

Reporting wrongdoing in the workplace: problems for police

In the long haul the solution cannot be one that involves tagging an employee as a whistleblower and then trying to protect the person thus singled out. The emphasis has to be on creating a climate in which agencies possess the managerial willingness and internal capacity to investigate themselves in an open and direct manner to ensure that they conform to their own publicly stated ethical and professional standards.

Professor Richard Fox, Protecting the Whistleblower (1993) 15
Adelaide Law Review 137 at 162

Letter of transmittal

To

The Honourable the President of the Legislative Council

And

The Honourable the Speaker of the Legislative Assembly

This report is presented to Parliament in accordance with section 28(2) of the *Police Integrity Act 2008*.

It is the culmination of a lengthy review by the Office of Police Integrity (OPI) of a longstanding issue in Victoria Police – the experience of police who report the wrongdoing of their colleagues.

A handwritten signature in dark ink, appearing to read 'R. B. Bonighton' followed by a period.

Ron Bonighton AM

ACTING DIRECTOR, POLICE INTEGRITY

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Executive summary

This report examines the application of the current legislative and policy framework for police reporting police wrongdoing. The topic is of particular importance to police because they – unlike any other public sector employees in Victoria – are compelled by legislation to report serious misconduct by their colleagues.

The legislative framework for police reporting police wrongdoing is made up of certain sections of the *Police Regulation Act 1958*, the *Whistleblowers Protection Act 2001* and the *Police Integrity Act 2008*. The historical origins of the framework indicate that it was intended to protect individuals who report wrongdoing and to facilitate organisational improvement by uncovering and remedying workplace problems.

Provisions to protect police who report their colleagues' wrongdoing were established on the basis that there is a risk of reprisal for those who report. That risk is not unique to police. However, various inquiries into police corruption in past decades, both in Australia and elsewhere, have identified a culture of misguided solidarity among police. This has given the risk of reprisal particular relevance to police.

The framework for police reporting wrongdoing in the workplace is complex and confusing. Victoria Police has had difficulty classifying wrongdoing under differing legislative definitions. This has affected the quality and consistency of its responses to wrongdoing. It has also resulted in inconsistent outcomes for those who report, in terms of the protections they receive and their perceptions of the organisation's response to what they reported. It is timely to examine the problems faced by police under the present framework while Victoria's anti-corruption landscape is undergoing reform.

Leaving aside difficulties with the current legislative framework, representatives of Victoria Police say the negative culture that denigrates police who report wrongdoing in the workplace has reduced over time. OPI investigations indicate a significant proportion of police *are* prepared to speak up when workplace wrongdoing occurs, suggesting that some very negative perceptions of police culture might be unfair or outdated. Despite this, OPI investigations suggest there is still a significant proportion of police who are unlikely to speak up about wrongdoing.

The legislated protections against retaliation do not address the root cause of reprisal – a workplace culture of misguided loyalty. The protections are individualistic and short-term, tending to 'look after' victims and potential victims of reprisal rather than address why reprisal occurs in the first place.

Such an approach to reprisal can inhibit organisational improvement in response to wrongdoing, which undermines the value of reporting it at all. If Victoria Police does not or cannot make improvements in response to reports of wrongdoing then the process of reporting provides little value.

OPI does not recommend withdrawing either the requirement for police to report wrongdoing in the workplace or the formal protections against reprisal. So long as reprisal does occur, Victoria Police should apply sanctions for retaliation to the full extent of the law. But formal compulsions and protections are no substitute for a culture that actively supports speaking up against wrongdoing in the workplace.

The current framework is an improvement on a culture of silence where no one can or will speak up about wrongdoing. But individualistic and short-term protections are not the ultimate goal. Ideally, the Victoria Police workplace will be one in which individuals who speak up about wrongdoing are fully supported – then they will have no need of protection.

Recommendations

OPI supports the Ombudsman's call for greater clarity in the legislative framework relating to reports of police wrongdoing¹ and recommends:

1. The Government considers the issues raised in this report in the further development of anti-corruption legislation in Victoria.

OPI recommends Victoria Police:

2. Strengthens its administration of formal protections for police who report workplace wrongdoing
3. Continues to promote ethical culture to ensure police have confidence to report workplace wrongdoing.

¹ Ombudsman Victoria 2011 *Investigation into the Office of Police Integrity's handling of a complaint*

Background to this review

Rationale

Encouraging employees to speak up about problems – including wrongdoing by other employees – can be a useful means of bringing about organisational improvement.

Workplace culture does not always support speaking up against colleagues, even if colleagues behave unethically. In a wide variety of Australian workplaces, from hospitals to local governments and private sector bodies such as insurance firms, employees have spoken up about wrongdoing and been subsequently mistreated at work.

This topic is particularly important for police in Victoria because they are compelled by legislation to report wrongdoing and because police have historically been viewed as having a culture of misplaced solidarity that leads to a code of silence and mistreatment of those who break that code.

Key concepts

In this report, the term ‘wrongdoing’ refers to a significant transgression committed in bad faith. OPI has previously asserted that honest mistakes, low-level poor conduct and underperformance by employees are best dealt with developmentally, for example through strong performance management.² Significant wrongdoing, particularly if deliberate, requires an organisational response that is firm enough to stop the wrongdoing and to deter others from similar misdeeds. Such a response is necessary for the confidence of the police workforce and the broader community.

Legislation in Victoria refers to police wrongdoing variously as misconduct, serious misconduct, improper conduct and corruption. Closely related are fraud, breaches of discipline and various forms of criminality. These are not mutually exclusive terms, nor are they simply interchangeable. A glossary at the back of this report defines key terms as they appear in legislation, policy and in this report. To avoid obscuring the fundamental issues with legal technicalities, this report uses the term ‘workplace wrongdoing’ to include all forms of serious misconduct, improper conduct and corruption.

² Office of Police Integrity 2011 *Improving Victoria Police discipline and complaint handling systems: A progress report*

Depending on circumstances, the act of bringing wrongdoing to light in Victoria Police might be referred to as making a disclosure, making a complaint, providing a witness statement, reporting, managing discipline breaches or 'just doing the job'. Police who speak out against wrongdoing may be classified as complainants, whistleblowers, internal sources, internal witnesses, managers or all of the above. This is not simply a matter of terminology. Each of these terms arises from particular legislative and policy rules which determine how wrongdoing will be addressed and how the person who brought it to light should be treated. Again, this report encompasses them all, referring to the concept broadly as 'police reporting wrongdoing in the workplace'.

Methodology

For this report, OPI:

- Reviewed legislation, policy and procedural documents and recent academic, Government and industry literature.
- Consulted subject matter experts internal and external to Victoria Police.
- Convened a discussion group of mid-level managers from Victoria Police.
- Examined 159 OPI investigations from 2004 to 2011.
- Interviewed four individuals who had reported workplace wrongdoing in Victoria Police.
- Reviewed basic data provided by the Victoria Police Internal Witness Support Unit and de-identified summaries of five files selected by the Unit.

For procedural fairness, a copy of this report was provided to Victoria Police prior to publication. Victoria Police's response is included in full at Appendix One.

A copy of this report was also provided to the Victorian Ombudsman with an invitation to comment. His response is included in full at Appendix Two.

Background to the current framework

To understand the effectiveness of the framework for police reporting workplace wrongdoing, it is important to consider its historical context, which demonstrates the barriers the framework was intended to overcome.

