

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

CLOSED HEARINGS

Melbourne — 11 April 2016

Members

Mr Kim Wells — Chair

Ms Marsha Thomson — Deputy Chair

Mr Sam Hibbins

Mr Danny O'Brien

Mr Simon Ramsay

Mr Tim Richardson

Ms Jaclyn Symes

Staff

Executive Officer: Ms Sandy Cook

Research Officer: Ms Kirstie Twigg

Witnesses

Assistant Commissioner Brett Guerin, Professional Standards Command, and
Acting Inspector James Mulholland, IBAC Liaison Officer, Victoria Police.

The CHAIR — Assistant Commissioner and Senior Sergeant, welcome to the IBAC closed hearing. We welcome you to the closed hearing of the Independent Broad-based Anti-corruption Commission Committee. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and where applicable provisions of reciprocal legislation of other Australian states and territories. However, it is important that you note that any comments you make outside the hearing, including effective repetition of what you have said in evidence, may not be afforded such privilege. This hearing is closed to the public; however, it will be transcribed by Hansard, and the transcripts will be published when the committee its report in Parliament. Have you received and read the guide for witnesses presenting evidence to the parliamentary committees?

Asst Comm. GUERIN — Yes, I have.

The CHAIR — It is also important to note that any action which seeks to impede or hinder a witness or threaten a witness for the evidence they would give or have given may constitute and be punishable as contempt of Parliament. We are recording the evidence, and we will provide a proof version of the Hansard transcript at the earliest opportunity so you can correct it as appropriate. We would like you to make a verbal presentation, and we will ask questions as appropriate. Thank you very much again for your time.

Asst Comm. GUERIN — Thank you; a pleasure. Senior Sergeant — or Acting Inspector — Mulholland is one of three subject matter experts within Victoria Police around the protected disclosure legislation. He is our protected disclosure coordinator, so that is why I brought him along today, because he can put meat on the bones around stuff that I may not be able to.

Ms THOMSON — The go-to man.

Asst Comm. GUERIN — What I have had prepared and what I have presented you with this morning is our responses to the questions that the committee emailed us.

The CHAIR — Excellent.

Asst Comm. GUERIN — If you would like, I will read those responses onto the record.

The CHAIR — Yes. If we can step you through that, that would be great.

Asst Comm. GUERIN — Sure. Okay. I will probably selectively read it. It is not everything.

Ms THOMSON — Yes, that is fine.

Asst Comm. GUERIN — Yes. Okay. In relation to the first question — and I will not repeat the question; it is there for all to see — there are a number of ways in which protected disclosures are received and acted on by Victoria Police depending on who makes the complaint, who receives the complaint and what the nature of the complaint is. It is obviously governed by the Victoria Police Act and the Protected Disclosure Act as well as the IBAC act.

Any complaint made to Victoria Police is processed at the police conduct unit — professional standards command — over which I sit. Any complaint considered to be a protected disclosure complaint is notified to IBAC by the protected disclosure coordinator, Acting Inspector Mulholland, for its determination under section 21 of the Protected Disclosure Act. If the complaint is against a commissioner of police, it is notified under section 57(4) of the IBAC act.

The process — the actual internal process — for receiving a complaint is the same regardless of who it is made against and who made it. Difficulties have been encountered where the complaint has not been made in accordance with the legislation. For instance, a complaint made by an unsworn member can only be made to IBAC or an acting sergeant or above and not their unsworn manager or other senior person who may also be unsworn. In these situations the complaint cannot be notified to IBAC for determination as a

protected disclosure until the complaint is made to the correct person. We are seeing that a little bit with the matters arising out of the Salus taskforce, where you might have allegations of sexual predatory behaviour or sexual harassment against an unsworn —

We are exhorted now to use the term ‘unsworn’; they are VPS colleagues, but for the purpose of differentiation I will use the term ‘unsworn’. If an unsworn staff member makes a complaint to their unsworn manager, it does not qualify; it must go through a sworn officer to initiate the protected disclosure assessment process. This has occurred frequently since the VEOHRC report into predatory behaviours by police, where complaints have been made to unsworn employees and cannot be considered to be protected disclosures until a police officer of appropriate rank, which is sergeant or above, has spoken with the person and received the complaint.

