

Integrity Report

Monitoring Project on Victorian Ombudsman Interviews

June 2019

Contents

OVERVIEW	1
COERCIVE POWERS	3
PROCEDURAL FAIRNESS	4
CONTACT WITH WITNESSES	5
METHODOLOGY	7
ANALYSIS	9
COMPULSORY INTERVIEWS – HAPPENING TO BE PRESENT	9
COMPULSORY INTERVIEWS – SUMMONED	13
VOLUNTARY INTERVIEWS	15
OMBUDSMAN'S RESPONSE TO ANALYSIS	18
PRINCIPAL FINDINGS	20
RECOMMENDATIONS	21
OMBUDSMAN'S RESPONSE TO RECOMMENDATIONS	22

Overview

The Victorian Ombudsman (the Ombudsman) plays a vital role in the public sector by shining a light on administrative decisions that detrimentally affect the lives of Victorians.

The stated purpose of the Ombudsman is to ensure fairness for Victorians in their dealings with the public sector and to improve public administration.¹ That purpose is principally achieved through the co-operation of public officials and members of the public in Ombudsman investigations. Such co-operation involves participating as witnesses in interviews with Ombudsman officers where they are questioned about matters relevant to an investigation. This report is about the information that the Ombudsman provides to witnesses before they decide to participate in interviews.

For this report the Victorian Inspectorate (the Inspectorate) reviewed the contact Ombudsman officers had with witnesses in a number of investigations before those witnesses participated in interviews with Ombudsman officers. The purpose of the review was to determine whether witnesses (including persons of interest) are provided with sufficient information by the Ombudsman to make informed decisions about their participation in interviews. A particular focus of the review was witnesses who volunteered to be interviewed by Ombudsman officers under oath or affirmation without being summoned. Confusingly, such witnesses are treated by the *Ombudsman Act 1973* as making a 'compulsory appearance'.²

The Ombudsman is not required to seek the co-operation of witnesses in an investigation. It is the Ombudsman's preference to do so rather than summons witnesses. The Inspectorate acknowledges that Ombudsman officers seek the co-operation of witnesses in a professional manner. In their telephone contact with witnesses, Ombudsman officers listen and respond to the questions of witnesses and express empathy when appropriate to do so. However, the principal finding of the Inspectorate's review is that certain information that may be of assistance to witnesses before they decide to voluntarily participate in interviews with Ombudsman officers is not provided to them. This finding raises the issue of fairness in the Ombudsman's engagement with witnesses. If seeking the voluntary co-operation of witnesses in an investigation, it is fair to provide them with sufficient information to make an informed decision about their co-operation.

The Inspectorate provided the Ombudsman with a preliminary report of the review on 8 November 2018. On 28 November 2018, officers of the Ombudsman and Inspectorate met to discuss the findings of the preliminary review and the audit undertaken by the Inspectorate on which those findings were based. The small sample of 50 witnesses in the Inspectorate's audit was accepted by the Ombudsman as being a representative sample of the contact between Ombudsman officers and witnesses.

¹ Strategic Framework 2017-2020 'Our Purpose'.

² s2 of the *Ombudsman Act 1973*.

Following the 28 November 2018 meeting a draft of this report was prepared containing recommendations directed to strengthening the Ombudsman's existing practice of promoting the co-operation of witnesses. A copy was provided to the Ombudsman on 21 December 2018. The Ombudsman responded to the draft on 1 February 2019 and that response was taken into account in preparing a further draft report that was provided to the Ombudsman on 12 April 2019. The response of the Ombudsman to that draft was received on 22 May 2019.

The Inspectorate acknowledges the co-operation of the Ombudsman in the conduct of the review and the preparation of this report.

Coercive Powers

The Ombudsman may exercise coercive power in the conduct of its enquiries and investigations. One such power is the power of the Ombudsman to summons a person, or require a person “who happens to be present” before the Ombudsman, to give evidence and/or produce documents under oath or affirmation.³ A person summoned to attend or produce documents commits an offence if he or she fails to do so without reasonable excuse.⁴ A person who happens to be present before the Ombudsman commits an offence if he or she refuses to be sworn or refuses or fails, without lawful excuse, to answer a question or produce a document.⁵ The coercive powers exercisable by the Ombudsman are significant. Parliament has conferred on the Inspectorate the function of monitoring their exercise and the compliance by Ombudsman officers with procedural fairness requirements in the conduct of Ombudsman enquiries and investigations.⁶

For the purposes of the *Ombudsman Act 1973*, a person appearing before the Ombudsman in accordance with a summons, or who is examined under oath or affirmation when happening to be present before the Ombudsman, is making a ‘compulsory appearance’.⁷

Persons who ‘happen to be present’ before the Ombudsman may include persons who volunteer to attend for interview by Ombudsman officers. On attending, such persons are compelled to give evidence

under oath or affirmation. Their voluntary attendance thus morphs into a ‘compulsory appearance’ for the purposes of the *Ombudsman Act 1973*.

