

ombudsman VICTORIAN

**Investigation into the Office of
Police Integrity's handling of a complaint**

October 2011

**Whistleblowers Protection
Act 2001**

**Ordered to be printed
Victorian government printer
Session 2010 - 11
P.P. No. 74**

Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament my report of an investigation into the Office of Police Integrity's handling of a complaint.



G E Brouwer

OMBUDSMAN

10 October 2011

Contents	Page
The investigation	3
Statutory obligations under the Whistleblowers Protection Act	5
Complexity of whistleblower legislation	7
Use of telecommunication interception powers	8
Poor oversight arrangements	9
Interstate arrangements	10
Conduct of Office of Police Integrity staff	12
The Director's own motion investigation into a Ministerial Officer	12
Recommendations	16
Attachment 1: Identification of the subject of a whistleblower disclosure	17
Attachment 2: Dealing with whistleblower disclosures	18
Attachment 3: Obtaining a warrant for telecommunication interceptions	19

The investigation

1. This report examines whether the Office of Police Integrity (OPI):
 - properly dealt with a complaint made to it
 - investigated the complaint on a valid legal basis
 - conducted an assessment and investigation into the complaint in good faith
 - used information from a whistleblower investigation to initiate an own motion investigation
 - can investigate the actions of a Ministerial Officer on leave without pay from Victoria Police
 - used its telecommunications interception powers appropriately.
2. This report also discusses the complexity of the whistleblower legislation in Victoria and the current limitations of oversight arrangements with regard to the use of telecommunication interceptions.
3. I have been unable to include details concerning the context of the complaint made to the OPI and its investigation into the complaint because the *Whistleblowers Protection Act 2001* (WPA) prohibits me from releasing information which is likely to reveal the identity of a whistleblower. This report has therefore been redacted in order to comply with the WPA.
4. On 16 May 2011 I commenced an own motion investigation into the OPI pursuant to section 14 of the *Ombudsman Act 1973* after I received a complaint from then Deputy Commissioner Sir Ken Jones (Mr Jones) that action had been taken against him by the OPI because persons in that office and persons within Victoria Police believed that he had made a disclosure under the WPA. I also received a complaint about the OPI's alleged misuse of powers with regard to its investigative action into Mr Jones and Mr Tristan Weston, a Ministerial Adviser to the Minister for Police and Emergency Services, on leave without pay from his duties as a police officer.
5. In a letter dated 16 May 2011 I advised the OPI that my investigation would examine administrative actions taken by officers of the OPI to determine whether they:
 - a. were, or were intended to be, detrimental to a person or persons who have made, intended to make or were believed to have made or had intended to make a disclosure or disclosures under the WPA
 - b. were an inappropriate use of powers provided by the *Police Integrity Act 2008*.

6. My investigation identified that the OPI and in particular, the Acting Director at the time, Mr Paul Jevtovic received a complaint of serious misconduct against Mr Jones. It was alleged that Mr Jones was the likely source of a leak to the media about the State's duty of care with regard to the death of Mr Carl Williams, the Department of Justice's placement of Mr Williams at Barwon Prison and Victoria Police's management of homicide investigations.
7. Mr Jevtovic accepted the complaint for investigation under section 40(4)(a) of the Police Integrity Act. Mr Michael Strong, Director, Police Integrity was on leave at the time the complaint was received by the OPI and when I commenced my investigation.
8. The OPI's file notes concerning the receipt of the complaint do not refer to any persons having direct knowledge of Mr Jones releasing confidential Victoria Police information to the media. I note that recently, the journalist to whom Mr Jones is alleged to have provided information published an article stating that *The Age* has found no evidence that Mr Jones leaked information to the media.
9. The Director has objected to my making the above reference to this media article. He stated that it 'seems to exonerate the person' who is the subject of the OPI's investigation, which of course it does not.
10. My investigation focussed on the actions and processes of the OPI rather than the motives of the Victoria Police staff who complained to the OPI or the validity of the complaint itself. I will consider these issues in a separate investigation.
11. This report identifies the person subject of a whistleblower disclosure and although my investigation was not conducted under the WPA, I consider that it is appropriate for me to comply with obligations in that Act. For this reason, I have made a statement reflecting the objectives of section 22A of the WPA in relation to this matter (see Attachment 1).
12. During the course of my investigation I obtained documents from the OPI including:
 - a complaint made to the OPI about Mr Jones
 - the assessment of the complaint
 - investigative action into the complaint, including surveillance of Mr Jones and the tracking of his whereabouts (documents relating to the investigation phase had information that was blacked-out, thereby limiting what my officers could review. The OPI advised that this information was blacked-out because of requirements in Commonwealth legislation, presumably telecommunication interception legislation)
 - media articles (this accounted for the majority of documents provided to my office)
 - analysis of media articles
 - statements and interviews