The definitions and thresholds for complaints against sworn and unsworn differ, which creates in our view unnecessary complexity and equity. For instance, a police officer must report to a more senior member and/or IBAC where they have reason to believe another police officer is guilty of misconduct under the Victoria Police Act. An unsworn employee may disclose to an acting sergeant or above and/or IBAC where they have information that shows or tends to show, or they have information that they believe on reasonable grounds shows or tends to show, any employee, whether a police officer or an unsworn staff member, has engaged, is engaging or proposes to engage in improper conduct or detrimental action. A sworn employee — a police officer — may disclose to an acting sergeant or above and/or IBAC where they have information that shows or tends to show they have information that they believe on reasonable grounds shows or tends to show an unsworn employee has engaged, is engaging or proposes to engage in improper conduct or detrimental action.

The definition of ‘improper conduct’ in the Protected Disclosure Act is different to the definition of ‘misconduct’ in the Victoria Police Act. I think speaking to our IBAC colleagues, the complexity of legislation is the thing that goes through the whole thread of everybody’s thinking. We all support the need for protected disclosure legislation to protect people stepping up and making complaints about bad behaviour, but it is really complicated. I do not think I am a stupid person. I have read the legislation several times, and I cannot say I am right across it already, which is why he is here. It is really complex.

The CHAIR — We will save questions till the end, but probably an appropriate one.

Asst Comm. GUERIN — Sure.

The CHAIR — How different are the definitions of ‘misconduct’ between the two different pieces of legislation? Is that one of the things that we should be looking at, to try and streamline the two so there is consistency? Or is it that the police are unique and it does need to be different to the general public?

Asst Comm. GUERIN — I might hand over to Jim for that.

Acting Insp. MULHOLLAND — Yes. I think that is one, I suppose, of the issues to look at: do we need a unique system for sworn police officers that is different from, say, the unsworn police officer or other persons from the community? I think there are true paths because police officers should, I suppose, have more ethical behaviour and non-corrupt behaviours and things like that. In our response to question 3 we touch on slightly, I suppose, the differences between the improper conduct and the misconduct, how it actually sits.

Ms THOMSON — Maybe we keep going and we can come back to it.

The CHAIR — All right.

Asst Comm. GUERIN — I think I have just touched on the complexity that arises out of the different definitions and the various options of people reporting misconduct and detrimental action.

The second question is really a quantitative question: how many notifications? That information is in the annual report of Victoria Police. From the commencement of the Protected Disclosure Act to the financial

year 2014–15, Victoria Police notified 60 assessable disclosure complaints to IBAC under sections 21 or 22 of the Protected Disclosure Act. For the financial year 2015–16 up to 31 March we have notified IBAC of 62 assessable disclosure complaints, and more than half of those relate to the complaints coming through as a result of the VEOHRC report. IBAC has determined 103 of the 122 referred complaints to be protected disclosure complaints, and we are still waiting for a determination on 8 complaints that are still with IBAC.

Every complaint received by the police conduct unit is assessed against the protected disclosure legislation, either the Protected Disclosure Act or the Victoria Police Act. Where it is considered by the assessor that it may meet the criteria, it is referred to the protected disclosure coordinator for assessment. From March 2013 to February 2016 Victoria Police received 9073 complaints.

IBAC receives written notification pursuant to section 169 of the Victoria Police Act of complaints of misconduct that are to be investigated. From March 2013 to February 2016 there have been 2799 of these notifications. Notifications under sections 21 and 22 of the Protected Disclosure Act are included in the figure, although they are also notified separately to comply with the legislation.

