

Can a legal practitioner's notes be removed after a coercive examination?

The purpose of Guidance Note 1 (GN1) by the Victorian Inspectorate (VI) is to assist legal practitioners representing witnesses in coercive examinations and to assist those conducting examinations.

This guidance focusses on examinations conducted by the Chief Examiner or an Examiner under the *Major Crime (Investigative Powers) Act 2004* (Chief Examiner), the Independent Broad-based Anti-corruption Commission (IBAC), and compulsory interviews conducted by the Victorian Ombudsman (VO).

Yes, in limited circumstances a legal practitioner's notes can be removed after a coercive examination.

Why?

While legal practitioners have professional obligations of confidentiality, the rationale for the removal of notes by an examiner is to prevent any disclosure (inadvertent or otherwise) of information that may prejudice an investigation or the safety or reputation of an individual.

This guidance outlines the limited circumstances in which notes made by a legal practitioner during a coercive examination may be removed from them at the conclusion of a day's evidence (including the final day of the examination), and the rights of the legal practitioner to have those notes either securely stored or destroyed.

Examinations conducted by the Chief Examiner¹

The Chief Examiner has the power to regulate the conduct of proceedings as they think fit.² This includes the power to lawfully prevent a legal practitioner from removing notes they have taken during an examination. The Chief Examiner often exercises this power.

A legal practitioner representing a client before the Chief Examiner, during the explanation of preliminary matters, will be advised that at the conclusion of each day of the examination, their notes will be secured in a confidential envelope and they can elect for them to either be retained at the Office of Chief Examiner (and made available for inspection) or securely destroyed.

Further information about taking notes during examinations by the Chief Examiner and requesting access to a legal practitioner's notes can be found at: chiefexaminer.vic.gov.au/your-role.

¹ Reference to the Chief Examiner includes reference to an Examiner appointed under the *Major Crime (Investigative Powers) Act 2004*

² Section 30(1) *Major Crime (Investigative Powers) Act 2004*.

Examinations conducted by the Independent Broad-based Anti-corruption Commission and compulsory interviews conducted by the Victorian Ombudsman

IBAC and the VO also have the power to regulate the procedure of an examination and a compulsory interview as they consider appropriate.³ This may include the power to restrict a legal practitioner from keeping any notes they have made at the conclusion of each day of evidence (including the final day of the examination or compulsory interview).

While it is not the practice of VO or IBAC to exercise this power, if circumstances arose which required IBAC or VO to restrict a legal practitioner from keeping any notes, it would be appropriate for IBAC or VO to undertake the same process as the Chief Examiner, including:

- foreshadowing the intention to exercise the power at the commencement of the examination or compulsory interview (or at the point where the need arises), at which point the legal practitioner is entitled to seek a reason; and
- advising that the notes would be secured in a confidential envelope and they can elect for them to either be retained at IBAC or VO premises (and made available for inspection at any reasonable time) or securely destroyed. If an election is made for the notes to be retained, the legal practitioner would also be entitled to know how long they will be retained before destruction.

Further information in relation to IBAC's investigative powers can be found at: ibac.vic.gov.au/investigating-corruption.

Further information in relation to the VO's investigative powers can be found at: ombudsman.vic.gov.au/investigations/.

Complaints

If legal practitioners or witnesses have any concerns about the conduct of the Chief Examiner or an Examiner, IBAC or an IBAC officer or a VO officer during a coercive examination on the basis that the specified conduct is, for example, contrary to law or unreasonable⁴, they may make a complaint to the VI and we may be able to assist.

Complaints can be made via the online form at vicinspectorate.vic.gov.au/make-complaint-about-victorian-integrity-body or by phone on 1800 518 197.

Disclaimer: Please note that the advice provided in this guidance note is general in nature and does not constitute legal advice.

³ Section 116(b) *Independent Broad-based Anti-corruption Commission Act 2011* and s 17(7) *Ombudsman Act 1973*.

⁴ Sections 43(2),(6) and (8) *Victorian Inspectorate Act 2011*