Persons who make a ‘compulsory appearance’ under summons or by ‘happening to be present’ before the Ombudsman are to be distinguished from persons who make a ‘voluntary appearance’ before the Ombudsman. Section 2(1) of the *Ombudsman Act 1973* defines ‘voluntary appearance’ as ‘the appearance of a person before an Ombudsman officer in the course of or in relation to the performance of the Ombudsman’s functions under this Act or any other Act, other than a compulsory appearance’. These are persons who volunteer to attend before the Ombudsman and who, on so attending, are not required to give evidence under oath or affirmation.

³ s18 of the *Ombudsman Act 1973* applying ss17, 18, 19, 20 and 20A of the *Evidence (Miscellaneous Provisions) Act 1958*.

⁴ s19(a) of the *Evidence (Miscellaneous Provisions) Act 1958* as applied by s18 of the *Ombudsman Act 1973*.

⁵ s19(b) of the *Evidence (Miscellaneous Provisions) Act 1958* as applied by s18 of the *Ombudsman Act 1973*.

⁶ s11(4)(a) of the *Victorian Inspectorate Act 2011*.

⁷ s2(1) of the *Ombudsman Act 1973*.

Procedural Fairness

The Ombudsman is required to accord procedural fairness to persons who may be adversely affected by the exercise by the Ombudsman of coercive power in the conduct of enquiries and investigations.

In exercising a general investigative power, such as the power to interview, or a coercive power to require persons to provide evidence or produce documents, the Ombudsman may adversely affect the rights and interests of persons subject to that power. Before deciding to exercise such powers in relation to persons who may be adversely affected by their exercise, the Ombudsman must first ensure that those persons are given appropriate information and have the opportunity to be heard. This requirement on the Ombudsman is the requirement to afford procedural fairness.

The requirement on the Ombudsman to afford procedural fairness is relevant to how the Ombudsman seeks the co-operation of witnesses who are not summoned to be interviewed for the purpose of Ombudsman investigations. Witnesses who are sufficiently informed about their participation in interviews with Ombudsman officers can make informed decisions about whether they wish to co-operate with an Ombudsman investigation. In making such informed decisions they can consider whether their participation in interviews may adversely affect their rights or interests. They may, in the process of making an informed decision, engage with or be heard by Ombudsman officers about the effect of that exercise of power on their rights and interests.

As indicated in the Overview, a particular focus of the Inspectorate's review was the exercise by the Ombudsman of coercive power over persons who 'volunteer' to attend and, on attending, are compelled to give evidence under oath or affirmation. Such persons, when provided with sufficient information about participating in interviews with Ombudsman officers, have the capacity to identify whether doing so may have an adverse effect on their rights and interests.

As also indicated in the Overview, it is open to the Ombudsman to summons a person to be interviewed rather than requesting a person to volunteer their attendance at interview. However, it does not follow from this fact that persons who volunteer their attendance are to be treated by the Ombudsman as if they were summoned to be interviewed by the Ombudsman.

Contact with Witnesses

The Tables below in Figures 1, 2, and 3 indicate the information provided by Ombudsman officers to witnesses in relation to their participation in interviews.

The first contact by Ombudsman officers with witnesses is by telephone. A template is used by Ombudsman officers to guide their discussions with witnesses. The template is headed "Phoning witnesses to arrange interviews-script suggestions". There is a script for both compulsory appearances and voluntary appearances.

The term 'compulsory interview' used in the script refers to a 'compulsory appearance'. The term 'voluntary interview' used in the script refers to a 'voluntary appearance'.

The information provided by telephone to the 50 witnesses in the Inspectorate's audit⁸ is outlined in Figure 1. The documentary information provided to those witnesses after the telephone contact and before the interview is outlined in Figure 2. The information provided to those witnesses at the beginning of the interview is outlined in Figure 3.

FIGURE 1

Information provided to witnesses by telephone

- The Ombudsman officer states that 'we would like you to attend an interview' or 'we ask that you attend an interview'
- The subject matter of the investigation
- That the interview relates to their involvement in or knowledge about an aspect or aspects of that subject matter
- The Ombudsman officer suggests an interview date and the details of the location of the interview are provided
- Confirmation of the contact details of the witness, including email and mailing address
- That a support person or lawyer can be brought to the interview
- What would occur if adverse comments were intended to be made against the witness in an Ombudsman report
- That interviews are audio or video recorded
- Information about any applicable confidentiality matters

