a) The adverse comment in the Special Report to the effect that IBAC emailed Emma without warning, thereby leading her to '*spiral*' and '*become suicidal*' is unfair and fails to take into account the evidence in the possession of the VI. Specifically, the email referred to at page 28 of the Special Report followed an exchange of 27 emails between Emma and an IBAC officer after IBAC had spoken to the social worker, during which time Emma did not raise any welfare concerns about the nature of the contact. Further, immediately upon receiving Emma's email late on a Friday night about her welfare, a senior IBAC officer responded to Emma on a Saturday morning and provided information about access to welfare support. In the month following this email communication, IBAC met with Emma and there were a further 8 emails exchanged between Emma and IBAC, including where IBAC respected the wishes of Emma in relation to when she was ready to receive IBAC communications.

- (b) The VI's assessment generally about the failings of IBAC to consider Emma's welfare, further reveals the inadequacies in conducting a paper-based file review. Had the VI interviewed relevant decision makers, the extent to which IBAC gave consideration to the complainant's welfare would have been evident.

23.3 Similarly, with respect to the inferred finding, comment or opinion that suggests that IBAC's decision to refer Emma's complaint to Victoria Police for investigation carried with it "*foreseeable negative consequences for Emma*", IBAC responds that:

- (a) The VI's findings that the IBAC decision to refer the complaint to Victoria Police had foreseeable negative consequences for Emma and her family is not supported by the evidence. IBAC was aware that a Family Violence Safety Notice (FVSN) and Intervention Order (IVO) was in place at the relevant time. Objectively assessed, the existence of these orders was a reasonable basis to form the view that Victoria Police was taking steps to ensure the protection of Emma and her family's welfare.
- (b) It was not reasonably foreseeable to IBAC that Victoria Police's investigation would be conducted by officers with a conflict of interest – IBAC has repeatedly clearly set out its expectations regarding management of conflicts of interest to Victoria Police. Compliance with IBAC's expectations is what is "reasonably foreseeable".
- (c) With respect to the finding on page 28 of the Special Report, IBAC notes that it was also not reasonably foreseeable to IBAC that Victoria Police officers would inappropriately send correspondence to an address that IBAC had not provided to them.

24. Issue 3: IBAC's handling of the complaints

24.1 The "Issue 3" section of the Special Report makes a series of adverse findings, opinions or comments which relate to IBAC's handling of Emma's complaints more generally.

24.2 In particular, the Special Report makes findings, opinions or comments which suggest that IBAC changed its approach to the handling of Emma's complaints when the matter was reported in the media. IBAC rejects these findings in the strongest possible terms. In response to these serious and unfounded adverse findings, comments and opinions, IBAC notes as follows:

- (a) The VI asserts that it does not consider there is any evidence contained in the IBAC file to support IBAC's position. There is also no proper evidence on the IBAC file to support the VI's position that a shift in approach was the result of the complainant approaching the media, which is what would be necessary to make such a finding on the *Briginshaw* standard.
- (b) The VI's conclusion that IBAC's approach changed following media scrutiny cannot be safely or reliably reached on the basis of relying on draft or superseded documents prepared by junior IBAC staff. The VI in effect acknowledges this in the Special Report when it states "*some caution must be taken*", and yet still proceeds to rely on these

documents, together with (untested) assumptions made in an email by Emma, as the only evidence to support the finding.

- (c) The VI's confirmation that its findings are limited to its review of the IBAC file does not rectify, but rather only confirms the deficiency in the view formed.
- (d) Had the relevant individuals been interviewed, the following additional information would have been apparent:
 - (i) to the extent there was any shift in approach, it resulted from concerns about a number of shortcomings in Victoria Police's investigation of Emma's first complaint that were identified when the relevant decision maker was given a briefing about IBAC's review of Victoria Police's investigation. There is evidence on the file to this effect – the review memo was not signed off by the decision maker and further work on the review was undertaken.
 - (ii) Further, the content of audio recordings of telephone discussions between IBAC officers demonstrate that the IBAC officer in question confirmed there was no change in approach as a result of media activity.