Moving through to question 3 around further clarity — could Victoria Police indicate how many notifications this might affect? Victoria Police suggests that ‘misconduct’, ‘conduct’ and ‘improper conduct’ should be clarified to clearly indicate that the deeming provision of section 167(3) of the Victoria Police Act applies to serious conduct or corruption. Under the deeming provision, if a police officer makes a complaint against another police officer, it is automatically deemed to be a protected disclosure. So if he complains that I went through a red light two weeks ago, that is a protected disclosure — not against me, I am a commissioner, but I mean another police officer. The purpose of the legislation, we would contend, is not to capture things of that nature but more serious misconduct.

‘Improper conduct’ in the Protected Disclosure Act is specified conduct that if proved would constitute a criminal offence or reasonable grounds for dismissing or otherwise dispensing with, or otherwise terminating, the services of the police officer. This applies to unsworn employees or sworn employees if the complaint has been made under the Protected Disclosure Act.

‘Misconduct’ under the Victoria Police Act means 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 improper conduct, whether in the officer’s official capacity or otherwise — which are also breaches of discipline under the Victoria Police Act.

‘Conduct’ in the Victoria Police Act means an act or decision or a failure. It actually means any action that a police officer takes, whether it is lawful or otherwise. Just anything you do as a police officer comes under the definition of ‘conduct’.

A complaint of misconduct made according to section 167(3) is deemed to be a protected disclosure complaint. However, a complaint of conduct or of improper conduct may be considered as a protected disclosure complaint. From March 2013 to February 2016 there have been 1179 complaints that could fall within the definition of ‘misconduct’. That is 400 per year. IBAC interprets the legislation to capture any complaint by a police officer against any police officer to be a protected disclosure, regardless of the reasonable belief of the person making the complaint and the level or the type of misconduct that is reported. We have sought advice from the Victorian Government Solicitor’s Office around that, and they have advised us to apply a more practical definition that considers the level of conduct and the reasonable belief of the person making the complaint.

Ms THOMSON — Can you just flesh that out? What has happened since you have actually got that advice?

Acting Insp. MULHOLLAND — When we look at a complaint that could or could not be a protected disclosure complaint, VGSO says that we look at three elements to that complaint if it is under the Victoria Police Act. One is who has made it and who they made it to, so a police officer to a more senior police officer. The second element of that is the type of misconduct, so I suppose the level, if you like. Then, is

there a reasonable belief that it actually did occur? We look at that part of it. Out of the, say, 1200 there, we may look at those and consider, 'That's not of a serious nature', if you like. So it is not a sackable offence, if you like.

Referring back to the response earlier about improper conduct, under the Protected Disclosure Act it talks about reasonable grounds for dismissing or otherwise dispensing with. However, under 'misconduct' in the police act, that is missing, if you like. There is that kind of discrepancy. The VGSO have asked us to read that as being of a more serious level or nature, so it would not cover things like what Brett mentioned with regard to, 'You've gone through a red light'. We look at it as the purpose is to elicit serious behaviour — serious misconduct, if you like — and to protect the person who has reported it.

Ms THOMSON — So how does that sit with IBAC?

Acting Insp. MULHOLLAND — IBAC obviously have a different view with regard to it. The process that operates is that they get a notification of all the complaints that we are going to investigate. If I do not notify that to them under the specific sections of the Protected Disclosure Act, they will contact me and say, 'Jim, we need to have a look at this as a protected disclosure complaint'. So then we just go through the process and we will do it or we will not do it. Actually, it works, but it creates those difficulties.

Where the issues come is if the person comes to us and makes a complaint and also goes to IBAC and makes the same complaint. We may commence our investigation because we have considered it is not of, say, a serious nature. Say, for instance, a workplace conflict issue that is not criminal bullying. If that same person has made the same complaint to IBAC, IBAC through their internal processes — it takes them longer to make a determination before they will actually refer that to us to investigate. So we have already started it as a normal complaint investigation and then, say, three weeks, four weeks down the track it is now referred to us from IBAC as a protected disclosure complaint. So it creates these I suppose difficulties in then trying to investigate when we have already started it. Now we have to not necessarily restart it but look at it because it puts different layers of confidentiality over it. The investigation of a protected disclosure matter obviously has a lot more confidentiality restrictions placed on it. It creates those little difficulties. It is workable, but I think it could be better.