8 See Methodology

FIGURE 2

Written material provided to witnesses before interview

TYPE OF INTERVIEW	INFORMATION PROVIDED
Compulsory interview – Summons	<ul style="list-style-type: none">• Letter to witness confirming their attendance at an interview and any applicable confidentiality requirements• Witness summons• A template form that accompanies the summons outlining the obligations and rights of witnesses under the summons• An Information sheet for persons making compulsory appearances
Compulsory interview – Happening to be present	<ul style="list-style-type: none">• Letter to witness confirming their attendance at an interview• An Information sheet for persons making compulsory appearances
Voluntary interview	<ul style="list-style-type: none">• Letter to witness confirming their attendance at an interview• An Information sheet for persons making voluntary appearances

FIGURE 3

Information provided to witnesses at the beginning of interview

- Confirmation about whether witness had received information sent by Ombudsman
- Whether witness has any questions in relation to the information sent
- Confirmation about whether a lawyer or support person is or is not present
- Witness informed that interview would be recorded
- Witness informed of procedure if adverse comments were made against them in an Ombudsman report

Methodology

The Inspectorate reviewed the information provided to 50 witnesses contacted and interviewed by Ombudsman officers at the three contact points outlined above in Figures 1, 2 and 3, namely:

- Telephone contact (Figure 1)
- Written contact (Figure 2)
- Interview contact (Figure 3).

Those 50 witnesses were sourced from 5 investigations conducted between 2016 and 2017.

The Inspectorate obtained copies of the processes and procedures used by the Ombudsman to contact witnesses including the telephone scripts, template letters and information sheets sent to the witnesses.

The Inspectorate reviewed the contact of Ombudsman officers with:

- 13 witnesses who made compulsory appearances by 'happening to be present'⁹
- 3 witnesses who made compulsory appearances under summons
- 33 witnesses who made voluntary appearances.

Figure 4 below outlines, in percentage terms, the type of interviews in which those 50 witnesses participated.

FIGURE 4
Type of interview witnesses participated in



⁹ One witness appeared twice and only one appearance is included in this total.

An audit tool was used by the Inspectorate to analyse whether the information provided by the Ombudsman to the 50 witnesses at the three contact points (illustrated in Figures 1, 2 and 3) was sufficient to:

- assist witnesses to make informed decisions about whether to participate in interviews with Ombudsman officers and
- assist witnesses required to participate in such interviews (witnesses who are summoned) with information about their rights and obligations.

The audit tool is expressed in the form of questions (audit questions) about whether certain information was provided to witnesses about their participation. The questions are answered in the positive or the negative, yes or no. A negative response to an audit question indicates that the information has not been provided to the witness. A positive response to an audit question indicates that the information has been provided to the witness.

One set of audit questions requires clarification as it appears to relate to a right under the Victorian Charter of Human Rights and Responsibilities, namely, the right of freedom of movement.¹⁰ Those audit questions are marked with an asterisk (*) and relate to whether information is provided to witnesses about their freedom to leave the premises in which an interview is being conducted. Those questions are not directed to whether witnesses have freedom of movement, that is, whether they may physically leave the premises. Rather, those questions concern whether witnesses making compulsory appearances are informed that they are obliged to answer the questions of

Ombudsman officers until the conclusion of the interview. Compliance with that obligation involves witnesses remaining at the premises in which the interviews are being conducted until the conclusion of the interview. A witness who chooses to physically leave the premises before an interview is concluded, and thereby refuses or fails to answer questions to be put to them, may be the subject of a penalty.

The assumption of the audit tool is that the information in the audit questions, if provided to witnesses, would assist them to make informed decisions about participating in interviews with Ombudsman officers. The audit did not test this assumption by sampling a cohort of witnesses and questioning them as to whether they would or would not have participated in the interviews with Ombudsman officers if they had been provided with some or all of the information in the audit questions.

¹⁰ Section 12 of the *Charter of Human Rights and Responsibilities Act 2006*.

Analysis

As indicated in the methodology, the Inspectorate analysed the information provided to the three categories of witnesses at the three contact points outlined in Figures 1, 2 and 3. The analysis is presented for each category of witness and for each contact point.

Compulsory Interviews - Happening to be Present

Telephone Contact

The Ombudsman provided the Inspectorate with the telephone recordings of contact with 11 of the 13 witnesses in this category. Figure 5 below outlines the responses to the questions in the audit tool about the information provided by Ombudsman officers during telephone contact with those 11 witnesses.

FIGURE 5
Questions in the audit tool about the information provided by ombudsman officers in their telephone contact with witnesses

Was the witness informed about the subject matter of the investigation and what aspect of that subject matter s/he would be interviewed about?		Was the witness informed that s/he could choose to participate or not to participate in the interview?		Was witness informed that s/he would need to take an oath / affirmation and that the interview would be compulsory?		Was the witness informed that on participation s/he would be compelled to answer the questions of Ombudsman officers?		Was the witness informed that on participation s/he would not be free to leave the premises until the interview had concluded?*		Was the witness informed that s/he can bring a lawyer/support person to the interview?		Was the witness informed of the process if adverse comments were made against them in a report	
Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
11	0	0	11	10	1	0	11	0	11	11	0	11	0

All of the 11 witnesses were informed about the subject matter of the investigation and what aspect of the subject matter they would be interviewed about.