Perceptions of police culture

Historically and internationally, police culture has been infamous for retaliation towards those who speak up about wrongdoing in the workplace. Royal Commissions and other Inquiries in recent decades have commonly identified a culture of solidarity that opposes police reporting wrongdoing by colleagues or even giving evidence of it when asked.³

A United States Supreme Court Judge described the experience of a police employee who tackled police corruption during New York City's Mollen Commission as '*an insidious death of a thousand cuts*'. The judge said the employee '*should be lauded for his courage*', but was instead '*destroyed by the system whose integrity he sought to preserve*'.⁴

In Australia, the Wood Royal Commission in New South Wales observed a '*blue code of silence*'.⁵ Queensland's Fitzgerald Inquiry observed that '*under the code it is impermissible to criticise other police*'. The Inquiry reported:

*For a long time in the Queensland Police Force, speaking out achieved nothing but hardship, loneliness and fear. Those involved in misconduct were not punished. Those who reported it were.*⁶

3 Queensland Commission of public inquiry into possible illegal activities and associated police misconduct 1989 *Commission of public inquiry into possible illegal activities and associated police misconduct Queensland*; Commonwealth Ombudsman 1997 *Professional reporting and internal witness protection in the Australian Federal Police: a review of practices and procedures*; New South Wales Royal Commission into the New South Wales Police Service 1997 *Royal Commission into the New South Wales Police Service: Final report, Vol 1: Corruption*; Western Australia Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police officers 2004 *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police officers, Vol 2: Final report*; The City of New York Commission to investigate allegations of police corruption and the anti-corruption procedures of the Police Department 1994 *Commission to investigate allegations of police corruption and the anti-corruption procedures of the Police Department: Commission Report*

4 T Perrotta New York Law Journal 2004 *Judge Rebukes N.Y. for Denying Whistleblower Ex-Cop's Claim*

5 New South Wales Royal Commission into the New South Wales Police Service 1997 *Royal Commission into the New South Wales Police Service: Final report Vol 1: Corruption* p25

6 Queensland Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct 1989 *Report of a commission of inquiry pursuant to orders in council: Final Report* p202 & p204

The Harrison Inquiry into corruption in the Australian Federal Police reportedly found that:

*... the dishonest policeman's fear of detection and punishment for his crime is markedly less than the fear of the treatment the whistleblower anticipates he will receive from his colleagues should he expose it...*⁷

While sectors other than law enforcement also demonstrate negative attitudes to reporting wrongdoing, the consistent findings of inquiries into police corruption have created a perception of misguided solidarity in police culture generally; it is a stereotype reinforced in popular media and entertainment.

Most Royal Commissions and Inquiries into police corruption are now historical, having given rise to new oversight bodies and various reforms within law enforcement agencies. Some might argue that the popular perception of police culture laden with misplaced loyalty is no longer valid. Yet remnants of that culture become public now and then. For example, in Queensland in late 2011, an Inspector from the Ethical Standards Command was reportedly stood down after he left a can of dog food on a colleague's desk allegedly to reprimand him for being a 'snitch'.⁸ Reports of incidents such as this suggest that, even if it has abated, remnants of misguided police solidarity remain.

The Victorian context

In the Victorian context, OPI has previously identified a police culture with a historically heavy emphasis on solidarity. In the past, poor employment conditions for Victorian police meant they were 'obliged to support each other to obtain bare justice'. In a historical review of Victoria Police, OPI wrote:

*This history has left an imprint. Police solidarity in Victoria has supported and should support the best work of the Force but misguided solidarity has been a significant factor in the continuance of corruption.*⁹

As in other jurisdictions, policing in Victoria has undergone reform in response to highlighted problems. Victoria Police has been overseen by a series of external bodies, of which OPI is the most recent.

One key driver for change in the area of reporting wrongdoing in the Victorian police workplace was Operation Bart in 1995. In Operation Bart, Victoria Police investigated police who accepted kickbacks for referring victims of burglary to particular providers of security window shutters. The acceptance of kickbacks was widespread and the individual who spoke out against it suffered serious reprisal. Operation Bart revealed

⁷ N O'Brien & M McKenna The Australian 2008 *Investigators re-open AFP file on Mark Standen*

⁸ J Pierce & G Stolz The Courier Mail 2012 *Police whistleblowers in fear after Bob Atkinson vows to track down source of alleged Surfers Paradise bashing video*

⁹ Office of Police Integrity 2007 *Past patterns – future directions: Victoria Police and the problem of serious misconduct and corruption* p11

a culture of solidarity that protected those who did wrong and mistreated those who stood up to wrongdoing.

The then Ombudsman, who oversaw Operation Bart, concluded that the root cause of unethical behaviour had been a workplace culture in which breaking the rules had become acceptable. The Ombudsman wrote that Operation Bart brought about a '*new era of awareness of ethical issues*' but:

*... if there is one thing to be learnt from Operation BART, it is that the price of a truly professional and ethical Police Force is eternal vigilance and the need on occasions to heed the messenger.*¹⁰

A manifestation of the '*new era of awareness of ethical issues*' was Project Guardian, a review initiated by Victoria Police to '*promote and manage ethical behaviour*' in the wake of Operation Bart. Project Guardian produced extensive recommendations for change, including that:

The Force pursue legislative amendment to the Police Regulation Act and Public Sector Management Act to:

- a) Require mandatory reporting by staff of corrupt behaviour or serious misconduct by other staff employees; and*
- b) Prevent instances of intimidatory action against sources.*

Project Guardian also recommended the creation of an 'Internal Source Unit' to protect, support and recruit internal sources, publication of results from reports by internal sources and establishment of '*a policy for acknowledging ethical behaviour*'.¹¹

The requirement for police to report

Consistent with the recommendation of Victoria Police's Project Guardian, the *Police Regulation Act 1958* was amended in 1999 so that:

A member of the force must make a complaint to a member of the force of a more senior rank to that member, or to the Deputy Ombudsman, about the conduct of another member of the force if he or she has reason to believe that the other member is guilty of serious misconduct.

Prior to this, 1985 amendments to the *Police Regulation Act 1958* had prohibited police from reporting their colleagues' behaviour externally.¹² In 1997, further amendments allowed police to report serious misconduct internally or externally, but police were

¹⁰ Ombudsman Victoria 1998 *Operation BART: Investigation of allegations against police in relation to the shutter allegation system*

¹¹ Victoria Police 1996 *Project Guardian: Detection and prevention of corrupt or unethical behaviour*

¹² *Police Regulation (Amendment) Act 1985* s86L(2)(a)

still not *required* to report.¹³ The 1999 amendments made police the only public sector employees in Victoria legally *compelled* to report serious misconduct by their colleagues.

The 1999 amendments to the *Police Regulation Act 1958* also prohibited victimisation. This was an acknowledgment that if legislation was to compel police to report their colleagues' behaviour, it was obliged to protect those police who complied. It was an acknowledgment that reprisal was a real risk.

The then Minister for Police introduced the 1999 amendments with reference to Operation Bart. One objective of the amendments was to:

*... respond to recommendations from the Ombudsman's report on Operation Bart – window shutters investigation.*¹⁴

Parliamentary debate about the 1999 amendments focused primarily on the Chief Commissioner's '*no confidence*' powers and related rights of appeal. There was little reference to mandatory reporting of serious misconduct or prohibition of victimisation. While the debate was supportive of Victoria Police – with repeated assurances that the vast majority of police were highly ethical – there was also mention of '*obsessive secrecy that exists in the police force when problems occur*'¹⁵ and how, in New South Wales, the Wood Royal Commission had found that secrecy '*only encouraged rather than fixed the problems*'.¹⁶ The inference was that compelling police to report serious misconduct – forcing them to bring problems to light – would reduce secrecy in the police organisation and thereby facilitate organisational improvement.

Introduction of the *Whistleblowers Protection Act 2001*

Since the early 1990s, states and territories in Australia have successively legislated for 'public interest disclosures'. Public interest disclosures are generally reports of serious workplace wrongdoing in the public sector. Public interest disclosure legislation usually provides protection for those who make disclosures and a means of investigating the disclosures.

Victoria's public interest disclosure legislation, the *Whistleblowers Protection Act 2001*, was introduced to both enable reform and protect individuals who disclose wrongdoing. One parliamentarian described it as a means of:

*... ending the ... legacy of secrecy and lack of transparency, and instead support[ing] the principles of open, honest and accountable government.*¹⁷

13 *Police and Corrections (Amendment) Act 1997* s42

14 W D McGrath Legislative Assembly Melbourne 22 April 1999

15 A Haermeyer Legislative Assembly Melbourne 13 May 1999

16 A Haermeyer Legislative Assembly Melbourne 13 May 1999

17 R Hulls Legislative Assembly Melbourne 31 August 2000

As the title suggests, the *Whistleblowers Protection Act 2001* is based on the premise that people who report improper conduct risk mistreatment and therefore require protection.

Another Member of Parliament expanded on that premise:

It is known from notable cases in the past that whistleblowers come forward at great personal cost to themselves and their families, and most often they do so out of a strong sense of public duty and because of high personal ethical standards.

*Adequate protection has not been afforded them, as their personal experiences, such as job losses or at least suspension from their normal activities, attests. It is likely that that lack of protection acts as a deterrent to potential whistleblowers.*¹⁸

For police, who are a part of the public sector, the *Whistleblowers Protection Act 2001* provided another avenue through which they could report workplace wrongdoing. The then Attorney General explained its relationship to the *Police Regulation Act 1958*:

A detailed complaints regime for allegations of police misconduct (spanning a much broader range of inappropriate behaviour) already exists under ... the Police Regulation Act 1958. However, the remedies for persons making complaints under that act are narrower than the broad range of protections available under this bill. As public interest disclosures about police will cover the most serious forms of police misconduct, it is appropriate that the broadest range of protective devices apply to shelter a whistleblower.