Mr D. O'BRIEN — Just on that, can I just clarify, is there a situation at all where you might be investigating and IBAC is also investigating the same issue, or is it one or the other?

Acting Insp. MULHOLLAND — We have never had that as a concern. We have an agreement that if we have a report of something that is of a serious nature, we will notify IBAC there and then, to let them know that we are going to be conducting or starting it and this is the complaint that we have received. As you know, IBAC at any time can opt to do that investigation. We have had occasions where we have started to do that and we have notified IBAC and then they have said, 'We now want to conduct that investigation'. They just ask for us to hand over everything that we have done, so we effectively close our investigation and just give it all to IBAC and then they will conduct it.

Mr D. O'BRIEN — That is voluntary on their part, but there is a threshold. Is the threshold serious — —

Acting Insp. MULHOLLAND — Yes, because IBAC can only investigate certain matters. Yes.

Mr D. O'BRIEN — As it stands.

Asst Comm. GUERIN — Question 4 is around the exemptions relating to the discussion of conduct under protected disclosure. I think we mentioned this in our previous appearance, Mr Wells, in December. Our concern with the legislation as it is presently is that the disclosure provisions prevent subject members and other witnesses from discussing the complaint or their involvement except to people and for purposes as listed in section 184 of the Victoria Police Act or 54 of the Protected Disclosure Act. Those same restrictions are placed on investigators and other police members who have received information, including, for instance, our internal witness support unit. The discloser is permitted to discuss aspects of

their complaint with no restriction apart from the specific offences in section 74 of the Protected Disclosure Act and section 184 of the IBAC act. However, it is still unclear whether they are also bound by the class of persons as per the above.

So this gets back to victims, for example, of sexual harassment or predatory sexual behaviour not being able to discuss fully with clinicians or other support people the circumstances of the complaint. We actually met recently with IBAC and the Victims Support Agency, and we have come to, I guess, a gentlemen's agreement. We all understand that the purpose of the legislation is not to prevent people who are victims of crimes from getting help where it is needed, but on a strict interpretation of the act it is ambiguous. So we are saying that it would be nice if that were clarified — more along the lines of the reasons for speaking to a person rather than the class of person to whom a person has spoken. For example, not every form of assistance or help is provided by a practitioner or a registered organisation, so if you exempt people on the basis of the class of person, you may be unreasonably limiting the extent of assistance they can get. Does that make sense?

The CHAIR — Yes.

Asst Comm. GUERIN — So what we are saying is that the exemption should be based on why the person is speaking to the other person rather than the class of that person to whom they are speaking.

Question 5 talks about the confidentiality restrictions — have we experienced any difficulties arising from the requirements in the investigation or subsequent disciplinary processes? We operate under a need-to-know basis generally. However, situations have arisen that create difficulties in undertaking investigations. Probity relates to the advice we give selection panels within the organisation as to someone's suitability to get promoted or transferred. Before a final decision is made on someone's promotion or transfer, my command does a probity check. In other words, they check their internal records and identify whether there is a current investigation which may preclude that person being promoted or transferred or some other reason.

So if a subject member is a subject of a protected disclosure complaint, that is not recorded anywhere. So conceivably — this is an extreme example, I suppose — you could have a member who has been complained against for predatory sexual behaviour by six or seven women, but because they are protected disclosures, the probity unit does not know about. So that person could get promoted or transferred while that is underway.

Ms THOMSON — Is it based on innocent until proven or something?

