

**INQUIRY INTO PROTECTION OF PUBLIC SECTOR
WHISTLEBLOWER EMPLOYEES**

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Date received: 19/11/2008

NSW Police Force Submission

Committee on the Independent Commission Against Corruption Inquiry into the Protection of Public Sector Whistleblowers

INTRODUCTION

This submission seeks to describe the context in which NSW Police Force manages allegations, disclosures and complaints (both internal and external) about its employees (police officers and civilians). However, it is primarily focused on the effectiveness of existing legislative protections and identifying other possible options.

This submission includes:

- definitions of key terms;
- a description of NSW Police Force complaint environment including an explanation of why NSW Police Force relies on the Police Act 1990 and not the Protected Disclosures Act 1994;
- a discussion of the policies, practices, procedures and education model utilised within NSW Police Force;
- an overview of existing legislative protections and a broader examination of what works, what might work and what does not work.

NSW Police Force has prepared this submission based on its understanding of what the Committee is looking for. NSW Police Force is prepared to take questions on notice prior to the Committee Hearing date.

DEFINITIONS

- **Allegation:** relates to verbal report of misconduct made Clause 49 Police Regulation 2008.
- **Complaint:** relates to a written report of misconduct made in accordance with Part 8A Police Act 1990.
- **Disclosure:** relates to written report of misconduct made in accordance with Protected Disclosure Act 1994 or the Public Sector Employment & Management Act 2002.
- **Reporter:** is the person making the allegation, complaint or disclosure.
- **Reported:** is the person subject of the allegation, complaint or disclosure.
- **Misconduct:** includes definition under Clause 49 Police Regulation 2008, Part 8A Police Act 1990 and Part 2 Protected Disclosure Act 1994.
- **Protection:** relates to protection of identity (confidentiality) and protection from reprisal (physical, emotional, psychological and employment).
- **Reprisal:** includes detrimental action under Section 20 Protected Disclosure Act 1994 and reprisal action under Section 206 Police Act 1990. Reprisal can include:
 - injury, damage or loss;
 - intimidation or harassment;
 - discrimination, disadvantage or adverse treatment in relation to employment;
 - dismissal from, or prejudice in, employment;
 - disciplinary proceedings and payback complaints

CONTEXT

NSW Police Force utilises a decentralised complaint handling model. Police officers are able to report misconduct of a police colleague to any officer senior to themselves. Reports may be made verbally or in writing. Reports of alleged misconduct are generally assessed within the Command they are made in. Risks are identified, assessed and addressed locally. Decisions about any interim management action is taken locally. It is only after the report of misconduct has been registered on c@ts.i (corporate complaint handling system) that it is available for a support assessment by Internal Witness Support Unit and subject to quality review by Professional Standards Command, the Ombudsman and the Police Integrity Commission.

There are approximately 2500 internal reports of misconduct per year and approximately the same number of external reports. Most of these 2500 internal reports would not reach the benchmark to be considered a Protected Disclosure.

Reporting

- The NSW Police Force Code of Conduct & Ethics (Point 10) also requires police and civilian employees to report employee misconduct.
- Clause 49 Police Regulation 2008 requires a police officer to report misconduct or allegations of misconduct against another police officer (where it meets certain tests) to any officer senior to themselves (verbal allegations).
- Part 8A Police Act 1990 defines police misconduct, dictates who it must be reported to and in what format (written). Part 8A also enables members of the public to complain about police officers.
- Part 2.7 Public Sector Employment & Management Act 2002 is used to manage disclosures about civilian employees. The Professional Conduct Unit, Professional Standards Comand is responsible for centralised receipt, assessment, investigation and penalty determination for these matters.
- NSW Police Force has two Protected Disclosure Coordinators (One police and one civilian).

Police Act 1990 vs Protected Disclosure Act 1994

NSW Police Force relies on the Police Act 1990 for handling complaints of misconduct. Verbal allegations of misconduct under the Police Regulation 2008 are committed to writing and therefore become subject to Part 8A Police Act 1990. The two Acts (Police Act 1990 and Protected Disclosures Act 1994) place similar obligations (with a few minor exceptions) on the NSW Police Force.

Protected Disclosures Act 1994 requires an organisation:

- To assess the disclosure and decide what, if any, action is to be taken (Section 27).
- To notify the whistleblower within 6 months of the disclosure being made of any action taken or proposed (Section 27).
- To maintain confidentiality of information that might identify or tend to identify a person who has made a protected disclosure (except in certain circumstances) (Section 22).