The Act therefore intended to offer broader protection for more serious matters than the *Police Regulation Act 1958*. The then Attorney General also said:

*In order to minimise procedural duplication, the bill as far as possible provides for the same procedures to apply in police matters as would apply under the Police Regulation Act 1958.*¹⁹

¹⁸ R Wynne Legislative Assembly Melbourne 5 April 2001

¹⁹ Dr Dean Legislative Assembly Melbourne 4 April 2001

The role of OPI

The establishment of OPI in 2004 created a new third party – in addition to Victoria Police and the Ombudsman – for dealing with police wrongdoing. OPI provided an additional pathway through which police could report wrongdoing in the workplace. OPI was given the mandate to detect and prevent serious misconduct and corruption.

OPI's powers were initially detailed in the *Police Regulation Act 1958* and the *Whistleblowers Protection Act 2001* and were consistent across both regimes. However, when the *Police Integrity Act 2008* was proclaimed it provided OPI with more extensive powers. The *Whistleblowers Protection Act 2001* was not amended to reflect the more extensive powers.

Like the other Acts, the legislation establishing OPI was introduced with an acknowledgment that police who provided information about wrongdoing needed protection, in particular through confidentiality. A Member of Parliament said:

Disclosure of information ... has the potential to jeopardise the effectiveness of an OPI investigation and to impact upon the rights of others. In some cases, disclosure of information could jeopardise the safety of a person who has given information to the OPI.

... To a large extent ... [the Director, Police Integrity] relies upon the preparedness of police officers and other persons to provide information. Without clear assurances as to the confidentiality of information provided by them, potential informants and witnesses would be less willing to provide such information to [the Director, Police Integrity].²⁰

20 R Cameron Legislative Assembly Melbourne 13 March 2008

Navigating the framework

Complexity creates opportunities for manipulating the system by encouraging “workarounds” and the establishment of alternative systems. Consequently, it is difficult to detect corrupt activities in a complex system, as any lack of clarity in a system provides an opportunity for corrupt actions to succeed. The inconsistent decisionmaking that results from a complex system also makes it difficult to establish that correct processes are being followed.

*Delays are also a by-product of complex systems ...*²¹

When public disclosure legislation was introduced to Victoria, the then Ombudsman recognised the risk of over-complicating the framework for reporting wrongdoing in the police workplace. A Member of Parliament said:

*... [the Ombudsman] was concerned that unless there was a close similarity between the Ombudsman Act, the Police Regulation Act and this bill, the possibility would exist that three pieces of legislation would control and affect very similar types of situations and that could give rise to more confusion than it is worth.*²²

This prediction has to some extent been realised.

Understanding wrongdoing

For Victoria Police as an organisation, the first step in applying the framework for reporting workplace wrongdoing is understanding wrongdoing as it is defined in the legislation. The type and seriousness of the wrongdoing reported determines which legislative provisions apply for investigation and protection.

Similarly, individual police must understand classifications of wrongdoing in legislation and policy so they know what to report and have realistic expectations about the organisation’s response to reports and reporters.

When the organisation or the individual lacks a clear picture of where wrongdoing fits in the framework, individuals and allegations are sometimes mismanaged or incorrectly perceived to be mismanaged.

21 Independent Commission Against Corruption 2012 *Anti-corruption safeguards and the NSW planning system* p17

22 C A Furletti Legislative Council Melbourne 16 May 2001

Understanding wrongdoing in legislation

The three Acts of Parliament that explicitly address police wrongdoing in Victoria create a complex and confusing framework for understanding police wrongdoing. They place bewildering and overlapping obligations on the police organisation and individual police.

Serious misconduct
(a) <i>conduct which constitutes an offence punishable by imprisonment; or</i>
(b) <i>conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or</i>
(c) <i>disgraceful or improper conduct ...</i>
<i>Police Regulation Act 1958, s86A</i>
Improper conduct
(a) <i>corrupt conduct; or</i>
(b) <i>a substantial mismanagement of public resources; or</i>
(c) <i>conduct involving substantial risk to public health or safety; or</i>
(d) <i>conduct involving substantial risk to the environment – that would, if proved, constitute –</i>
(e) <i>a criminal offence; or</i>
(f) <i>reasonable grounds for dismissing ... a public officer ...</i>
<i>Whistleblowers Protection Act 2001, s3(1)</i>

The organisational response required of Victoria Police is difficult to understand too. A report of improper conduct is called a *protected disclosure* under the *Whistleblowers Protection Act 2001*. The Ombudsman may determine that a protected disclosure is also a *public interest disclosure* if it ‘shows or tends to show’ the conduct reported did occur.

Corrupt conduct
(a) <i>conduct ... that adversely affects, or could adversely affect, either directly or indirectly, the honest performance of a public officer’s or public body’s functions; or</i>
(b) <i>conduct ... that amounts to the performance of ... functions as a public officer dishonestly or with inappropriate partiality; or</i>
(c) <i>conduct ... that amounts to a breach of public trust; or</i>
(d) <i>conduct ... that amounts to the misuse of information; or material acquired in the course of the performance of [public] functions ... or</i>
(e) <i>a conspiracy or attempt to engage in conduct ... in paragraphs (a) to (d)</i>
<i>Whistleblowers Protection Act 2001, s3(1)</i>

Police *may* report improper conduct and corruption under the *Whistleblowers Protection Act 2001*, and they *must* report serious misconduct under the *Police Regulation Act 1958*. By definition in the *Police Regulation Act 1958*, serious misconduct *includes* improper conduct²³ and in the *Whistleblowers Protection Act 2001*, improper conduct *includes* corrupt conduct.²⁴ Corrupt conduct is defined in the *Whistleblowers Protection Act 2001* but not in the *Police Regulation Act 1958* or in the *Police Integrity Act 2008* despite the fact the *Police Integrity Act 2008* was established primarily to deal with police corruption (and serious misconduct).

23 *Police Regulation Act 1958 s86A(c)*

24 *Whistleblowers Protection Act 2001 s3(1)(a)*

Since the proclamation of the *Whistleblowers Protection Act 2001*, the *Police Regulation Act 1958* has required²⁵ that Victoria Police must treat all complaints by police of *serious misconduct*²⁶ by colleagues as if they were protected disclosures of *improper conduct* made under the *Whistleblowers Protection Act 2001*. Yet *improper conduct* is just one type of *serious misconduct* under the *Police Regulation Act 1958*.

Understanding wrongdoing in policy

Victoria Police has established a number of policy documents to help police understand these arrangements and to guide them through their requirements and opportunities to report wrongdoing. OPI found that some documents, such as the Frequently Asked Questions document of the Internal Witness Support Unit, were out of date and difficult to locate on the Victoria Police intranet.

Understanding wrongdoing in practice

There appears a significant degree of uncertainty in Victoria Police in understanding classifications of wrongdoing. The uncertainty is evident among those responsible for administering legislation and policy as well as individual police who might report wrongdoing.

An Inspector of Victoria Police who had responsibility in this area suggested to OPI that in practice the interaction of legislation created difficulties for the assessment of reports by police. The Inspector said:

... it gets a little bit complicated, because we've got the Whistleblowers Act on one side, and we've got the Police Regulation Act on the other and they both effectively say the same thing. So we have to work out whether they're a whistleblower under that Act ... or whether they're just – I say 'just' – somebody who is entitled to protection from detrimental action under the Police Regulation Act.

It appears that in practice Victoria Police does not formally assess all reports of wrongdoing to determine whether they are protected disclosures under the *Whistleblowers Protection Act 2001*. An Inspector told OPI in 2010 that employees in the Police Conduct Unit usually 'know' if a matter falls under that Act. In 2012, another Inspector said employees at the Police Conduct Unit found the legislation confusing, even after they attended training provided by Ombudsman Victoria. During consultations for this report, the Victorian Deputy Ombudsman told OPI he would be very surprised if Victoria Police had correctly identified all potential protected disclosures under the *Whistleblowers Protection Act 2001*.

²⁵ *Police Regulation Act 1958* s86LA(2)

²⁶ *Police Regulation Act 1958* s86L(2A)

If those in Victoria Police who are responsible for applying the legislative and policy framework are uncertain, it is likely that individual police are too.

Focus group explores misconduct and corruption

OPI asked a focus group of mid-level managers from Victoria Police to consider 13 examples of workplace wrongdoing and determine whether each was: acceptable; misconduct; serious misconduct; or corruption. OPI also asked what should be done in response to each example. The examples were drawn from past OPI investigations and, in OPI's opinion, each met the criteria for serious misconduct or corruption.