Asst Comm. GUERIN — Well, that is a whole other debate. The presumption of innocence — I am not sure whether we are meant to take that literally, otherwise you would have no-one on remand. It truly is to explain the burden of proof on the prosecution. This is not a widespread — —

Ms THOMSON — I am just trying to understand why it was there in the first place. I assume it was there for a reason.

Asst Comm. GUERIN — Why the protection was there?

Ms THOMSON — Yes.

Asst Comm. GUERIN — I think it is just a corollary effect — maybe an unintended consequence. I do not think the legislators would have intended for us not to know or not to use that type of information when making selections. It is just a fallout of the act. Correct me if I am wrong.

Acting Insp. MULHOLLAND — A recent example of that where it has affected someone, say, externally, is we had an ex-police member who resigned, I suppose, before he was dismissed for sexual predatory behaviours. That person later on applied for a particular licence, and they have asked us for details about why he left Victoria Police. They were aware that there was a complaint investigation but not the nature of that. We could not disclose what the nature of that complaint was. So there is that person who

could then get a licence, whereas perhaps they should not be deemed to be a suitable person to have that. Internally, again, it is another one of those ones where we can work around the legislation, but I suppose it is unclear that we can actually do what we do do with regard to it. We see that non-disclosure of those sorts of matters is silly. However, again, if you apply the strict interpretation, you cannot really do that. So you are better off being a subject member of a protected disclosure complaint than a non-protected disclosure complaint, if you like.

Asst Comm. GUERIN — Yes, unintended consequence.

Mr D. O'BRIEN — Sorry, just to clarify that, if I may, Chair, if someone is going for a promotion and you do not know whether there is a complaint against them or not, that is a fact of the legislation, not of your internal processes, and you are prohibited from keeping that record?

Asst Comm. GUERIN — That is right. We have many members who perhaps are under investigation who apply for a position, and if it is not a protected disclosure, that appears on ROCSID, which is our register of complaints. The probity unit is able to advise the selection panel, 'Well, this person is under investigation for this particular issue', but not if it is a PD — a protected disclosure.

Mr D. O'BRIEN — And likewise, in the example you just gave, it could work the other way — if they are the subject of an investigation but they are actually innocent, and you can only say, 'They are being investigated, but we cannot tell you anything more than that', it looks dodgy and it may not be.

Acting Insp. MULHOLLAND — Yes, and that is effectively how it is.

Ms THOMSON — So it works both ways.

Asst Comm. GUERIN — It does. And without reading the rest of it, around WorkCover or similar investigations of workplace conflict where people make complaints that are protected disclosures, that mitigates against timely investigation. Someone can make a complaint of workplace bullying or make a WorkCover claim, but if it is a protected disclosure, no-one can talk about it. It is difficult to interview the manager who is prohibited from talking about it. Again, unintended consequences.

Ms THOMSON — Yes.

Asst Comm. GUERIN — Question 6 talks to how we make an assessment as to whether a disclosure has been made under the Victoria Police Act or the PD act. Jim, you might talk to that, because you are the one who receives them all the time.

Acting Insp. MULHOLLAND — Yes, as we saw earlier there are the two options, and effectively what we do is that if it is a police member against another police officer, we just make the assumption that it has been made under the Victoria Police Act. The only times I have not done that is where the person who has made the complaint, I suppose, does not want to be, in their perception, tarnished as the whistleblower, if you like. So they say, 'Look, I want to make this complaint, because the person should not be within the organisation, but I do not want anyone to know anything about it. I know that even though I am protected under the act, I do not trust the act' and things like that. Under the Protected Disclosure Act we can do that as an anonymous complaint, whereas under the Victoria Police Act we cannot, so that is one reason.

The other one is the Protected Disclosure Act provides for an opt-out provision, so you can still have your identity known but you just want to forgo your protections under the act for whatever reason. Some have done that, and a lot of it, again, is, 'I do not want to be known as the whistleblower', if you like, in certain matters. So they decide, 'Well, I'll make the complaint, but I do not care if my identity is known'. We have had a few of those sorts of situations where the police officers do not want the protections, so we can use that under the Protected Disclosure Act, where they can actually opt out of it. Whereas, again, under the Victoria Police Act they cannot. We put the choice to them, if you like, otherwise it is going to be deemed to be under the police act.