- interview and hearing transcripts
- conflict of interest risk assessments
- security arrangements for the OPI's investigation.

Statutory obligations under the Whistleblowers Protection Act

13. My investigation established that the OPI accepted the complaint about Mr Jones for investigation but failed to consider and assess it under the WPA despite legislative provisions which required it to do so. Specifically, the complaint was made to the OPI under section 86L (2A) of the *Police Regulation Act 1958* which, according to section 39(2) of the Police Integrity Act, must be treated as a disclosure under the WPA.
14. However, the OPI commenced an investigation under the Police Integrity Act and failed to consider the WPA until I identified the relevance of the WPA.
15. When I drew this issue to the Director's attention he sought legal advice from Senior Counsel and suspended his investigation. The Director then referred the matter to me for determination under the WPA.¹ I subsequently determined that the disclosure was a public interest disclosure under the WPA and referred the matter back to the Director for him to investigate as the conduct related to a senior police officer. My determination that the matter was a public interest disclosure does not imply that the allegation is correct; rather, the disclosure meets the statutory definition of a public interest disclosure and therefore must be investigated.
16. The Director's initial investigation of the disclosure was made under his Police Integrity Act powers - which he considered appropriate until such time as I made a determination under the WPA. As a result of concerns that I had regarding the OPI commencing its investigation, the Director sought advice from the Solicitor-General.
17. The Solicitor-General is of the view that section 39 of the Police Integrity Act creates a situation where the Director was subject to the obligations under **both** the Police Integrity Act and the WPA. He therefore considered that the Director could 'undertake any investigations or inquiries appropriate to the complaint in question' until such time that I make a determination that the disclosure was a public interest disclosure. He was also of the view that the Director was 'entitled to undertake any investigations or inquiries he considers appropriate in order to form a view as to' whether a disclosure is a protected disclosure and, if so, whether it is also a public interest disclosure. I note that much of the Director's investigation was not undertaken for that purpose as he was not aware of the application of the WPA to this matter until advised by my office, more than four weeks after the commencement of the OPI investigation.

¹ The process by which a whistleblower disclosure should be dealt with under the WPA is described in Attachment 2.

18. I also note that the powers exercised in the OPI's initial investigation involved surveillance and may have included telecommunication interception of Mr Jones and others - powers which seem irrelevant to either the question of whether the disclosure was a protected disclosure or a public interest disclosure. In this regard, in his advice the Solicitor-General also added that 'in most cases we would expect that it would be apparent on the face of the disclosure whether it is a disclosure in accordance with Part 2 of the WPA, so that limited investigation or inquiry is likely to be warranted in relation to [that] issue'.
19. The Solicitor-General also advised the Director that he was able to use the material collected during the initial investigation as the basis for an own motion investigation under the Police Integrity Act - which it seems was done in relation to his investigation of Mr Tristan Weston and his relationship with Mr Jones. The Solicitor-General stated that if such an own motion investigation concerned the 'subject matter' of the disclosure, the own motion investigation could not continue once I make a determination that the disclosure is a public interest disclosure.
20. In my view, the Solicitor-General's conclusions are at odds with the arrangements that the WPA carefully and extensively contains for the confidentiality and security of whistleblowers and WPA information. According to the Solicitor-General, the Director can receive a WPA disclosure and undertake a Police Integrity Act investigation based on that disclosure, which is then not subject to the controls and constraints of the WPA. The Solicitor-General's conclusions also suggest that the Director can launch a subsequent Police Integrity Act investigation, also not subject to the constraints and controls of the WPA, based on information received in the course of an investigation conducted to investigate a WPA disclosure.
21. While I do not query the Solicitor-General's analysis (with one exception²), his conclusions mean that, in relation to those Police Integrity Act investigations, whistleblowers will not have the protection of any statutory prohibition preventing their names being included in Police Integrity Act reports and will, instead, be reliant on the Director's discretion for their anonymity. This lack of a statutory protection must place potential whistleblowers in fear of detrimental action and can only have the effect of dissuading potential police whistleblowers from coming forward. This result can hardly have been the outcome that the legislature intended when it enacted the WPA in 2001.