None of the 11 witnesses were informed that they could choose to participate or not participate in the interview.

Ten of the 11 witnesses were informed they would be required to take an oath/affirmation and that the interview would be a compulsory interview. However, the meaning of the term 'compulsory interview' was not explained to the witnesses.

None of the 11 witnesses were informed that if they participated in the interview they would be compelled to answer the questions of Ombudsman officers until the conclusion of the interview and that this would involve them remaining at the premises in which interviews are held until the questioning of Ombudsman officers concluded.

All 11 witnesses were informed that they could bring a lawyer/support person to the interview.

All 11 witnesses were informed of the process that would follow if adverse comments were made against them in a report.

Written contact

The Ombudsman provided the Inspectorate with the written records of contact with 12 of the 13 witnesses in this category. Figures 6 and 7 below outline the responses to the questions in the audit tool about the written information sent to those 12 witnesses after the telephone contact.

FIGURE 6

Questions in the audit tool about the information provided by ombudsman officers in letters sent to witnesses

Was the witness informed that his or her attendance at the interview is voluntary?	Was the witness informed that at the interview s/he will be required to take an oath/affirmation?	Was the witness informed that on attendance at interview s/he will be compelled to answer the questions of Ombudsman officers?	Was the witness informed that on attendance at the interview, s/he will not be free to leave the premises until the interview has concluded?*	Was the witness informed that s/he may bring a lawyer or support person to the interview?	Does the letter explain to the witness the process if adverse comments were made against them in a report?
No	Yes	No	No	Yes	Yes

FIGURE 7**Questions in the audit tool about the information provided by ombudsman officers in information sheets sent to witnesses**

Does the sheet inform witnesses that their attendance at the interview is voluntary?	Does the sheet inform witnesses that at the interview they will be required to take an oath/affirmation?	Does the sheet inform witnesses that on attendance at the interview they will be compelled to answer the questions of Ombudsman officers?	Does the sheet inform witnesses that on attendance at the interview, they will not be free to leave the premises until the interview has concluded?*	Does the sheet inform witnesses that they may bring a lawyer or support person to the interview?	Does the sheet inform witnesses of the process if adverse comments were made against them in a report?
No	Yes	Yes	No	Yes	Yes

Neither the information sheet nor the letters inform the witnesses that they are not required to attend the interview.

The information sheet and the letter inform witnesses that they are required to take an oath/affirmation if they attend the interview, may bring a lawyer or support person to the interview, and inform them of the process to be taken if adverse comments are intended to be made against them in a report.

The information sheet, but not the letter, informs witnesses that they are compelled to answer questions at an interview. However, the information sheet does not inform witnesses that this involves them remaining at the premises in which the interview is being held until the questioning of Ombudsman officers has concluded.

Interview contact

Figure 8 outlines the responses to the questions in the audit tool about the information provided by Ombudsman officers at interview to 12 of the 13 witnesses.

None of the 12 witnesses were informed that if they participated in the interview they would be compelled to answer the questions of Ombudsman officers which would involve them remaining at the premises in which the interview is being held until the questioning of Ombudsman officers has concluded.

Only 1 of the 12 witnesses was informed that evidence could be admitted against him or her in a court or tribunal.

All 12 witnesses were asked whether they had received the information that was sent to them and whether they had any questions regarding it. One witness was not informed about what would occur if subsequent adverse comments were made against him or her in a report.

FIGURE 8

Questions in the audit tool about the information provided by ombudsman officers in the interview

Was the witness asked whether s/he received the information sent to them and whether s/he had any questions about that information?		Was the witness informed s/he could not leave the interview?*		Was the witness informed that s/he is required to answer the questions of the Ombudsman officer(s)?		Was the witness informed that evidence obtained during an interview could be admitted against him or her at a court or tribunal?		Was the witness informed about what would occur if adverse comments were made about the evidence of the witness in a report by the Ombudsman?	
Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
12	0	0	12	0	12	1	11	11	1

Compulsory Interviews - Summons

The Inspectorate reviewed the contact of Ombudsman officers with the 3 witnesses who made compulsory appearances under summons.

Telephone Contact

The data reviewed by the Inspectorate did not include recordings of telephone calls between an Ombudsman officer and a witness regarding the issuing of a summons. This may be because the summoned witnesses in the sample were previously contacted to make a compulsory appearance by volunteering to take an oath or affirmation but declined to do so.

Written contact

Figure 9 below outlines the responses to the questions in the audit tool about the information provided by Ombudsman officers before interview to those 3 witnesses who were summoned.

The written material informed the witnesses that they will be required to take an oath/affirmation and will be compelled to answer questions.