Ms THOMSON — How many would choose to opt out? I would have thought not many.

Acting Insp. MULHOLLAND — Yes, it is not many at all.

Ms THOMSON — Unless they are on their way out anyway.

Acting Insp. MULHOLLAND — We have not had many of those at all. An example of, say, an opt-out provision, if you look at, say, a strict interpretation of the legislation, is someone who has been monitoring a listening device, and so they have picked up certain conversations that a police officer has been involved in corrupt conduct. They are reporting that serious misconduct even though it is part of their duties to actually do that and that is part of their job — to listen and pick up. Again, you look at the act, should they be falling under the Protected Disclosure Act or are they just reporting that because they are listening on the listening device and have picked up certain things? So that is where we have used the opt-out provision, if you like.

Asst Comm. GUERIN — They are not a whistleblower.

Acting Insp. MULHOLLAND — And again that is where it gets difficult with, I suppose, that application of the 167 in the police act in that police officer against police officer is deemed to be a protected disclosure.

The CHAIR — And it could be just a straight out criminal offence. The person could be just charged.

Acting Insp. MULHOLLAND — Yes, and again that creates issues for us as well as to, are you reporting this as a victim of crime, say, for instance, a family violence matter? So am I reporting family violence as a victim of crime or am I reporting it as misconduct against the police officer who is the perpetrator of that family violence? We get a lot of those.

Asst Comm. GUERIN — Question 7 is our ability to investigate. We are the only agency that can investigate protected disclosures against ourselves. Is the ability to do that beneficial? If so, why? Are there challenges? Yes, it is beneficial. It is beneficial across the board that we are able to investigate complaints against us because we have got skin in the game around ethical behaviour. If we did not investigate the complaints and misbehaviour within our ranks, it would be easy to abrogate that to another outside agency, plus it is a matter of capability. We have got the capability to investigate internal protected disclosure complaints at all levels, whether it is around minor misconduct or serious criminal behaviour.

Are there any challenges? There are challenges. The main challenges are around briefing investigators on what their requirements are under the Protected Disclosure Act, because quite often regional investigators who do not normally conduct investigations under this legislation are unaware of what the requirements are. So the challenges are lined up against that, but they are no different from the introduction of any new law or legislative framework. I guess the short answer is yes, we believe it is beneficial that we are able to investigate ourselves even though they are protected disclosures. I am not too sure what the alternative would be —

The CHAIR — Exactly.

Asst Comm. GUERIN — unless you want to hire 500 people to do that. There is not much appetite for that.

Question 8 goes to other concerns that we may have about the operation of the PD regime. We have noticed a trend with police officers reporting workplace conflict issues to IBAC in addition to reporting these to Victoria Police, and Jim touched on that earlier. This causes an issue with investigation and a belief from the discloser that they will be exempt from any management action being taken against them.

This talks to the protections that whistleblowers have against detrimental action being taken against them — that there is a perception in the mind of some officers that if they make a protected disclosure allegation against a member, no-one can do anything — managers cannot manage them in relation to

anything else while a protected disclosure complaint is live — which is not right. Otherwise they would be able to go out and run amok with impunity. Of course that is not the intention of the legislation. Section 144, from memory, is the one that allows detrimental action to be taken against a member as long as that action is not as a result of them being a whistleblower.

Mr RAMSAY — Just in relation to that, there is an increasing trend of sworn members wanting to make a complaint against a sworn member going to IBAC rather than going through the internal process that you have sitting in the PDA legislation. Is that — —

Acting Insp. MULHOLLAND — Yes. With regard to the workplace conflict issues. And sometimes again what we mentioned before about the issues that that creates. We have a specific area that is established to investigate those matters, so under our processes they will make the complaint to that area but then they will also go to IBAC and make the same complaint and IBAC will make that a protected disclosure complaint.