² In his advice the Solicitor-General noted that 'it is not clear how the Director could always reach a conclusion under section 33(1) of the WPA as to whether a particular complaint was a public interest disclosure without exercising any investigative powers'. The test, however, for whether a disclosure is a public interest disclosure or not is dependent on whether the disclosure 'shows or tends to show' certain things. Thus, what is sought, is a determination, or in the Director's case, a conclusion as to whether the disclosure, on its face reveals particular criteria. Rarely will enquiries be necessary for that purpose and certainly, there would never be any need for compulsory interview powers, use of surveillance or telecommunication interceptions for that purpose. I also note that the Solicitor-General refers to the Director making determinations. This however, is a function reserved for the Ombudsman. The Director's task is to reach a 'conclusion' (see sections 33 and 34 WPA).

22. I have elsewhere encouraged extensive alterations to the WPA.³ Until such measures are addressed I consider that legislation is urgently needed to remedy issues identified in the Solicitor-General's advice. The operation of the WPA and its interrelationship with the Police Integrity Act and the Police Regulation Act should be in line with a straightforward reading of the relevant provisions and one which preserves the protections of whistleblowers - which is, after all, the fundamental aim of whistleblower legislation. A disclosure to the Director or the Chief Commissioner should be treated solely as a WPA disclosure, only capable of investigation as such a disclosure. A WPA disclosure should only be investigated as a complaint under either the Police Integrity Act or the Police Regulation Act once the WPA process has been completed by a determination that the disclosure is not a public interest disclosure and an expression of intent by the person who made the disclosure that it be investigated as a complaint. In addition, all material collected as part of a WPA investigation should be used solely for the purpose of WPA investigations in accordance with the aims of the WPA.
23. The Director agrees that whistleblowers should be 'encouraged and protected'. However he favours a parallel and complex legislative amendment, stating that 'the solution is to import into the *Police Integrity Act 2008* protections equivalent to those currently provided by the WPA and to remove from the WPA any application to complaints which are within the jurisdiction of the OPI'. How this solution would operate in relation to complaints received by police members or the Chief Commissioner is far from clear, and whether it is appropriate in view of the Government's plans for the Independent Broad-Based Anti-Corruption Commission seems problematic.
24. Accordingly, I consider that consideration should be given to developing legislative amendments to the WPA and/or the Police Integrity Act to provide certainty regarding the following two questions:
- Whether the Director, Police Integrity, can conduct an investigation using Police Integrity Act powers regarding a Whistleblowers Protection Act disclosure.
 - Whether information gained as part of a Whistleblowers Protection Act investigation can be used to initiate Police Integrity Act investigations.

Complexity of whistleblower legislation

25. While I consider that the OPI should have recognised that the complaint was a whistleblower disclosure, I acknowledge that the whistleblower legislation and its interrelationship with other legislation is complex. In my view, this contributed to the OPI's failure to appreciate the application of the WPA to the complaint it received.

³ Victorian Ombudsman, *Annual Report 2010 - part 1*, page 69.