The written material did not inform the witnesses that they will be required to remain at the premises in which the interview is being held until the questioning of Ombudsman officers has concluded. The written material informed the witnesses that they may bring a lawyer or support person to the interview and informed them of the process if adverse comments were made against them in the report.

FIGURE 9
Questions in the audit tool about the information provided to persons summoned

Was the witness informed that s/he will be required to take an oath/affirmation?	Was the witness informed that on attendance at the interview s/he will be compelled to answer the questions of Ombudsman officers?	Was the witness informed that on attendance at the interview, s/he will not be free to leave the premises until the interview has concluded?*	Was the witness informed that s/he may bring a lawyer or support person to the interview?	Was the witness informed of the process if adverse comments were made against them in a report?
Yes	Yes	No	Yes	Yes

Interview contact

Figure 10 outlines the responses to the questions in the audit tool about the information provided to those 3 witnesses by Ombudsman officers at interview.

In all interviews the witnesses were asked whether they received the material that was sent to them and if they had any questions. Only one witness was informed at interview that he or she was required to answer the questions of Ombudsman officers. However, the information sheet for compulsory appearances that was provided to all witnesses states that witnesses are required to answer the questions of Ombudsman officers. No witness was informed that on being so required, they are to remain at the premises in which the interview is being held until the questioning of Ombudsman officers has concluded.

While the witness summons states under the heading, 'When is the examination?', 'You must attend at (place) on (date) at [time] and from day to day unless excused or released from further attendance', this instruction may or may not indicate to a witness that being excused or released occurs only after Ombudsman officers have concluded their questioning.

One of the three witnesses was informed that his or her evidence could be admitted against him or her in a court or tribunal.

One of the three witnesses was not informed about what would occur if adverse comments were made about his or her evidence in a report of the Ombudsman.

FIGURE 10

Questions in the audit tool about the information provided at interview to persons summoned

Was the witness informed whether s/he received the information sent to him/her and whether s/he had any questions about that information?		Was the witness informed s/he could not leave the interview?*		Was the witness informed that s/he is required to answer the questions of the Ombudsman officer(s)?		Was the witness informed that evidence obtained during an interview could be admitted against him or her at a court or tribunal?		Was the witness informed about what would occur if adverse comments were made about the evidence of the witness in a report by the Ombudsman?	
Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
3	0	0	3	1	2	1	2	1	2

Voluntary Interviews

The Inspectorate reviewed the contact of Ombudsman officers with 33 witnesses who made voluntary appearances.

Telephone contact

The Inspectorate was provided by the Ombudsman with the telephone recordings of the contact with 23 of the 33 witnesses in this category of interview and the written information provided to all 33 witnesses.

Figure 11 below outlines the responses to the questions in the audit tool about the information provided by Ombudsman officers in the telephone contact with the 23 witnesses.

All 23 witnesses were informed about the subject matter of the investigation and what aspect of that subject matter they would be interviewed about.

All 23 witnesses were informed they could bring a lawyer/support person to an interview.

No witnesses were informed that they could choose to attend or not attend the interview or that they could leave an interview at any time if they did attend.

15 of 23 witnesses were informed before an interview about what would occur if adverse comments were made about their evidence in a report.

FIGURE 11

Questions in the audit tool about the information provided by ombudsman officers in their telephone contact with witnesses

Was the witness informed about the subject matter of the investigation and what aspect of that subject matter s/he would be interviewed about?		Was the witness informed that s/he could choose to attend or not attend the interview?		Was the witness informed that s/he is not required to answer the questions of the Ombudsman officer(s)?		Was the witness informed that s/he can bring a lawyer/support person to the interview?		Was the witness informed that on participation s/he would be free to leave the premises at any time during the interview?		Was the witness informed of the process if adverse comments were made about their evidence in any report by the Ombudsman?	
Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
23	0	0	23	0	23	23	0	0	23	15	8

Written contact

Figures 12 and 13 below outline the responses to the questions in the audit tool about the documentation sent to the 33 witnesses in the form of template letters, fact sheets and information forms by the Ombudsman officers.

Neither the letter nor information sheet notify a witness that they are not required to attend an interview, are not required to answer the questions of Ombudsman officers and are not required to remain at the premises where the interview is being held until the conclusion of questioning.

The information sheet explains to the witness they can bring a lawyer/support person to an interview, but this is not included in the letter.