24.3 The Special Report also makes adverse findings to the effect that IBAC was capable of, and failed to manage the delays that occurred in the handling of Emma's complaints. IBAC's response to these matters is as follows:

- (a) Having had significant legal deficiencies identified to the VI with the process and content of prior iterations of the Special Report, the VI continues to make significant findings which suggest or imply that IBAC, after referring a complaint, was capable of directing the conduct of investigations undertaken by Victoria Police, or manage delays that occurred within Victoria Police. IBAC has concerns that those findings are inconsistent with and unsupported by the extent of IBAC's statutory functions and power under the *IBAC Act*. None of sections 73, 78(2), 78(3) or 79(2) of the *IBAC Act* confer upon IBAC power of the kind necessary to direct another body's investigation after the initial referral has been made. Accordingly, the VI's findings will leave the reader of the report with a misunderstanding about the nature and extent of IBAC's legislative powers.
- (b) Further, a conclusion that it is "*reasonable to expect a greater level of proactive engagement and liaison with Victoria Police by IBAC*" is at odds with information currently in the possession of the VI including that IBAC was raising the issues concerning Emma's investigations directly with Victoria Police. Further information about the proactive engagement conducted by IBAC and its officers and whether a greater level of engagement was actually available to IBAC could only be made following interviews with the IBAC decision-makers and officers in question. IBAC has provided the VI with additional documentation (up to 40 new documents) some of which support the existence of proactive

engagement by IBAC yet it appears that information has not been adequately taken into account in forming the adverse comments or opinions.

- (c) There were good reasons why the relevant IBAC officers did not use the power to retract the referral in this instance. This included that Victoria Police's investigation was well underway, with the effect that if IBAC withdrew the referral pursuant to section 79(2) of the IBAC Act due to delay on Victoria Police's part, as suggested as a possibility by the VI here, it would require that the process start again for Emma, likely leading to even further extensive delays. This factor weighed against the exercise of this particular power.

24.4 The Special Report makes adverse findings, opinions or comment to the effect that IBAC's officers were unresponsive and did not adequately update Emma in their communications. IBAC's response to these matters is as follows:

- (a) IBAC took specific care to keep Emma updated throughout the matter. IBAC provided Emma with updates via emails, had a dedicated contact person for Emma who provided regular updates and conducted numerous meetings with Emma. Not all correspondence was in writing. IBAC took care to respond promptly to Emma's communications, give Emma notice of and an opportunity to digest any major developments, confirm Emma's understanding and ensure Emma was not offended or otherwise distressed by the handling of her complaint.
- (b) While IBAC acknowledges that after the initial referral to Victoria Police in 2018 and prior to IBAC conducting its first review of Victoria Police's investigation in 2020, regular updates by IBAC were limited. This was because at the time Victoria Police was the investigating entity and it was responsible for communication with Emma about progress of its investigation.
- (c) To suggest that IBAC was not responsive to Emma at other times is entirely misleading. IBAC notes that between February 2019 to April 2021, IBAC exchanged in excess of 100 emails with Emma to respond to her queries, keep her updated and/or communicate with her. This was in addition to meetings and telephone calls with Emma that form part of the files provided to the VI.
- (d) The Special Report also fails to acknowledge that to assist in communication consistency, IBAC offered to be present in a meeting between Victoria Police and Emma in February 2021 in which Victoria Police was to provide the investigation outcome. IBAC did not ultimately attend, because on the day of the meeting Emma indicated that she did not wish for IBAC to be involved. Emma made positive comments at that time about, for example, IBAC doing everything possible to get a response from Victoria Police, saying IBAC was "*keeping at them*", and handling technology in a manner that was considerate of Emma's circumstances.