Mr RAMSAY — Are there instances where they go to IBAC and not through internal processes? I thought they might feel compromised by going through the internal process.

Acting Insp. MULHOLLAND — Yes, there are. You could read into it that they are dissatisfied that Victoria Police will not investigate it properly so they will go to IBAC in the expectation that IBAC will investigate it properly. But as we know, with IBAC's threshold for investigations, they are not going to investigate those matters and they just refer them back to us anyway.

Ms THOMSON — So how many would be referred back to you?

Acting Insp. MULHOLLAND — Out of all of those 160 odd, or whatever it was, IBAC has only I think done 3. All the rest of them have been referred back to us. That does not include matters that have been reported to IBAC, because we obviously do not know how many investigations are reported to IBAC. But they refer to us a very similar number, so around that, say, 30 a year.

Asst Comm. GUERIN — We have just touched on the remainder of question 8. Question 9 asks us for our views on how the scheme could be further enhanced. We say that the legislation needs to clarify that Victoria Police can commence a criminal investigation of a complaint of misconduct or improper conduct that has been notified to IBAC for determination as a protected disclosure without waiting for a determination from IBAC. In practice Victoria Police does this by agreement with IBAC and treats the investigation as if it is a protected disclosure. In other words, confidentiality applies where it is appropriate. For example, many Taskforce Salus investigations are conducted in this manner due to the time it takes for IBAC to make a determination. So Taskforce Salus will start the investigation straightaway while IBAC is considering it. It is just not realistic to wait for a determination — evidence can be degraded and witnesses can be interfered with.

Ms THOMSON — So does IBAC ultimately let that continue right through or does it take it at some point after it has considered its position and say, 'Well, we will take this over.'?

Asst Comm. GUERIN — They very rarely take it over, because we have started the investigation and they just do not have the capacity to take over these investigations.

How the protected disclosure regime applies in criminal matters where the disclosure is known, for example, through strict interpretation of the legislation and report of family violence, which you touched on before, between police officers and their partner who may or may not be a police officer, should be considered as a protected disclosure complaint. However, although this is serious misconduct that should not be tolerated, should it be treated as a protected disclosure when all parties are known to each other and the identity of the discloser is obvious? So it is a bit of a nonsense if a female police officer makes a complaint against her husband or partner for family violence. That is a protected disclosure under the legislation. It is deemed to be a PD.

Ms THOMSON — Is that to protect them within the force, though?

Asst Comm. GUERIN — Yes. But under the deeming provisions of the Victoria Police Act it is a protected disclosure, although the husband would know who the complainant is, or the partner would know who the complainant is.

Ms THOMSON — But it also helps against backlash, does it not?

Asst Comm. GUERIN — It does. That is right. The purpose of the legislation is to protect the whistleblower against detrimental action.

The CHAIR — But once again it could be a criminal matter where someone could be just straight out charged for assault.

Asst Comm. GUERIN — That is right. Correct.

Ms THOMSON — For violence.

Asst Comm. GUERIN — Yes, for violence or a sexual offence or whatever. Do you want to clarify anything further with that?

The CHAIR — Marsha, are you happy with that?

Ms THOMSON — Yes. What I am not sure about is why you would not still allow for that protected disclosure. Even though the perpetrator in this instance might be known, what you are doing is protecting it from anyone else being a part of that cycle of knowledge. So if you had a popular police officer, for instance, and he is very popular, and there is a complaint by the partner of family violence, what you want to do is not have him being able to go around saying, ‘She has made this up’ or done whatever.

Asst Comm. GUERIN — That is a really good point.

Ms THOMSON — You want to be able to protect her to go through a process without being potentially victimised by his mates.

Asst Comm. GUERIN — That is right.