FIGURE 12

Questions in the audit tool about the information provided by ombudsman officers in letters sent to witnesses

Was the witness informed about the subject matter of the investigation and what aspect of that subject matter s/he would be interviewed about?	Was the witness informed that his or her attendance at the interview is voluntary?	Was the witness informed that s/he is not required to answer the questions of the Ombudsman officer(s)?	Was the witness informed that on participation s/he would be free to leave the premises at any time?*	Was the witness informed of the process if adverse comments were made about their evidence in any report by the Ombudsman?	Was the witness informed that that s/he may bring a lawyer or support person to the interview?
Yes	No	No	No	No	No

FIGURE 13

Questions in the audit tool about the information provided by ombudsman officers in information sheets sent to witnesses

Does the information sheet inform witnesses that their attendance at the interview is voluntary?	Does the information sheet inform witnesses that on attendance at the interview they are not required to answer the questions of Ombudsman officers?	Does the information sheet inform witnesses they are free to leave the premises at any time?*	Does the information sheet inform witnesses of the process if adverse comments were made about their evidence in any report by the Ombudsman?	Does the information sheet inform witnesses that they may bring a lawyer or support person to the interview?
No	No	No	Yes	Yes

Interview contact

Figure 14 below outlines the responses to the questions in the audit tool about the information provided at interview by Ombudsman officers to 30 of the 33 witnesses who participated in voluntary interviews. (In 3 instances, the Inspectorate was not provided with the interview recording and could not make an assessment).

All 30 witnesses were asked whether they had received relevant material sent by the Ombudsman and whether they had any questions in relation to it.

None of the 30 witnesses were informed they could leave an interview and did not have to answer questions asked of them.

All 30 witnesses were informed about what would occur if adverse comments were made about their evidence in any subsequent report.

FIGURE 14 Questions in the audit tool about the information provided by ombudsman officers in the interview

Was the witness asked whether s/he received the information sent to him/her and whether s/he had any questions about that information?		Was the witness informed that s/he would be free to leave the premises at any time?		Was the witness informed that they are not required to answer the questions of Ombudsman officers?		Was the witness informed of the process if adverse comments were made about their evidence in any report by the Ombudsman?	
Yes	No	Yes	No	Yes	No	Yes	No
30	0	0	30	0	30	30	0

Ombudsman's Response to Analysis

In her response of 1 February 2019 the Ombudsman made various comments.

The Ombudsman commented that the contact Ombudsman officers have with witnesses is made across the three contact points providing opportunities for clarification and reinforcement about the rights and obligations of witnesses who participate in interviews. While the Inspectorate acknowledges this, the analysis supports the Inspectorate's findings that certain information was consistently not provided by Ombudsman officers to witnesses across the three contact points in voluntary appearances and compulsory appearances made by persons who 'happen to be present'.

The Inspectorate also acknowledges that Ombudsman officers communicated in a professional manner in their telephone contact with witnesses, listening to them as well as expressing empathy when appropriate to do so.

The Ombudsman commented that "witnesses are not expressly told they can 'decline to attend' interviews but Ombudsman officers respectfully seek witnesses' cooperation, invite their attendance, and do not inform them they must attend." The Ombudsman stated that this would be "borne out in the audited telephone calls which are audited by the Assistant Ombudsman". While the Inspectorate acknowledges this, the analysis supports the Inspectorate's finding that witnesses were not provided with information that may have assisted them to make an informed decision about whether to participate or not participate in interviews with Ombudsman officers in voluntary appearances and compulsory appearances made by persons who 'happen to be present'.

The Ombudsman also commented in relation to the telephone contact that, 'A person is made aware of options, including the issue of a summons if they do not volunteer to attend and this is included in the script of the initial telephone call'. The witnesses in the sample reviewed by the Inspectorate were not read this part of the script before deciding to participate in an interview with Ombudsman officers.

It is not clear to the Inspectorate how informing a witness about the option of using a summons would encourage the co-operation of the witness to voluntarily participate in an interview with Ombudsman officers. As indicated in the Overview and Coercive Powers sections in this report, whilst it is open to the Ombudsman to summons a person to be interviewed rather than requesting a person to volunteer their attendance at interview, it does not follow from this fact that persons who volunteer their attendance are to be treated by the Ombudsman as if they were summoned to be interviewed by the Ombudsman.

In relation to witnesses who volunteer to be interviewed and are not subjected to being examined under oath or affirmation, the Ombudsman commented that, "while witnesses are not expressly told they may leave, Ombudsman officers are alert to the voluntary nature of interviews and the welfare of the witness. Ombudsman officers regularly ask if the witness would like an adjournment and they take care not to give the impression that witnesses cannot leave". Whilst this may be so, in the Inspectorate's view this is not a substitute for a clear communication to such witnesses that they are not compelled to participate in interviews by Ombudsman officers.

The Ombudsman also commented that the data in Figure 9 with respect to the audit question, 'Was the witness informed that on attendance at the interview, s/he will not be free to leave the premises until the interview has concluded?', is inaccurate as persons summoned are informed in the summons itself that they are not free to leave the premises until the interview is concluded. The witness summons states under the heading 'When is the examination?', 'You must attend at [place] on [date] at [time] and from day to day unless excused or released from further attendance'. From this statement witnesses may or may not infer that they are only excused or released from attendance at the conclusion of the interview after answering all the questions of Ombudsman officers.