- 24.5 The Special Report makes adverse findings, opinion or comment to the effect that IBAC acted unlawfully, or alternatively, improperly by refusing to provide documents sought by Emma. IBAC's response to these matters is as follows.
- (a) IBAC disagrees with the suggestion that it did not provide Emma with information about the outcome of the review. IBAC's letter to Emma contained the same recommendations as provided to Victoria Police, which was explained to Emma.
- 24.6 The VI makes adverse findings, opinion or comment in this section of the Special Report to the effect that IBAC's handling of Emma's complaint was inadequate because IBAC did not provide reasons for its decision to refer. In response, IBAC notes as follows:
- (a) IBAC explained briefly in a letter dated 12 February 2021, the reasons for its decision to refer. There was also a meeting on 20 November 2020 where an IBAC officer attempted to explain the administrative law aspect of the decision to Emma.
 - (b) The audio recordings clearly indicate that Emma told IBAC officers that she had relevant prior expertise and had considered the relevant case law that applied to administrative decision making. During those conversations, Emma's engagement in the conversations clearly indicated that she was well versed in the legal position and had a detailed and thorough understanding of the law. It is misleading to suggest that IBAC failed to explain the legal position to Emma in these circumstances.
- 24.7 The Special Report makes adverse findings to the effect that IBAC's response to Emma's complaints was inadequate, because it did not focus on or address systemic issues in relation to Victoria Police's investigation of complaints of this nature in making its decision to refer. IBAC's response to these matters is as follows:
- (a) Separate to Emma's complaint, work was being, and is still being, undertaken with Victoria Police in relation to the systemic issue of police employees who are perpetrators of family violence. The VI's review has been limited to a review of the complaint file, and thus has not been informed by other information regarding IBAC's prevention, education and policy reform functions.
 - (b) IBAC is also aware that Victoria Police have consulted in depth with Emma regarding the systemic issues her experience is evidence of, including receiving feedback from her on the new VPM on Family Violence. This, as the VI notes in the Special Report, was one of the key outcomes Emma identified she wanted when she made her complaint to IBAC.
- 24.8 To the extent the Special Report makes an adverse finding, comment or opinion to the effect that IBAC failed to summarise Emma's allegations when referring the complaint to Victoria Police for investigation, IBAC responds as follows:
- (a) In making these findings, comments or opinions, the VI has not acknowledged or taken into consideration the reasons for which the complaint was forwarded by IBAC in full, being that

IBAC's previous policy in exercising its power to refer was to refer the complaint in full, rather than by way of summary, to the relevant referral agency. The rationale behind this was to avoid narrowing the complaint or in any way suggesting to the referral agency how to conduct its investigation, in light of IBAC not having any power to direct how an investigation is conducted upon the making of a referral pursuant to the *IBAC Act*.

- (b) IBAC notes this practice changed in 2019, when allegations were particularised and a copy of the complaint was also included with referrals. However, IBAC notes that when the second complaint was referred to Victoria Police in February 2021, it specifically included the allegations as drafted and particularised by Emma herself.

25. Issue 4: Consideration of corrupt conduct and detrimental action in complaints about Victoria Police

25.1 The "Issue 4" section of the Special Report makes adverse findings to the effect that IBAC failed to consider whether the police conduct under consideration amounted to "corrupt conduct".

25.2 IBAC's response to these matters is as follows:

- (a) The VI does not refer to a crucial aspect of the definition of "corrupt conduct" contained in section 4 of the *IBAC Act*, being that the conduct must constitute a "relevant offence".
- (b) Section 4 of the *IBAC Act* describes and defines corrupt conduct, or an attempt or conspiracy to engage in conduct (whether it takes place inside or outside of Victoria), that:
 - (i) adversely affects the honest performance of the functions of a public officer or public body;
 - (ii) constitutes or involves the dishonest performance of the functions of a public officer or public body;
 - (iii) constitutes or involves knowingly or recklessly breaching public trust;
 - (iv) involves the misuse of information or material acquired in the course of the performance of the functions of a public officer or public body;
 - (v) is intended to adversely affect the effective performance of the functions or power of a public officer or public body and results in the person or their associate obtaining a specific benefit,
- (c) A "*relevant offence*" is defined in s 3 of the *IBAC Act* as being:
 - (i) an indictable offence against an Act; or
 - (ii) common law offences: attempt to pervert the course of justice, bribery of a public official, perverting the course of justice or misconduct in public office.

- (d) The threshold set by this definition is accordingly far higher than that underlying the VI's reasoning and findings, and so high that the conduct in question could never have satisfied the definition of corrupt conduct as per the *IBAC Act*. This accordingly raises serious questions about all of the VI's findings in this section, which flow from this definition of corrupt conduct.
- (e) Also implicit in the VI's findings is that in classifying the conduct as "*police personnel misconduct*" rather than "*corrupt conduct*", IBAC somehow minimised, or failed to recognise the seriousness of the conduct in question. However, this implication does not take into account the application of the *IBAC Act*, in defining and describing kinds of conduct. The definition of police personnel misconduct contained in s 5 of the *IBAC Act* confirms that the term covers a broader range of circumstances than "*corrupt conduct*" (in part because the conduct is not required to also constitute an indictable offence), ranging in seriousness, and including:
 - (i) conduct which constitutes an offence punishable by imprisonment;
 - (ii) conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or
 - (iii) disgraceful or improper conduct (whether in an official capacity or otherwise).