In only two of the 13 cases was there majority agreement about how to classify the behaviour. Where participants identified misconduct or serious misconduct, they said they preferred to resolve matters informally, without the intervention of the Ethical Standards Department.

Police who have reported wrongdoing and were interviewed for this report (called '*case study interviewees*') tended to disregard the distinction between types of wrongdoing. Asked why they reported what they did, case study interviewees were adamant the behaviour they reported was wrong. They gave explanations such as: '[I] *just knew it was wrong*'; '*something's not quite right here*'; and '*this is just wrong, you know, totally wrong ... that sense of right and wrong ... it just didn't fit right*'.

The commitment to ethical principles demonstrated by these police is beyond question. But there is an apparent lack of knowledge of the various types of wrongdoing under legislation.

Investigating reports of wrongdoing

Investigation in legislation and policy

Among other things, legislation requires Victoria Police to do the following in response to police reports of police wrongdoing:

- Use the provisions of the *Police Regulation Act 1958* to investigate allegations of serious misconduct reported directly to Victoria Police, and report on allegations and investigations to the Director, Police Integrity as soon as practicable.²⁷
- Use the provisions of the *Police Regulation Act 1958* to investigate serious misconduct and corruption referred to Victoria Police by the Director, Police Integrity,²⁸ and report on investigations to the Director, Police Integrity.²⁹
- Report to the Ombudsman disclosures of improper conduct made to Victoria Police under the *Whistleblowers Protection Act 2001* where Victoria Police believes the disclosures are public interest disclosures.
- Use the provisions of the *Whistleblowers Protection Act 2001* to investigate disclosures of improper conduct determined to be public interest disclosures and referred to Victoria Police by the Ombudsman,³⁰ and report on the investigation to the Ombudsman.³¹

These provisions appear to require different treatment for serious misconduct and improper conduct, even though the two are not distinct. However, the following legislative requirement causes serious misconduct reported by a member of police to be classified as improper conduct:

- Reports of serious misconduct made by police under the *Police Regulation Act 1958* are automatically deemed protected disclosures of improper conduct and must therefore be considered potential public interest disclosures under the *Whistleblowers Protection Act 2001*.³²

It is only if the protected disclosure is not also a public interest disclosure that it can be investigated as serious misconduct under the *Police Regulation Act 1958* rather than as improper conduct under the *Whistleblowers Protection Act 2001*. Although Victoria Police is legislatively required to inform OPI of allegations of serious misconduct as soon as practicable, it is forbidden from disclosing information about protected disclosures of improper conduct to OPI or anyone other than the Ombudsman.

²⁷ *Police Regulation Act 1958* s86M

²⁸ *Police Integrity Act 2008* s40(3)

²⁹ *Police Regulation Act 1958* s86M

³⁰ *Whistleblowers Protection Act 2001* s84

³¹ *Whistleblowers Protection Act 2001* s93

³² *Whistleblowers Protection Act 2001* s26

Parliamentary debate indicates it was not the intention of Parliament to make redundant provisions in the *Police Integrity Act 2008* and the *Police Regulation Act 1958*. Some potential overlaps were dealt with when OPI was created by actively excluding the conduct of sworn police members from the jurisdiction of the Ombudsman under the *Ombudsman Act 1973*.

When the *Whistleblowers Protection Act 2001* was enacted it intended for ‘*the same procedures to apply in police matters as would apply under the Police Regulation Act 1958*’ in order to ‘*minimise procedural duplication*’.

Nevertheless, under the current framework it is impossible to apply certain sections of the *Police Regulation Act 1958* and the *Police Integrity Act 2008* without seeming to contravene the *Whistleblowers Protection Act 2001*.

Investigation in practice

In practice, the complexity of the framework for classifying wrongdoing can contribute to inappropriate, inconsistent and untimely outcomes.

Misclassification

A police employee reported suspected misuse of a police vehicle by another employee who was taking the vehicle home during periods of leave. Victoria Police classified the report as suitable for ‘conciliation’. The resolution officer approached the person who reported the suspected wrongdoing seeking that person’s consent to resolve the matter.

In the above case, the employee reporting the matter was not a complainant in the sense that he or she was personally affected by the behaviour. Rather, the employee reported what he or she felt was inappropriate conduct by a colleague. If there was a victim of the suspected wrongdoing, it was the organisation and its public resources, not the individual employee. In such cases, the agreement of the ‘complainant’ should not be required to settle the matter.³³

³³ OPI discussed problems with the use of the word ‘complaint’ in its 2011 report *Improving Victoria Police discipline and complaint handling systems: A progress report*

Time-consuming process

In June 2011, a member of police reported suspected wrongdoing by a colleague to Victoria Police. Victoria Police classified the report as an allegation of serious misconduct. Because the person of interest was a senior police officer, Victoria Police referred it to OPI. OPI was required by legislation to consider the report a protected disclosure. OPI also considered the report a public interest disclosure and was therefore required to refer it to the Ombudsman. The Ombudsman determined the report was indeed a public interest disclosure and referred it back to OPI to investigate. OPI began its investigation in October 2011. The investigation concluded in March 2012.

In the above case, the classification of suspected wrongdoing and the associated referrals took around the same time as the investigation. It is not uncommon for such matters to take two months to be classified for investigation under particular legislative provisions.

Classifying individuals

Confusion about the classification of wrongdoing can also cause confusion about the classification of individuals who report wrongdoing. How an individual is classified affects his or her entitlements.

Some members of Victoria Police who have not made protected disclosures according to Victoria Police's assessment have complained to OPI that they have suffered detrimental action under the *Whistleblowers Protection Act 2001*. Some have complained to OPI that Victoria Police denied them 'whistleblower status'.

Despite popular belief and despite the title of the Act, there is no such thing as a 'whistleblower' in the *Whistleblowers Protection Act 2001*. The Act offers protection to people who make protected disclosures and to people who are believed to have made protected disclosures or believed to be intending to make protected disclosures. It appears there is a general lack of understanding of what constitutes a protected disclosure. Some complainants to OPI are frustrated by that lack of understanding.

While classification may not seem important so long as police act on sound ethical principles, OPI has previously reported a negative impact on workplace morale when the organisation does not enforce consistent standards of behaviour.³⁴ Misclassification frustrates police who report police wrongdoing because it affects how the wrongdoing is handled and thus how the person who reports it is managed. If the organisation acts appropriately but the individual does not understand that, frustration remains.

³⁴ Office of Police Integrity 2011 *Improving Victoria Police discipline and complaint handling systems: A progress report*

One case study interviewee who uncovered police wrongdoing was adamant about not being a ‘whistleblower’ and implied the term carried negative connotations. The interviewee said:

I should not have been classed as a whistleblower. I just [exposed corruption] as an investigative tool ... What am I, doing that? I should not be classed as anything ... Whistleblowers should not exist and don't exist in my mind ... I'm a cop. I just did what I had to do because I took the oath. I didn't see myself as ... anything other than doing what I had to do.

Later, however, the same interviewee mentioned seeking protection and support, and said:

[The relevant committee] decided that I am not a witness and I'm not to be protected because I'm just doing my job ...

Victoria Police later granted the interviewee the status of an internal witness.

When OPI mentioned the term ‘whistleblower’ to a second interviewee, that interviewee said:

That's what I am, isn't it?

That interviewee's report of wrongdoing was not considered to be a protected disclosure under the *Whistleblowers Protection Act 2001*. The interviewee did not understand the different classifications and expressed significant dissatisfaction over a perceived lack of support and protection.

A further interviewee made a report that was classified a public interest disclosure under the *Whistleblowers Protection Act 2001*. That interviewee said:

I had certainly heard the term whistleblower, but I certainly didn't think that that's what I was doing at the time.

The interviewee became comfortable being referred to as a whistleblower with the qualification that:

I don't go around and tell people I see that I'm a whistleblower.

It is clear that administrators and individuals alike have difficulty with classifications of wrongdoing under the current legislative framework. Victoria Police is at risk of not applying the law correctly and individuals can suffer from unmet expectations and frustration.

Protecting individuals from reprisal

One of the key aims of the legislative framework for reporting wrongdoing in the police workplace is to protect individuals against reprisal. Protecting individuals from reprisal is important to prevent retaliation and to encourage others to speak up about wrongdoing. If employees fear their colleagues will ‘get away with’ mistreating them for speaking up, they are likely to be reluctant to report their colleagues’ wrongdoing.