The results of the audit question, 'Was the witness informed about what would occur if adverse comments were made about the evidence of the witness in a report by the Ombudsman?' (in Figure 10 at the 'interview contact point' in relation to summoned witnesses) were the subject of comment by the Ombudsman. The result of the audit question was that 2 of the 3 in the sample of witnesses were not so informed. The Ombudsman commented that the result was surprising as they are consistent in providing such information to witnesses in compulsory interviews and that the adverse comments process is explained in the Information and fact sheets provided to witnesses.

Figures 5 to 9 indicate that the Ombudsman does provide such information and it is likely that the result in Figure 10 at the 'interview contact point' would not be significant in a larger witness sample.

The audit question, 'Was the witness informed that evidence obtained during an interview could be admitted against him or her at a court or tribunal?' was also the subject

of comment by the Ombudsman. This question appears in Figures 8 and 10 and relates to information provided at the interview contact point. The Ombudsman commented that evidence obtained from a compulsory interview could not be admitted against a witness in a court or tribunal unless section 29B of the *Ombudsman Act 1973* applies. In the Inspectorate's view, section 29B only relates to admissible evidence in the form of 'information obtained or received by a party from the Ombudsman'. The section does not appear to restrict the use of admissible evidence that is obtained by the Ombudsman from a party. The Inspectorate, however, acknowledges that the Ombudsman does not conduct investigations into criminal matters and does not generally obtain evidence in a form that is admissible in criminal matters. Further, the Ombudsman has commented that its officers make it clear to witnesses that they do not have to answer questions that might tend to incriminate them.

Principal Findings

The analysis indicates a significant negative response rate to certain audit questions across all three contact points in two categories of interview: voluntary interview and compulsory interview other than by way of summons. Those questions relate to what witnesses may choose to do or not to do about participating in interviews, answering questions at interview and discontinuing participation in interviews.

Participating in interviews

At each of the three contact points (telephone contact, letter and information sheets and interview) in the two categories of interview, there was a 100% negative response rate to audit questions that relate to the choice witnesses have to participate or not to participate in interviews with Ombudsman officers.

Answering questions at interview

At each of the three contact points in the voluntary interview category, there was a 100% negative response rate to audit questions about whether witnesses were informed that on attending an interview they were not required to answer questions of Ombudsman officers.

At two contact points (telephone contact and interview) in the compulsory interview other than by way of summons category, there was a 100% negative response rate to audit questions about whether witnesses were informed that they were required to answer the questions put to them.

Discontinuing participation in interviews

There was a 100% negative response rate to audit questions about whether witnesses were informed that on attending a voluntary interview they may choose to discontinue the interview at any time and that on attending a compulsory interview other than by way of summons they may not so choose.

Recommendations

The Inspectorate recommends that the Ombudsman strengthens its practice of encouraging the informed co-operation of witnesses in the conduct of interviews by doing the following:

Voluntary interviews

1. Reviewing and amending the telephone scripts and other written material used by the Ombudsman at the three contact points to make it clear that a witness may decline to attend the interview.
2. Reviewing and amending the telephone scripts and other written material used by the Ombudsman at the three contact points to clearly inform witnesses about their rights and obligations on attending an interview, particularly their right not to answer the questions of Ombudsman officers during the course of the interview and their right to conclude the interview at any time.

Compulsory interviews other than by summons

3. Reviewing and amending the telephone scripts and other written material used by the Ombudsman at the three contact points to make it clear that a witness may decline to attend the interview.
4. Reviewing and amending the telephone scripts and other written material used by the Ombudsman at the three contact points to clearly inform witnesses about their rights and obligations on attending an interview, particularly their obligation to answer the questions of Ombudsman officers (unless they have a lawful excuse for not doing so) until such time as the interview is concluded.

Ombudsman's Response to Recommendations

As indicated in the Overview to this report, the Inspectorate supports the collaborative approach currently adopted by the Ombudsman in its engagement with witnesses. However, the Inspectorate firmly believes that, consistent with the requirements of procedural fairness, witnesses whose co-operation with an investigation is sought should be given sufficient information for them to be able to make an informed decision about co-operating.

The Ombudsman responded to the report and recommendations of the Inspectorate in a letter dated 22 May 2019 which, at the request of the Ombudsman, is published in this report in full. The Ombudsman accepted the recommendations to include further information in the written material provided to prospective witnesses in voluntary interviews and compulsory interviews (other than by summons).

A prospective witness in a voluntary interview is to be informed that he or she may decline to attend the interview, is not required to answer questions during the interview and may conclude the interview at any time. A prospective witness in compulsory interviews (other than by summons) is to be informed that he or she may decline to attend the interview and is also to be informed of his or her rights and obligations on attending the interview, particularly the obligation to answer questions unless he or she has a reasonable excuse not to do so.