26. Issue 5: IBAC's lack of focus on systemic issues

26.1 The "Issue 5" section of the Special Report makes adverse findings, opinion or comments to the effect that IBAC's response to Emma's complaints was inadequate, because IBAC's decision makers did not focus on or address systemic issues in relation to Victoria Police's investigation of complaints of this nature in making its decision to refer.

26.2 IBAC's response to these matters is as follows.

- (a) IBAC took into account its work with Victoria Police on these issues, and the failings identified by IBAC when reviewing Victoria Police's initial investigation, as factors relevant to whether or not to refer Emma's second complaint to Victoria Police. Having taken these factors into consideration, IBAC reached the decision that it was still appropriate to refer on the basis that, amongst other things, IBAC believed Victoria Police was aware of these matters and would be alive to the issues.
- (b) The risks of conflicts of interest and poor investigation of allegations against police officers were highlighted by the Royal Commission into Family Violence (completed in 2015), with recommendations made to Victoria Police to review their policy and practice with respect to these risks. Victoria Police was in the process of implementing those recommendations, and IBAC was aware of the work that was underway and has engaged extensively with Victoria Police on issues relating to police perpetrators of family violence and the development of Victoria Police's policy and operational responses.

- (c) The full extent of IBAC's interactions with Victoria Police on relevant systemic issues is not reflected in the Special Report. IBAC has also provided the VI with additional information to show the contact IBAC had with Victoria Police on these matters and this additional information has not been reflected in the Special Report.
- (d) Further, the VI has not spoken to IBAC about how systemic issues that cannot be dealt with by assessment and review processes are pursued with Victoria Police. Relevantly, in this respect, IBAC's own review of the initial investigation by Victoria Police also uncovered systemic failings, which led to IBAC requiring Victoria Police to reinvestigate the 2018 complaint. The reinvestigation included organisational and systemic reform recommendations.
- (e) IBAC previously requested Victoria Police to fix issues of this nature, which were complied with. IBAC took this into account in making the decision to refer Emma's second complaint. The VI response implies that IBAC knowingly referred the matter in circumstances where there were issues of concern, which is rejected and unfounded.

27. Issue 6: Failures in IBAC's dealings with the VI

27.1 The "Issue 6" section of the Special Report makes an adverse finding, comment or opinion to the effect that IBAC did not properly comply with the requirements of section 71 of the IBAC Act to notify the VI of Emma's complaint.

27.2 IBAC's response to these matters is as follows;

- (a) The Special Report does not acknowledge or take into consideration that briefing material was prepared for IBAC's executive within a week of Emma's email, recommending that the matter be referred to the VI, despite Emma indicating that she did not believe anything of value would come from her taking the matter to the VI. Correspondence to the VI was prepared in the following fortnight.
- (b) However, it was determined that the correspondence should be sent after a meeting that was scheduled to occur with Emma. The reason was to discuss the referral with Emma, and to determine her preference in relation to the complaint.
- (c) It is acknowledged that IBAC has an obligation to refer complaints to the VI, despite any contrary views of the complainant. This obligation was ultimately complied with by IBAC. In this instance, IBAC sought to ensure compliance with section 71 while simultaneously ensuring it remained cognisant and protective of Emma's welfare as far as possible (within the confines and constraints of its legislative obligations). Given the significant emphasis placed on Emma's welfare by the VI (as outlined in its criticisms of IBAC) in this report, the protection and consideration of Emma's welfare ought be a factor taken into account in respect of this matter.

- (d) IBAC also apologised for the delay between its verbal notification to the VI and the formal written notification and provided reasons for the delay. This should be acknowledged in the Special Report.
- (e) IBAC acknowledges that its referral should have been more timely, but points out that the Special Report has failed to properly identify, refer to or otherwise take the above matters into proper consideration.

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