Police Act 1990 requires the NSW Police Force:

- To assess the complaint and decide what, if any, action will be taken (Section 139).
- To notify the complainant of any action taken or proposed, including no action (Section 150) (No time frame).
- To maintain confidentiality of the identity of a person who has made a complaint (except in certain circumstances) (Section 169A).

Both Acts list reporting requirements. Both Acts contain sanctions for reprisal action (Section 20 Protected Disclosures Act 1994 and Section 206 Police Act 1990). However, Section 206 Police Act 1990 contains additional protection against 'payback' complaints.

POLICY

Internal Witness Support Policy (under review) is the NSW Police Force policy in relation to the protection available to those employees who make allegations, complaints or disclosures.

The Internal Witness Support Policy sets out the procedures and guidelines regarding the provision of advice and support to Internal Witnesses (Reporters) within the organisation.

The aim of this Policy is to:

- Contribute to the creation of a professional organisational climate where employees feel confident to report misconduct and corruption.
- Heighten awareness within the organisation that individual members have responsibilities regarding Internal Witnesses.
- Ensure employees reporting these issues are supported and protected from victimisation.
- Address the fundamental problems of a culture actively working against the reporting of illegalities and the perception of non support from managers and the organisation.

The goals of the Internal Witness Support Policy are to:

- Provide support and positive reinforcement to Police employees who identify and report the misconduct of colleagues.
- Ensure all Police employees are aware of, and have access to, the support processes available to Internal Witnesses.
- Ensure all Police employees are aware of their responsibilities with regard to Internal Witnesses.
- Ensure all commanders and managers are aware of their responsibilities with regard to Internal Witnesses.
- Improve the understanding of the need for all Police employees to be aware of the conduct of their colleagues and to take positive action.
- To create and maintain an acceptable ethical environment where all members of the organisation can confidently report corrupt conduct, maladministration, serious and substantial waste or serious misconduct by their colleagues.

Threats Against Police Policy (under review) is utilised for the identification, assessment and management of physical threats against NSW Police Force officers irrespective of the source or motivation behind the threat.

The policy document, seeks to identify and highlight the following:

- Information to assist members who are threatened.
- The responsibilities of commanders and supervisors.
- How to complete a risk/threat assessment for members who are threatened.
- The procedures which must be adopted in reporting, recording, monitoring and reviewing a threat.
- Responsibilities in respect of security enhancements carried out for threatened members.

PROCEDURES

Complaint Handling Guidelines provide instructions for managing a complaint (allegation or disclosure) received by the NSW Police Force about the conduct of a police officer.

The document is divided into six parts that reflect the key areas of complaint management. It provides guidance on the triage process, managing a complaint that does not require evidence based investigation, managing complaints that do require an evidence based investigation and management action. The six parts are as follows:

- Part 1 - Triage describes the triage process to be followed when a command receives a complaint.
- Part 2 - Resolution provides guidance to resolution managers on resolving complaints.
- Part 3 - Complaint Management Team describes steps that may be required by a Complaint Management Team (CMT) in the complaints management process.
- Part 4 - CMT evidence based investigations provides guidance to investigators on CMT managed.
- Part 5 - Complaint outcomes and management action provides information and guidelines about management action.
- Part 6 - Administrative support functions provides guidance on administrative actions that support triage / resolution and CMT managed investigation processes.

Guidelines for Determining Possible Detrimental Action Including Payback (Reprisal) Complaints assist Complaints Management Teams (CMTs) who have the local knowledge to determine whether officers within their command are the subject of possible detrimental (reprisal) action.

PRACTICES

STANDARDS

Code of Conduct & Ethics (Point 10) expressly states that employees of NSW Police must report the misconduct of other employees of NSW Police. This includes criminal offences, corrupt or unethical conduct, serious mismanagement and substantial waste of public resources. Further, employees are encouraged to challenge inappropriate behaviour. Employees are advised that failure to comply with the Code of Conduct & Ethics may result in management action.

Employees are advised that they can report misconduct to any employee senior in rank or grade to themselves, or through the Corruption Hotline on 1 800 060 205.

Police officers have specific legislative obligations to report corrupt or unethical conduct under clause 49 NSW Police Regulation 2008. In doing so certain protection from reprisal is available under legislation including Police Act 1990, and the Protected Disclosures Act 1994.

MANAGEMENT

Complaints Management Team (CMT) are mandatory for any command with police officers attached. They assist in satisfying complaint related legal and policy responsibilities, promoting related standards and exercising the commander / manager complaint delegation. This is done through monitoring, guiding, reviewing and endorsing investigations and determining any management action to be implemented.