The Inspectorate welcomes the response of the Ombudsman to the recommendations of the Inspectorate with respect to the written material provided to prospective witnesses. The written material currently

utilised by the Ombudsman, in combination with the proposed additional information, will ensure that prospective witnesses are clearly informed at this contact point of their rights and obligations with respect to their participation in interviews with Ombudsman officers.

However, the Ombudsman in her response has indicated that she does not accept the recommendations that relate to the first contact (telephone) by Ombudsman officers with prospective witnesses. In that first contact, a date, time and place for interview is scheduled for the prospective witness. While it is possible for an individual, on receipt of the written material, to change his or her mind about being a witness and contact the office of the Ombudsman to cancel the scheduled interview, it is the view of the Inspectorate that that this puts an unfair onus on the individual. The onus ought to be on Ombudsman officers to inform prospective witnesses of their rights and obligations before scheduling interviews with them.

As indicated in the attached letter of the Ombudsman, the first contact by Ombudsman officers is important in "facilitating a collaborative engagement" with witnesses. In the Inspectorate's view, it is detrimental to the achievement of such collaboration if witnesses are not informed at the first opportunity about their rights and obligations with respect to participating in interviews. The Inspectorate does not accept that informing prospective witnesses of their rights and obligations at this first contact would cause "unnecessary alarm" as indicated in the letter of the Ombudsman. Indeed the Inspectorate is of the view that

it is necessary to give such information so as to empower prospective witnesses to make informed decisions about their collaboration in Ombudsman investigations.

The Inspectorate related this view to the Ombudsman in a communication dated 31 May 2019. The Ombudsman on 3 June 2019 in response maintained her view that the first telephone contact of an Ombudsman officer with a prospective witness is not the time to impart too much information. However the Ombudsman stated that her office would “ensure in guidance to staff that they advise witnesses that we will be providing further information and encourage them to read it and contact us if they have any questions.”

22 May 2019

Mr Eamonn Moran PSM QC
Inspector

[REDACTED]

Dear Inspector

Re: Draft Integrity Report: Information provided to witnesses

Thank you for your further draft report dated 12 April 2019, and for providing me with an extension of time to respond to your draft.

I appreciate that it reflects aspects of my letter of 1 February and our subsequent meeting, and I am grateful for your consideration of the matters we discussed. I do however continue to have a different view of some aspects on which your report continues to be critical, and I ask, in the interests of procedural fairness, that this letter be published in full in your final report.

I agree with your view that a prospective witness needs to be provided with sufficient information to make an informed decision as to whether or not they participate in a voluntary interview or a compulsory interview other than by summons. I do not, however, agree that my office currently provides insufficient information for an informed decision.

As we have discussed, the context in which we carry out investigations includes my power to issue summonses and to require witnesses to answer questions. In practice, my investigators seek a co-operative approach, and I will only issue a summons where an essential witness is not willing to co-operate or where a summons is otherwise necessary at the request of the witness. In my experience, most witnesses in Ombudsman investigations prefer not to be summonsed, and whether or not they know they are required to answer questions is immaterial – they recognise they have an option to co-operate and prefer to do so.

I also note that there have been no complaints from any witness, that they did not have sufficient information to decide to co-operate voluntarily.

I am willing to accept that my office can provide more information to witnesses, although I do not think further information is required either by legislation or by the requirements of fairness.

Our initial approach

Your focus of your audit on three distinct contact points between my officers and a prospective witness has also caused my office to review our processes. I remain strongly of the view that my office's interaction with a prospective witness should not overwhelm a person with too much information in the first instance. These calls are often the first contact that is made with a witness and are important to facilitating a collaborative engagement that provides a good balance between educating the witness on my office's role and providing them the opportunity to consider the prospect of attending an interview without unnecessary alarm. While this needs to be balanced with the need to ensure that the witness is sufficiently informed of their rights and obligations, this information is better set out in the follow-up letter or information sheet.

Your proposed recommendations

I therefore accept the substance of your recommendations to include further information to make the following clear to a prospective witness in a voluntary interview:

1. That the witness may decline to attend a voluntary interview, and
2. The witness's rights and obligations, particularly their right not to answer questions during the course of the interview and to conclude the interview at any time.

In relation to a compulsory interview other than by summons, I accept the substance of your recommendations to include further information to make clear to a prospective witness:

1. That the witness may decline to attend an interview, and
2. The witness's rights and obligations, particularly their obligations on attending an interview to answer questions during the course of the interview unless they have a reasonable excuse until such time as the interview is concluded.

The information will be provided in writing to potential witnesses following an initial phone call, and before any interview takes place.

Thank you for the opportunity to comment on your drafts and to discuss them in person.

Yours sincerely



Deborah Glass
Ombudsman



vic.gov.au/vicinspectorate