An investigation conducted against an unsworn employee is done so in the same manner as those against sworn officers. Presently where IBAC refers to Victoria Police a protected disclosure complaint for investigation the IBAC act states that it must be conducted under part 10 of the Victoria Police Act. That part does not apply to unsworn employees, who are subject to different discipline processes that do not consider the confidentiality arrangements within the Victoria Police Act. So when a police officer is investigated in relation to a disciplinary matter, it is a completely different stream, different legislation than unsworns.

Where IBAC is notified by an agency of a complaint and IBAC determine that they will conduct the investigation, IBAC must advise the notifying agency of the outcomes of that investigation unless circumstances similar to those in section 182 of the Victoria Police Act apply. This is generally the situation. However, there have been occasions where Victoria Police has sought a written response to enable completion and witness finalisation. In other words, they have not actually told us the outcome of their investigation.

A complaint made under section 167 of the Victoria Police Act includes only a member voluntarily making a complaint, and that is what Jim was talking about before, where you are monitoring a listening device or a telephone intercept, evidence is derived from that activity and you report it up. You should not be a protected witness in those circumstances; you are just doing your job.

The other issue, Chair, is around the time it takes for IBAC to make a determination which creates investigative or management concerns for us. For instance, many Taskforce Salus matters after initial assessment are pursued via the discipline stream rather than criminal. A discipline investigation is conducted under either part 9 of the Victoria Police Act or part 10 for a protected disclosure complaint. In

part 10 strict confidentiality provisions prevail and are different in direction to members to produce documents or answer questions. For example, part 10 only applies when IBAC has made its determination. So effectively a discipline investigation cannot be pursued until that determination has been made as investigators are unsure whether it is conducted under part 9 or part 10.

So we agree with the amendments in the bill. However, the concerns that we have raised here are not addressed in the amendments. We request that they be considered as an opportunity to improve the integrity system. The only impact on Victoria Police with the proposed changes is the mandatory reporting to IBAC of improper conduct by unsworn employees. In practice this currently occurs as reports of misconduct conducted by police members are reported by virtue of section 169 of the Victoria Police Act and this notification is electronic and captures improper conduct by unsworn employees. That means that IBAC has access to our ROCSID database, so every time a complaint comes in it pops up on their system as well.

The CHAIR — We have asked a lot of questions through the presentation. Are there any further questions?

Mr RAMSAY — Can I just ask a quick one? I guess, Assistant Commissioner, where there is an increase in unsworn, particularly in the administrative areas, there seems to be a sort of separation of legislative responsibility between unsworn and sworn. I guess that gap will become greater as more unsworn police officers do more administration work, where workplace bullying and other things will become more of an issue. How do you see that long term being fixed?

Asst Comm. GUERIN — By having one discipline system for both.

Mr RAMSAY — Which I think was the message you started with this morning in your presentation.

The CHAIR — So that is the position of Victoria Police — to have the one discipline system for sworn and unsworn?

Asst Comm. GUERIN — Yes. I guess to break it down to its most basic, it is quite easy to get rid of a VPS colleague who is guilty of misconduct: he or she can be sacked by a senior unsworn manager. To get rid of a police officer you have got to charge them with a breach of discipline and then it is not guaranteed they will be dismissed. So as the chief commissioner's delegate if I see behaviour that I believe warrants dismissal, I have got to charge that person with a breach of discipline. It goes to a person authorised to inquire into a charge — Terry Purton is his name at the moment — and that person may or may not dismiss the officer. So with a streamlined system where there is one discipline system for both, and I am unsure as to the government's appetite right now as to whether a reform of the discipline system is on the table, we would see police officers subjected to the same standards as everybody in the community, where they can be sacked by the boss of the organisation for misconduct. At the moment Graham Ashton is the only public sector manager who does not have the right to do that.

The CHAIR — Assistant Commissioner and Acting Inspector, thank you very much for that very thorough presentation. Very well done.

Ms THOMSON — It was great. Thank you.

Asst Comm. GUERIN — Thank you.

Committee adjourned.