Legislated protections against reprisal towards police are generally not implemented well. Perhaps more importantly they do not address the fundamental causes of reprisal.

Prohibitions and penalties

Prohibitions and penalties in legislation and policy

The *Police Regulation Act 1958* prohibits victimising police who provide information about police wrongdoing. The penalty is 120 penalty units or imprisonment for 12 months or both.³⁵ The *Whistleblowers Protection Act 2001* specifies a penalty of 240 penalty units or two years imprisonment or both for taking detrimental action against a person who has made, is believed to have made, or is believed to be intending to make a disclosure of improper conduct.³⁶

The Victoria Police Manual restates the prohibition against victimisation, but only against ‘internal sources’. It instructs:

*Employees are reminded that victimisation and interference of internal sources, or causing others to do the same, is a criminal offence, punishable by a fine, imprisonment or both.*³⁷

The Manual also requires local managers to ensure ‘internal sources’ and ‘whistleblowers’ do not suffer reprisal in their workplaces.³⁸

Prohibitions and penalties in practice

While Victoria Police policy is committed to protecting employees who report wrongdoing by colleagues, there appear to be few instances where police have been sanctioned for retaliation. OPI is not aware of any Victorian police prosecuted for reprisal under the *Police Regulation Act 1958* or the *Whistleblowers Protection Act 2001*.

³⁵ *Police Regulation Act 1958* s86V

³⁶ *Whistleblowers Protection Act 2001* s18(1)

³⁷ Victoria Police 2012 *Victoria Police Manual – Policy Rules: Professional and Ethical Standards*

³⁸ Victoria Police 2012 *Victoria Police Manual – Procedures and Guidelines: Complaint management and investigation*

Confidentiality

A primary purpose of confidentiality in handling reports of workplace wrongdoing is to protect the reporting person against reprisal. If the threat of reprisal were to disappear, confidentiality would be less important. Further, if reporting workplace wrongdoing was an act that drew praise from managers and colleagues, confidentiality would be undesirable to the individual.

Confidentiality in legislation and policy

Both the 1999 amendments to the *Police Regulation Act 1958* and the introduction of the *Whistleblowers Protection Act 2001* purported to address ‘secrecy’. Reporting workplace wrongdoing is about uncovering problems, bringing them to light.

Despite this, confidentiality is a key protection in the *Whistleblowers Protection Act 2001*. The Act requires information arising from a protected disclosure, including the identity of the person who made it, to remain confidential.

At the policy level, the Victoria Police Manual makes the following provisions for confidentiality of the identities of individuals who report wrongdoing:

Internal source – the identity and any information communicated by an internal source is confidential and will not be disclosed outside the reporting process outlined or where a disclosure is required:

- *following the lawful direction of a Court ...*
- *where disclosure becomes necessary during any investigation connected with the report of information – approval is to be sought from the Manager, IWSU [Internal Witness Support Unit] who will consult with the internal source before their identity is disclosed.*

The Manager, IWSU [Internal Witness Support Unit] will notify/consult the internal source prior to or as soon as practicable afterwards where any information is disclosed regarding the internal source in the above situations.

Whistleblowers – The identity of whistleblowers will be kept confidential. However, should the identity be made known, due to the nature of the allegations, the investigator should warn the whistleblowers and their welfare manager of this, as soon as practicable.³⁹

The Victoria Police Manual does not require the identities of police who report wrongdoing but are not classified ‘internal sources’ or ‘whistleblowers’ to be kept confidential.

39 Victoria Police 2012 *Victoria Police Manual – Procedures and Guidelines: Complaint management and investigation*

Confidentiality in practice

OPI has encountered a range of views about the confidentiality of individuals' identities in Victoria Police. For example, two case study interviewees who reported wrongdoing did not appear to place much value on the concealment of their identities. They appeared more concerned with the organisation's response to the report of wrongdoing than whether others knew their identities. In contrast, OPI investigators have dealt with witnesses from Victoria Police who very firmly wished their identities as witnesses to be concealed, even – in at least one case – if it meant investigation of wrongdoing could not proceed.

An Inspector of Victoria Police told OPI:

We get a lot of anonymous complaints. You can see that they most clearly come from police members.

OPI also receives anonymous reports from people who appear – by virtue of the organisational knowledge they convey – to be members of police. Clearly some police are reluctant to be associated with a report of workplace wrongdoing.

Confidential and anonymous reports can be difficult to substantiate since the investigator may not be able to request further information from the reporting person and must be careful not to expose the reporter to his or her workplace when gathering evidence. The latter is especially difficult where police work in pairs and there is only one witness to an act of wrongdoing.

It is clearly desirable from an investigative standpoint that police identify themselves when reporting workplace issues. However, so long as there is risk of reprisal, it is likely that anonymous reporting will continue and it would be unreasonable to refuse anonymous reports.

In practice, confidentiality does not always prevent reprisal. One case study interviewee whose identity was not revealed was subject to physical threats along with others who were the only ones aware of the wrongdoing and therefore the only potential reporters of it. In a recent OPI matter an individual who had not reported anything suffered reprisal due to the mistaken belief that the individual had caused the OPI investigation to begin.

In the long term, concealing the identity of the reporter is not the solution to reprisal. In fact, the protection of witnesses under the cloak of confidentiality can be an excuse not to deal with workplace wrongdoing. Reporting a whistleblower investigation in Victoria Police in 2007, the Ombudsman wrote:

I am of the view that the whistleblowers and other witnesses are much more robust, forthright and resilient than they appear to be given credit for. While I acknowledge the constraints the [Whistleblowers Protection] Act has placed on Victoria Police, the whistleblowers should be asked if they are prepared to have their identity revealed

for the purposes of an investigation. I also consider that it is unsatisfactory that the allegations have not been put to the [police suspected of wrongdoing]. The whistleblowers and other witnesses have indicated to my office that they are willing to cooperate with an investigation, including disclosing their identity, if necessary.⁴⁰

As already demonstrated, not all police are willing to have their identity disclosed as witnesses or sources in investigations of police wrongdoing. But an inflexible commitment to secrecy can inhibit successful investigation. It can also restrict the use of investigation findings for purposes of organisational improvement.

OPI does not wish to understate the importance of protecting police who report wrongdoing through confidentiality and anonymity in a policing environment where reprisal is likely. But Victoria Police, like any organisation, must look beyond short-term protection through secrecy towards a workplace culture that applauds those who speak up for integrity, instead of making them victims whose identity must be kept secret for their own good.

Managing welfare

Welfare management in legislation and policy

Neither the *Police Regulation Act 1958* nor the *Police Integrity Act 2008* contains specific provisions for the welfare of individuals. The Ombudsman's Guidelines require organisations to manage the welfare of people who make protected disclosures.

Victoria Police's provision of a dedicated Internal Witness Support Unit is consistent with the recommendations of various authorities on whistleblowing-type matters,⁴¹ including the Ombudsman's Guidelines. The Internal Witness Support Unit has both reactive and proactive functions according to the Victoria Police Manual. The Manual lists the Unit's functions as:

- *Increase accountability of local managers in ensuring the welfare of internal sources and whistleblowers.*
- *Appoint a welfare manager for whistleblowers.*
- *Provide encouragement and advice to potential internal sources.*
- *Provide case management to individuals who have acted as internal sources or whistleblowers and who may be experiencing concerns.*
- *Coordinate welfare services where appropriate.*
- *Foster a climate whereby employees readily report matters of corruption, criminality or serious misconduct thereby providing the means to eliminate such behaviour at the earliest opportunity.*

⁴⁰ Ombudsman Victoria 2007 *Investigation into a disclosure about WorkSafe's and Victoria Police's handling of a bullying and harassment complaint* p26

⁴¹ For example, it is one of three options identified in P Roberts J Olsen AJ Brown 2009 *Whistling while they work: towards best practice whistleblowing programs in public sector organisations* Draft report p110

These functions indicate that protection and support offered to an employee will depend on how the report (and thus the reporter) is classified. Welfare support is provided for 'internal sources' and 'whistleblowers'.

Despite making reference to 'internal sources', Victoria Police policy does not define 'internal source'. It dictates that:

The Internal Sources Standing Committee will examine all applications for registration of internal source and will be responsible for approving all such registrations. All employees registered as an internal source will be referred to Internal Witness Support Unit (IWSU) for support.

Police told OPI the Internal Source Standing Committee no longer exists.

Welfare management in practice

Among five case files selected and summarised for OPI by the Internal Witness Support Unit, OPI observed an informal, unstructured approach to welfare management. The summaries of files contained no assessment of risk to the individuals who disclosed wrongdoing or any case management plans. Contact with individuals appeared sporadic, often months apart.