26. The difficulties faced by the OPI arise from the complexity of the WPA, which in addition to the protections it provides to whistleblowers, imposes a complicated process with regard to investigations and reporting requirements. This differs markedly from the investigation powers and procedures under which investigating agencies, including my office, normally operate.
27. This level of complexity is unnecessary and hampers the effectiveness of the whistleblower arrangements in Victoria. As I have pointed out in my 2010 Annual Report⁴, the WPA would be greatly simplified if it concentrated on the provision of protections to whistleblowers, with investigations being conducted by investigative bodies, such as the Victorian Ombudsman or the OPI under their existing investigative powers with referral back to the Victorian Ombudsman upon completion of the investigation.
28. My investigation into the OPI's handling of the complaint was also limited by the whistleblower legislation. My investigation was conducted under the Ombudsman Act rather than the WPA because section 4(2)(ia) of the WPA states that the Director, Police Integrity is not a public officer for the purposes of the WPA and because section 4(1)(b) provides that bodies presided over by a judge or legal practitioner presiding as such by virtue of statutory requirement are not public bodies. Therefore, a whistleblower disclosure cannot be made against the Director, Police Integrity or the OPI itself. While the Ombudsman Act was amended to include the OPI in my jurisdiction, no similar amendment was made to the WPA. I consider that this anomaly needs to be addressed.

Use of telecommunication interception powers

29. The media has reported on the OPI's alleged abuse of its telecommunication interception powers. Witnesses have also raised concerns with my office regarding the OPI's alleged overuse of telecommunication interception powers particularly, but not exclusively, in the context of the investigation into Mr Jones.⁵
30. Many documents provided to me by the OPI were redacted due to requirements in Commonwealth legislation, presumably the *Telecommunications (Interception and Access) Act 1979*. The OPI, quite properly, was not able to provide me with information regarding any use of telecommunication interception powers owing to the constraints imposed by the Commonwealth Act. The OPI could not confirm that it had even used telecommunication interception powers in its investigation.
31. Due to Commonwealth legislation, I am not able to investigate the OPI's alleged use of telecommunication interceptions or deal with any aspects of complaints about the interception of telephone conversations. This inability to investigate is of concern as allegations have been made that the OPI used telecommunication interceptions in its investigation

⁴ *ibid.*

⁵ The process by which the OPI can obtain a warrant for a telecommunication interception is described in Attachment 3.

of Mr Jones and may have used interception material from its investigation into Mr Jones to initiate its investigation into Mr Weston. However I am not able to test the appropriateness of the OPI's use of telecommunication interceptions.

32. The Director is equally constrained by the Commonwealth legislation in responding to such allegations, as he pointed out in his letter to me dated 9 September 2011:

You are well aware that I cannot comment on the use of telecommunications interceptions in a particular case. Although you have provided the report to me on natural justice grounds, you know I cannot do justice to myself or to OPI on this issue because of my inability to comment ...

33. For similar reasons, the Director also asserted in his subsequent letter to me of 20 September 2011 that:

... your incursion into this area is not justified. The limited jurisdiction you had was removed by the creation of the Office of the Special Investigations Monitor.

34. While I do not accept this latter assertion, it leads to a consideration of what oversight arrangements apply to the use of telecommunication interception powers in Victoria.

Poor oversight arrangements

35. There appears to be a considerable gap in oversight arrangements in relation to the use of telecommunication interception powers in Victoria.

36. The existing oversight arrangements for the OPI's use of telecommunication interceptions, and that of Victoria Police, is through the issuing of warrants by the Federal judiciary and the audit function of the Special Investigations Monitor (SIM).

37. In a letter to me dated 30 September 2011 the Director stated:

I do not accept that OPI uses its telecommunications interception powers inappropriately. Although oversight by the Special Investigations Monitor and the Commonwealth Ombudsman is of limited ambit, both agencies consistently give OPI high marks for compliance.

38. However, the existing controls do not examine the **merit** of using telecommunication interceptions. This is apparent as:

- The judicial process, while requiring the Federal Court Judge or Administrative Appeals Tribunal member to be satisfied as to a number of factors, relies on an affidavit of an officer from the intercepting agency. The affidavit is unable to be challenged by a third party within an adversarial environment.