SUPPORT

The Internal Witness Support Unit (IWSU):

- encourages reporting by building confidence in the support and protections available to those who report misconduct;
- monitors employees who report misconduct and support and advise those officers who are considered at greatest risk;
- provides advice to employees about the best way to report misconduct, protect themselves and where to get support;
- works with commanders, managers and investigators to ensure that Reporters (where they know about them) are provided with acknowledgement, support, validation and protection.

IWSU utilises a shared responsibility model (employee and employer) focused on maintaining a healthy and safe workplace for all employees during the complaint process, which includes returning to the workplace after all management action/s have been implemented.

IWSU contacts Reporters to validate their actions in reporting, discuss protection strategies, support options and the need to maintain confidentiality. A basic risk assessment is conducted which may result in immediate interventions being undertaken or longer term support arrangements being entered into.

QUALITY REVIEW

Professional Standards Managers (PSM) are a focal point for provision of advice on the conduct of Part 8A investigations undertaken at Region/Specialist Commands. They also:

- Provide advice to Complaint Management Teams on the complaints management process, with particular attention to investigative requirements and strategies.
- Monitor and assist in the support and advice provided to subject officers, complainants and Internal Police Witnesses.
- Quality review all investigations prior to referral to the Internal Review Panel as required.
- Monitor the progress of any reviewable management action (Section 80(3), 173(2) and 181(D)).

Complaint & Employee Management Consultants provide:

- Advice on the management of complaints made under Part 8A Police Act 1990.
- Advice on the consistent application of management actions.
- c@ts.i issue assessment and investigation quality reviews.

EDUCATION

Professional Standards Command provides education in a range of areas:

Proactive

- To recruits and the other employees.
- To those charged with:
 - managing, resolving (including investigating) allegations, complaints or disclosures;
 - supporting Reporters; and
 - supervising and managing employees and their workplaces.

Reactive

- Targeted at workplaces and duty types where issues have arisen.

PROTECTION - *LEGISLATION*

Protection in the context of this submission covers protection of identity (confidentiality) and protection from reprisal (physical, emotional, psychological and employment).

Identity of the Reporter - to assist with the protection of the identity of the Reporter, the following legislation exists:

- **Part 8A Police Act 1990** incorporating **Section 169A** 'Identity of complainant not to be disclosed'. This section serves to maintain the confidential status of the complainant where practicable. Exceptions to this exist within this section.
- **Clause 53 Police Regulation 2008** 'Secrecy as to complaints about conduct' serves to maintain the confidential identity of any person who has made a disclosure of a serious nature (definitions provided) unless with the consent of the Commissioner of Police.
- **Clause 75 Police Regulation 2008** 'Confidential information' requires NSW Police employees to treat all information which comes to their knowledge in their official capacity as strictly confidential, and on no account without proper authority divulge it to anyone.
- **Section 22 Protected Disclosures Act 1994** 'Confidentiality Guideline' provides that information is not to be disclosed that might identify or tend to identify a person who has made the protected disclosure with certain exceptions particularly with regard to the principles of natural justice or to ensure the matter can be investigated effectively.
- **Section 32 Witness Protection Act 1995** makes it an offence to disclose identity or location of someone in the Witness Protection Program.

Reprisal against the Reporter - for the purpose of providing protection for the Reporter against reprisals, the following legislation exists:

- Clause 50 Police Regulation 2008 provides for the protection of police officers against victimisation in retaliation for that officer having made a protected report in relation to unlawful conduct. In this clause, 'protected report' means report under this Division, a complaint under Part 8A Police Act 1990, a protected disclosure within the meaning of the Protected Disclosures Act 1994 or a disclosure to another police officer.
- Section 206 Police Act 1990 provides protections from detrimental action substantially in reprisal for police officers who have reported allegations of misconduct or criminal activity from the officer reported (or via third party).
- Section 20 Protected Disclosures Act 1994 provides protection against reprisal for public officials who disclose corrupt conduct, maladministration and waste in the public sector.
- Witness Protection Act 1995 and Police Integrity Commission Act 1996 provide protection to witnesses / persons assisting in certain circumstances.
- Section 31 Crimes Act 1900 makes the creation and use of documents creating threats an offence and Section 60 Crimes Act 1900 makes assault and other actions against a police officer an offence. Apprehended Personal Violence Orders can also be used.
- Section 23 Occupational Health & Safety Act 2000 makes it unlawful to dismiss or otherwise victimise an employee who has reported a health and safety risk amongst other things.

Action against the Reporter - for the purpose of providing protection for the Reporter against action, the following legislation exists:

- Section 21 Protected Disclosures Act 1994 provides protection against action for public officials who disclose corrupt conduct, maladministration and waste in the public sector.