Given that reprisal can be difficult to establish, a risk assessment that records the working conditions of an individual at the time he or she makes a report of wrongdoing would be useful for establishing whether those conditions later change and whether any changes might represent reprisal.

The caseload of the Internal Witness Support Unit is unlikely to include all police who have reported workplace wrongdoing. Between 2007 and 2010, the Unit provided welfare support to between four and 17 police each year. As mentioned earlier, one case study interviewee was initially denied support because of not being classified an 'internal source'. An Inspector and former investigator of the Ethical Standards Department suggested difficulties with classification had in the past impacted on the welfare services provided to police who report workplace wrongdoing. The Inspector said:

I think they got tied up initially with what was and was not an internal source as opposed to an internal witness as opposed to simply a police witness and to me I think that is semantics getting away from the issue which is support and encouragement of people to, A, disclose issues which may constitute misconduct or criminality and then, B, stand up and give evidence about it.

The Internal Witness Support Unit told OPI it no longer restricts access to welfare support to police classified as internal sources. Victoria Police policy is yet to reflect that change. As indicated earlier, the complex legislative framework continues to cause confusion about classifications of reports and reporters. OPI supports the stated practical approach of Victoria Police to not limit support services to those who fit formal classifications.

While the Internal Witness Support Unit said it does not refuse welfare support to police who request it, it acknowledged that not all police who report workplace wrongdoing are referred to the Unit. The process of referral is not formalised and appears to depend on proactive action by investigators from the Ethical Standards Department or on police making contact of their own accord. The extent to which police are aware of the Unit and its functions is unknown. The Internal Witness Support Unit said it planned to broaden its proactive educational activities which were previously directed at recruits only.

Case study interviewees had differing needs and expectations of welfare management and reported varying levels of satisfaction. Their experiences were mostly positive, although one interviewee was entirely dissatisfied.

One case study interviewee said:

... [my case manager] was magnificent and ... made lots of sense out of what had happened to me and said all the right things and was very supportive and took fantastic notes which, years later, helped to bear fruit when things flared up again.

That interviewee also said consistency of support was most important – that describing traumatic events to a succession of different case managers at the Internal Witness Support Unit ‘*was like re-victimisation*’.

Two case study interviewees reported beneficial support from a person other than a formal case manager in the Internal Witness Support Unit. One said independent non-Victoria Police support was reassuring yet knowledge of the police organisation was important. The other initially resisted welfare support because ‘*no whistleblower, no witness ... [is] going to admit that they’re suffering isolation*’. However, when a support person was provided anyway, the interviewee ‘*would tell him all my problems*’ and ‘*it was fantastic*’.

In contrast, the fourth case study interviewee said:

I had some people from their witness protection come out and see me ... [They] came out one morning [and] sat down in the kitchen with me. [We] had a bit of a talk and [they said], ‘Here’s our card.’ And that’s the last I ever saw of them ... It just makes you more frustrated because you think, you know, they’re just going through the motions.

One strategy used in Victoria Police to manage the welfare of police who report police wrongdoing is to relocate reporters. Relocation may be an appropriate strategy for protecting employees in some circumstances. For example, if workplace culture in a particular location is unhealthy and cannot be immediately changed. However, the strategy does nothing to build supportive culture; it perpetuates the culture that punishes those who speak up. One case study interviewee referred to the strategy as ‘*the classic thing of move the victim, not the problem*’.

Addressing the root cause of reprisal: misguided loyalty

Many strategies for dealing with reprisal (not unique to Victoria Police) are reactive, not geared to tackling causes or preventing future instances. They are also individualistic, assisting individual reporters without giving attention to the broader causes of a person's suffering.

For several decades now, corruption has been considered an organisational problem rather than simply a matter of 'bad apples' or inherently corrupt individuals. Yet reprisal is most often addressed as an individual offence, by individuals against individuals. In an assessment of the *Whistleblowers Protection Act 2001*, academic William De Maria wrote:

The Victorian Act, like most other similar statutes, provides individual penalties for reprisers but none for the reprinter's work area. The only meaning we can get out of this is that the disclosure-reprisal phenomenon continues to be understood in individualist not organizational (sic) and political terms. Usually the only person who acts "individually" is the whistleblower. Research on the vendetta culture has now put organisational complicity beyond doubt.

Yet the laws fail to target the errant workplace. There is some argument that this can be done in other places (eg codes of conduct, ethics commissions, public inquiries). But what better place to put the focus on organisations than in whistleblower laws?⁴²

Victoria Police can improve its administration of the protections available under the framework, for example by monitoring the risk of reprisal and enforcing penalties when reprisal occurs. However, such measures are not ends in themselves. They are stop gap solutions designed to assist individuals who are already in a position of danger or have already suffered. They alleviate symptoms. No matter how well those protections are implemented, they are not sufficient to address the root cause of reprisal – what De Maria calls the 'vendetta culture'.

OPI has observed remnants of that culture in some of its investigations into suspected wrongdoing in Victoria Police. For example, the reluctance of some police to give evidence of their colleagues' suspected wrongdoing indicates misguided loyalty. Of the investigations in which OPI sought evidence from police other than the person of interest, 49 percent featured one or more police member who was reluctant or uncooperative in giving evidence.

The case study below is a recent investigation in which a member of police actively hindered OPI investigators gathering evidence of suspected police wrongdoing.

⁴² W De Maria 2002 *The Victorian Whistleblower Protection Act: Patting the Paws of Corruption?* Paper presented to Department of Business Law and Taxation Monash University 3 May 2002 p16-17

Magistrate finds *'misguided loyalty'*

During the course of an investigation, OPI conducted an overt search of a police station. During the search, a Leading Senior Constable contacted his colleague whose conduct was under investigation to warn him of the search.

At the colleague's request, the Leading Senior Constable removed and concealed both the *'day book'* and the official police diary of the colleague. The Leading Senior Constable thus prevented OPI from seizing those items, both of which were relevant to OPI's investigation.

OPI surveillance operatives later observed the Leading Senior Constable delivering the *'day book'* and diary to the home of the colleague against whom allegations had been made.

When OPI questioned the Leading Senior Constable about the evidence he concealed, he admitted his involvement after OPI showed him incontrovertible evidence of his actions.

In early 2012, the Leading Senior Constable was convicted and fined in the Magistrates Court for hindering OPI's investigation. The Magistrate found that the Leading Senior Constable had acted out of *'misguided loyalty'*.

In a separate OPI matter in early 2012, two further police were convicted of lying to the Director, Police Integrity after they attempted to withhold/falsify evidence relating to the suspected wrongdoing of their colleagues. One of those police reportedly said a colleague accused him of being a *'lagger'*.

OPI investigations also demonstrate reluctance among some in Victoria Police to report wrongdoing in the first place. In 159 OPI investigations examined for this review, one or more allegations was substantiated in 54 cases. Of those 54 cases, one or more members of police was aware of the wrongdoing in 36. In those 36 cases, police reported the wrongdoing less than half of the time (15 cases, or 42 percent).

How these figures compare with earlier times – for example the 1990s when compulsory reporting of serious misconduct was introduced – cannot be determined. There is no earlier data with which to compare. All police interviewed for this report said the situation is improving, but most said it remains to some extent or in some *'pockets'* of the organisation.

An Inspector of Victoria Police said:

Let's just say we're getting better. ... I don't think there's any doubt that ... there's been a very strong reluctance to report other police members ... I think that's very much changing. ... And I think a lot of that is ... generational change. You know, the type of people we're getting in now and the younger generation ... I suppose we say that they ... live for today and no accountability, but they actually do ... expect

a lot of accountability from each other. Um, whereas the old-style policing, you know, where you never give anybody up ... we're very much moving away from that. I have to say it's still there, but ... I think it's safe to say that we're certainly improving.

When OPI discussed the incidence of internal reporting with the Police Conduct Unit in 2010, the Unit told OPI it did not register whether or not a matter originated from a member of police; it therefore had no data to show whether reporting levels changed over time.

Since that time Victoria Police's Ethical Standards Department has commenced publishing and circulating an Ethical Health Performance Indicator Report. As an indicator of ethical health, this report includes data on internally-generated discipline files which on the face of the allegations could lead to disciplinary action.

Although it is too early to determine trends in internal reporting from this data, this initiative will be valuable for the future in indicating changes to reporting patterns over time.

In addition to analysing internally-generated complaint investigation data, it is in the interests of Victoria Police to continue to measure other indicators of workplace culture to help understand what is required to build and sustain a positive workplace report culture.

Given the short-term, reactionary and individualistic nature of the legislated protections against reprisal, it is likely that any improvement in reporting and reprisal levels has occurred despite – not because of – the present framework for police reporting police wrongdoing.

The role of the workplace manager

If reprisal is an organisational problem to be prevented rather than simply treated after the fact, there is a crucial role for local workplace managers. A number of police told OPI the likelihood of reprisal varies between local workplaces, even those located very close geographically.

One case study interviewee demonstrated the strength of local culture and the importance of the local manager. The interviewee said:

I remember at the Academy having that drilled into us, that alcohol's a no-go zone, cash is a no-go zone, that you don't pick and choose who you book and who you don't ...

In that first six months [at my first station] ... it was obvious that there was a very strong culture and very strong clique going on ...

The shocking part for me looking back is how early it showed itself ... Within the first month they were not afraid to say, 'This is how we do it here' ... 'You're new. What would you know? Don't be asking questions. Don't be gobbing off'. And our boss

[was] sitting upstairs with his head in a pot plant – I'm being polite – you know, and just allowing all this to go on.

Managers are empowered and expected to act in response to inappropriate behaviour by their staff, including attitudes that are inconsistent with Victoria Police ethical and professional standards. An Inspector of Victoria Police demonstrated very simply but firmly how managers can challenge poor attitudes amongst staff. The Inspector said:

... I actually encourage my management group and my supervisors to look at it quite starkly and say, 'By that comment, do you mean that you're happy to support or ignore corruption or misconduct?'

If all managers took the approach of that Inspector, the threat of reprisal against police who spoke up against wrongdoing would be significantly reduced.

Improving organisational performance

Protecting individuals against reprisal is a key aim of the framework for police reporting police wrongdoing. However, protecting individuals is not the ultimate objective of the framework. The ultimate objective of reporting wrongdoing in the workplace must be organisational improvement. Without learning from and preventing wrongdoing – making the organisation better – there is no point compelling or even encouraging police to report the wrongdoing of their colleagues. If there is to be no organisational improvement, then the best way to protect police would be to have them not speak up at all.

When asked about the ongoing affects of reprisal, one case study interviewee told OPI what *'bugs me'* and *'annoys the crap out of me'* was a feeling that Victoria Police had not acted adequately on the wrongdoing reported by the interviewee. The interviewee said that was *'most disappointing'* and the *'biggest bone of contention'*. Another case study interviewee discussed how seeing a successful outcome from a report of wrongdoing validated the interviewee's original decision to report corrupt behaviour. The interviewee said that knowing Victoria Police took action in response to wrongdoing made the interviewee *'really pleased, despite all the agony it brought'*.

Prosecutions and dismissals can have a deterrent effect that helps to prevent future wrongdoing, if they are made public and used for educational purposes. Ensuring identified wrongdoing does not occur in the future also involves making organisational change to reduce the motivations and opportunities that allowed past wrongdoing to occur.

The *Whistleblowers Protection Act 2001* requires the following of Victoria Police:

- (1) *If, on completing an investigation of a disclosed matter under this Part, the Chief Commissioner of Police finds that the conduct that was the subject of the investigation has occurred, the Chief Commissioner of Police –*
 - (a) *must take all reasonable steps to prevent the conduct from continuing or occurring in the future; and*
 - (b) *may take action to remedy any harm or loss arising from the conduct.*
- (2) *The steps to be taken may include the bringing of disciplinary proceedings against the person responsible for the conduct that was the subject of the investigation.*⁴³

Victoria Police has a 'lessons learnt' program, but it attracts little organisational support compared with the effort devoted to short-term reactionary responses to wrongdoing. In recognition of the need to strengthen a whole of organisation approach, the Ethical Standards Department has plans to increase the capability of the 'lessons learnt' program.

43 *Whistleblowers Protection Act 2001* s92

Strict requirements for confidentiality under the current framework can inhibit the organisation's learning from police reports of police wrongdoing. This is particularly the case for reports classified as protected disclosures under the *Whistleblowers Protection Act 2001*. The requirement for Victoria Police to treat all police reports of serious misconduct as protected disclosures limits the use it can make of information arising from such reports.

The *Whistleblowers Protection Act 2001* makes it an 'offence to reveal confidential information' except for certain purposes such as reporting to Parliament, taking criminal or disciplinary action or exercising the functions of the Chief Commissioner under the Act.

It is a function of the Chief Commissioner to '*take all reasonable steps*' to prevent improper conduct from occurring in the future. Therefore it appears Victoria Police may use information derived from protected disclosures for preventative purposes.

However, there are no circumstances under which the Chief Commissioner (or anyone other than the Ombudsman in some circumstances) may reveal information likely to lead to the identification of a person who made a protected disclosure or a person against whom a protected disclosure is made.

Confidentiality provisions also limit the contribution OPI can make to improving systems and practices in Victoria Police. In this report, OPI has been restricted in its use of case studies due to legislative requirements for confidentiality. OPI also has no access to reports of serious misconduct made by police to Victoria Police where Victoria Police has deemed the reports potential public interest disclosures and referred them to the Ombudsman – unless the Ombudsman has then referred them to OPI for investigation as public interest disclosures.

Conclusion

Reducing complexity: legislating for the future

The legislative framework for reporting wrongdoing in the police workforce has caused confusion. Confusion has affected the quality of responses to reported wrongdoing and the experience of individuals who report it. There is a strong argument for a single, all-encompassing provision for the protection of individuals, whether they report, complain or disclose, and whether they are an internal source, internal witness, whistleblower or just 'doing the job'. Similarly, a single set of investigative provisions would provide consistent responses to workplace wrongdoing reported by police.

The issues raised in this report relating to the legislative framework are relevant for Victoria's imminent Independent Broad-based Anti-corruption Commission. Currently, 'corrupt conduct' in the broader public sector is considered a type of 'improper conduct' and may therefore be reported to the Ombudsman under the *Whistleblowers Protection Act 2001*. The lesson from the police jurisdiction is that powers to investigate corruption such as those granted to OPI will be contentious and difficult to apply if they purport to sit alongside the *Whistleblowers Protection Act 2001* in its current form.

A recent report by the Ombudsman foreshadowed potential future problems and recommended legislative amendment to provide certainty around the interaction between the *Whistleblowers Protection Act 2001* and the *Police Integrity Act 2008*.⁴⁴ Delineating corruption from closely-related concepts such as misconduct, fraud and criminality would also help the public sector understand and respond appropriately to the various types of wrongdoing that can occur in the workplace.

This is not the first time OPI has reported that administrative arrangements in Victoria Police are hampered by complex legislation.⁴⁵ While OPI strongly supports a simplified legislative framework for dealing with reports of police wrongdoing, OPI again underscores Victoria Police's obligation to ensure the best administrative arrangements possible under the current legislation. In this case, Victoria Police faces the challenge of eradicating all vestiges of negative organisational culture, not through reactionary protections but by building a culture of open support for those who speak up against wrongdoing.

⁴⁴ Ombudsman Victoria 2011 *Investigation into the Office of Police Integrity's handling of a complaint*

⁴⁵ Office of Police Integrity 2007 *A fair and effective Victoria Police discipline system*; Office of Police Integrity 2011 *Improving Victoria Police discipline and complaint handling systems: A progress report*

Addressing the root cause of reprisal

The optimal framework for dealing with the reporting of wrongdoing in the police workforce depends on the culture of the workforce. Where negative culture or misguided solidarity is strong, formal, reactionary and individualistic methods of protection are required. Where culture is more supportive, protection is less necessary.

The current legislative framework is a response to problems identified in a particular historical context. The fact that not all work units in Victoria Police are equally supportive or equally retaliatory towards those who report wrongdoing indicates that negative workplace culture is not inherent to policing. Victoria Police must adapt its strategies to suit the varied and evolving workplace culture in Victoria Police.

Almost all police OPI consulted for this review said there remained pockets of workplace culture that were hostile to police reporting the wrongdoing of others. Most felt that hostility is diminishing. What is missing is any measurement of the cultural change that many believe is taking place. The more Victoria Police can show improvement in the treatment of police who report police wrongdoing, the more police will be prepared to speak up for integrity.

Improving organisational performance

The reporting of workplace wrongdoing is not an end in itself. It is a means to achieve organisational improvement, by putting a stop to wrongdoing, deterring employees from further wrongdoing and strengthening systems and practices to reduce opportunities for wrongdoing.