False Complaint against the Reported - for the purpose of providing protection for the Reported, the following legislation exists:

- Section 167A Police Act 1990 makes it an offence to make a false complaint about conduct of police officers or furnish false information.

PROTECTION - *WHAT WORKS, WHAT MIGHT WORK and CURRENT ISSUES*

WHAT WORKS

Education

Ongoing education covering rights, responsibilities and expectations of behaviour for all involved parties (reporter, reported, workplace and management).

Interim Management Action

Risk based interim management action, including alternative duties or locations which reduce the opportunities for Reported Officers to engage in reprisal.

Support Officers

Appropriately skilled support officers, selected in consultation with the Reporter and located in their workplace are able to provide a balanced independent view of what if anything is occurring.

Leadership

Management providing active support for Reporters and clearly articulating expectations and consequences if these are not met. This requires a hands on attentive approach enabling quick identification and resolution of any issues as they arise

Prosecution

NSW Police Force has successfully prosecuted a Reported police officer under Section 60 Crimes Act 1990 for intimidation of a Reporter (another police officer). The Court also granted an Apprehended Personal Violence Order for the protection of the Reporter.

WHAT MIGHT WORK

Reporting

Dedicated positions that allegations, complaints and disclosures must be made to. This would make protection of identity easier, enable Reporters to have their actions validated, a risk assessment to be conducted including support options and protective strategies.

Immunity

An exemption from prosecution for somebody who has knowledge of possible criminal activity and may be personally culpable in exchange for giving sufficient information to investigators and the Courts may encourage reporting.

Extended Protection

Protection should be given to Reporters regardless of the nature of the allegation, complaint or disclosure unless the following circumstances exist:

- The allegation, complaint or disclosure:
 - Contains material wilful and false statements.
 - Misleads or attempts to mislead the recipient in any material respect.
 - Is clearly made for an improper purpose, with an improper motive eg to defame.
- The Reported:
 - Wilfully fails to assist investigators.
 - Fails to keep complaint confidential, and makes the complaint public other than in circumstances allowed for in the legislation.

Other Legislative Protections

A strategic link with other legislation and frameworks, for example:

- Using offences under other legislation such as Section 60 Crimes Act 1900 as police reporting misconduct are doing it in the execution of their duty. Apprehended Personal Violence Orders may also be effective.
- Occupational Health & Safety Act 2000 provisions to help the Reported, broader workplace and Management to understand that engaging in reprisal is a risk to health, safety and wellbeing and therefore an offence under the Occupational Health & Safety Act 2000. Offenders, those that aid and abet and those that do not ensure compliance may be subject to personal fines.

CURRENT ISSUES FOR NSW POLICE FORCE

Reporting

In NSW Police Force the decentralised complaint handling model and regulatory frameworks mean that most allegations, complaints or disclosures are made to an officer one rank above the Reporter. Adherence to a hierarchical structure means that allegations, complaints or disclosures pass through a number of hands before reaching the delegate.

Reporters may not have their actions validated, support options canvassed and protective strategies discussed at the time of making the allegation, complaint or disclosures.

Research (Whistling Whilst the Work and Urbis Keys Young Research on Internal Witnesses) demonstrates the Reporter often needs protection from more than just the person they have Reported. More often than not they need protection from the broader workplace and in some cases management. In most cases they need help managing their perception of reprisal.

Reported

The Reported may not receive any acknowledgement of the emotional and physical impact of being subject of an allegation, complaint or disclosure. The Reported officer may not have someone explain what is expected of them in terms of their behaviour in the workplace and with the Reporter if they become known.

Workplaces

Workplaces may not be told what is expected of them in relation the appropriate response to the individuals involved in the complaint process.

Different Legislative Provisions For Employees Within The Same Organisation

The NSW Police Force has seen a substantial increase in the number of civilian employees and many of those employees work alongside police officers in front line roles. Allegations, complaints and disclosures of misconduct against these police officers and civilian employees are managed under different Legislative provisions whilst in the same organisation. This results in inconsistencies and disparity with employee requirements, rights, protections and management action. Also Investigators require specific training across the different types of legislation.

Existing Legislative Provisions

Research (Whistling Whilst the Work and Urbis Keys Young Research on Internal Witnesses) demonstrates that existing legislative provisions (Section 20 Protected Disclosures Act 1994 and Section 206 Police Act 1990) do not appear to be effective deterrents to the Reported officer, the broader workplace or management engaging in reprisal action.

The research also highlights the disturbing fact that across Australia existing legislative provisions have not been effective in prosecuting those who have engaged in the behaviour.