Addressing the causes of reprisal assists organisational improvement. The more police can openly discuss workplace problems, including the wrongdoing of colleagues, the easier it will be for Victoria Police to make improvements in response to those problems.

Having police speak up about workplace wrongdoing in secret – under the protection of legislative prohibitions and penalties – is a step forward from a past where reporting wrongdoing was totally discouraged. It is better than having no one speak up at all or having no protection or support available. Ultimately, however, it is only a stepping stone towards a culture in which speaking up about wrongdoing is a source of pride.

Glossary of terms

Corrupt conduct	Under the <i>Whistleblowers Protection Act 2001</i> , conduct that adversely affects, or could adversely affect, either directly or indirectly, the honest performance of a public officer's or public body's functions; or the performance of public functions dishonestly or with inappropriate partiality; or a breach of public trust; or the misuse of information or material acquired in the course of the performance of public functions; or a conspiracy or attempt to engage in conduct in any of the above
Detrimental action	Under the <i>Whistleblowers Protection Act 2001</i> , conduct including action causing injury, loss or damage, intimidation or harassment, discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business, including the taking of disciplinary action
Improper conduct	Under the <i>Whistleblowers Protection Act 2001</i> , <i>corrupt conduct</i> ; or a substantial mismanagement of public resources; or conduct involving substantial risk to public health or safety or conduct involving substantial risk to the environment – that would, if proved, constitute a criminal offence or reasonable grounds for dismissing a public officer
Internal source	Not defined in Victoria Police policy, but entitled to confidentiality and welfare support according to the Victoria Police Manual
Internal witness	Not defined in the Victoria Police Manual; in this report, a police employee who provides information on request about another police employee's wrongdoing
Protected disclosure	A disclosure of <i>improper conduct</i> made according to Part 2 of the <i>Whistleblowers Protection Act 2001</i>
Public interest disclosure	Under the <i>Whistleblowers Protection Act 2001</i> , a disclosure that the Ombudsman has determined shows or tends to show that <i>improper conduct</i> or <i>detrimental action</i> has occurred
Reprisal	In this report, harmful behaviour intended as retaliation against someone who has reported workplace wrongdoing, including <i>detrimental action</i> and <i>victimisation</i>
Serious misconduct	Under the <i>Police Regulation Act 1958</i> , conduct which constitutes an offence punishable by imprisonment; or conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or disgraceful or <i>improper conduct</i>
Victimisation	Under the <i>Police Regulation Act 1958</i> , <i>detrimental action</i> meaning action causing, comprising or involving: injury, damage or loss; intimidation or harassment; ostracism; discrimination, disadvantage or adverse treatment in relation to employment; dismissal from, or prejudice in, employment; disciplinary proceedings
Whistleblower	Colloquially, a person (not necessarily an employee) who reports workplace wrongdoing or a person who makes a protected disclosure; despite popular belief, the term is not used in the <i>Whistleblowers Protection Act 2001</i> other than in the title

Appendix One – Response of Victoria Police



VICTORIA POLICE

Deputy Commissioner's Office

Victoria Police Centre
637 Flinders Street
DOCKLANDS VICTORIA 3008

Telephone [61 3] 9247 6890
Facsimile [61 3] 9247 6869

PO Box 913
MELBOURNE VICTORIA 3001

Mr Ron Bonighton AM
Acting Director, Police Integrity
Office of Police Integrity
Level 3 South Tower
459 Collins Street
Melbourne Vic 3001

Ron
Dear Mr Bonighton

Reporting wrongdoing in the workplace: problems for police

Thank you for the opportunity to provide a response to the above Report which identifies the challenges that the current legislation presents when dealing with whistleblowers. I note the first recommendation as outlined in the report and support a review of the Act that would provide more clarity and direction when dealing with whistleblowers.

Victoria Police understands that internal reporting of wrongdoing is a key measure of the organisation's ethical health and that it reflects a positive organisational culture that encourages and then supports employees who report wrongdoing.

I can advise that the Internal Witness Support Unit has commenced a body of work that will address the issues raised within the report and advice will be provided to your office regarding the progress of this work.

In January this year the Ethical Standards Department initiated a review of its processes and systems. Pursuant to this review ongoing contact has occurred with Ombudsman Victoria to ensure that the department complies with both legislative requirements and those set out in the Ombudsman's Guidelines.

Victoria Police continues to develop and strengthen our ethical health through a number of initiatives. The Centre for Ethics Community Engagement and Communication was introduced in 2009 and it provides comprehensive training for recruits during their foundation training. The reintroduction of promotional examinations and courses has provided a valuable opportunity to reinforce the Force values and leadership responsibilities for our future leaders. The publication of case studies in the Police Gazette and the attendance of our managers at the Discipline Investigation Course highlight mitigation strategies when our members are confronted with ethical dilemmas.

I thank your office for its ongoing support and suggestions to enhance Victoria Police's ethical and professional standards.

Yours sincerely



Graham Ashton AM
Deputy Commissioner
Crime & Operations Support

4 / 06 / 2012

Appendix Two – Response of Ombudsman



Response of the Victorian Ombudsman

It is important that persons who have knowledge of wrongdoing by Victoria Police employees have a mechanism by which they can bring that conduct to notice. It is also important that there is a system in place which enables wrongdoing to be investigated and action taken to ensure it does not happen again.

I agree that the legislative framework for reporting wrongdoing about Victoria Police employees is overly complex and does not support the reporting of wrongdoing. However, I consider that protections for reporting wrongdoing about Victoria Police employees should be confined to the particular types of complaints/disclosures made, namely:

- complaints to the Victorian Ombudsman
- complaints to the Chief Commissioner of Victoria Police about police members by its members
- complaints to the Independent Broad-Based Anti-Corruption Commission (when established).

In the past ten years I have gained considerable experience in the operation of the *Whistleblowers Protection Act 2007* and the challenges it presents in fulfilling my role in assessing, managing and investigating whistleblower disclosures. In several of my annual reports, I have commented on the urgent need to address the challenges created by the legislation. Measures need to be taken to simplify the operation of the Act; to improve the protections afforded to whistleblowers and those involved with their management; and ensure that the framework provided to investigate public interest disclosures fulfils the purpose of the Act.

It is of concern to me that structural weaknesses in the Whistleblowers Protection Act have been highlighted by the Victorian Solicitor-General in recent advice provided to the OPI. This advice provides that information obtained by the OPI as part of an investigation under the Whistleblowers Protection Act can be used to initiate an investigation by the OPI under the *Police Integrity Act 2008*. The result is, that the reporting restrictions that are in place under section 22 of the Whistleblowers Protection Act, which prevent any report under that Act from naming a whistleblower and restricts the power to name the subject of disclosures in reports, have no application to reports made under the Police Integrity Act. While I consider that there should be some limitations to those protections, such as to allow the Ombudsman to name a whistleblower in a report where the Ombudsman considers that this is in the public interest or where the whistleblower consents, I also am concerned that this protection can be entirely bypassed by the Director, Police Integrity, when fulfilling his functions.

I have requested that the Victorian government consider legislative change to enable the Ombudsman to name a whistleblower in a report where the Ombudsman considers that this is in the public interest or where the whistleblower consents. I also provided the Victorian government with an example of how this problem has been dealt with in New South Wales. The New South Wales legislation provides that the name of a whistleblower can be disclosed in a report where it is in the public interest to do so. I am of the view that a similar provision in the Victorian legislation would be desirable.

In spite of its shortcomings, the Whistleblowers Protection Act is an important component of the legislative framework in Victoria and has proven to be beneficial in identifying allegations and disclosures of improper conduct by Victoria Police. I have reported to Parliament on a number of my investigations involving Victoria Police, where I considered it to be in the public interest:

- *Investigation into the tendering and contracting of information and technology services within Victoria Police*, November 2009
- *Investigation into the handling of drug exhibits at the Victoria Police Forensic Services Centre*, December 2009
- *The Brotherhood – Risks associated with secretive organisations*, March 2011
- *Investigation into an allegation about Victoria Police crime statistics*, June 2011.

These investigations have resulted in significant improvements in accountability, processes and procedures within Victoria Police.

Finally, I agree that Victoria Police should address the underlying negative cultural issues which limit the reporting of wrongdoing. Encouraging the reporting of wrongdoing and supporting reporters of wrongdoing against any reprisals is essential to ensuring the effective operation of the legislative framework. While it is a serious offence under the Whistleblowers Protection Act to take (or propose to take) detrimental action against a whistleblower, I have encountered some cases where persons reporting wrongdoing about Victoria Police employees have not been adequately supported and have suffered reprisals.



G E Brouwer
OMBUDSMAN