- The SIM's function is limited to ensuring that certain records are maintained by the police and the OPI (and those records do not include the supporting affidavits for warrant applications). The SIM's role also includes reporting any breaches of the Commonwealth Act identified by his inspectors. However, the SIM does not have a role in questioning the merit of the basis for the use of telecommunication interceptions.
- There is no complaint or own motion investigation process available to deal with broader concerns regarding the use of telecommunication interceptions. This places the decision to use interceptions in a separate category to other administrative decisions made by government agencies such as the OPI. The Ombudsman Act provides me with the ability to examine administrative actions of government bodies and to reach conclusions as to whether the actions of government bodies were, for example, contrary to law; unreasonable, unjust, oppressive or improperly discriminatory; or simply wrong. The use of telecommunication interceptions in Victoria, whether by the OPI or the police, is not subject to such scrutiny. In my view this could lead to a situation where an opportunity for the improper use or overuse of interception powers could go undetected.

Interstate arrangements

39. This gap in accountability with regard to telecommunication interceptions has been recognised in some other States. In New South Wales attempts have been made to broaden the audit function of the Inspector of the Independent Commission Against Corruption (ICAC) to enable the merits of telecommunication interceptions to be examined.
40. The Inspector has a function under the New South Wales *Independent Commission Against Corruption Act 1988* 'to assess the effectiveness and appropriateness of the procedures of the Commission [ICAC] relating to legality or propriety of its activities'⁶. However, in his 2008-09 Annual Report the Inspector argued that he is unable to properly perform this function because the Commonwealth Telecommunications (Interception and Access) Act prevents him from accessing telecommunication intercept material held by ICAC. He also raised concerns about the existing monitoring arrangements regarding powers of the NSW Ombudsman in relation to telecommunication interceptions (whose powers are similar to those of the SIM):

... are limited to ensuring compliance with legal requirements and the keeping of records. The Ombudsman does not check to see whether the ICAC's powers are being exercised appropriately. Thus, a warrant and interception under the TIA Act could proceed undetected for purposes not appropriate to the objectives of the ICAC but for personal purposes unrelated to those objectives.⁷

⁶ Section 57B(1)(d) *Independent Commission Against Corruption Act 1988 (NSW)*.

⁷ Office of the Inspector of the Independent Commission Against Corruption, Annual Report 2008-09, page 6.

41. The Inspector proposed that the Telecommunications (Interception and Access) Act be amended to allow him to audit ICAC's use of its telecommunication interception powers. This approach was supported by ICAC and by the New South Wales parliamentary committee, the Committee of the Independent Commission Against Corruption (the Committee). However, the Commonwealth Attorney-General's Department rejected the proposal, stating that it would raise 'consistency issues that would need to be considered across all affected jurisdictions'⁸.
42. Nonetheless, the Committee recommended that the NSW Attorney-General write to the Commonwealth Attorney-General to request an amendment to the Commonwealth Act that would enable the Inspector to access telecommunication interception material for audit purposes.⁹
43. An alternative approach to a merits assessment has been taken in Queensland where its monitoring body, the Public Interest Monitor (PIM), must be involved in the warrant applications. Part 2 of the Queensland *Telecommunications Interception Act 2009* requires an authority who wishes to apply for a telecommunications interception warrant (in this instance, the Crime and Misconduct Commission or the police service) to notify the PIM if the authority 'intends to apply' for a warrant, in which case the PIM must be provided with a copy of the application for the warrant and the supporting affidavit. The Queensland Act also requires the relevant officer from the authority to 'fully disclose to the PIM all matters of which the officer is aware, both favourable and adverse to the issuing of the warrant'¹⁰. The PIM is also entitled to appear at the hearing of the warrant application 'to test the validity of the application' and for that purpose, to ask questions and make submissions.¹¹
44. The measures taken or being considered in New South Wales and Queensland are measures that may be of assistance in ensuring that there is an effective merits based assessment of telecommunication interceptions in Victoria. In this regard, I recommend that consideration be given to developing appropriate measures to allow the merit of telecommunication interceptions to be assessed and monitored in Victoria.

8 Parliament of New South Wales, Committee on the Independent Commission Against Corruption, *Review of the 2008-2009 Annual Report of the Inspector of the Independent Commission Against Corruption*, Report 11/54 - November 2010, page 14.

9 *ibid.*

10 Section 8 *Telecommunications Interception Act 2009 (Qld)*.

11 Section 10 *Telecommunications Interception Act 2009 (Qld)*.

Conduct of Office of Police Integrity staff

45. During the course of my investigation, I examined whether OPI officers had a conflict of interest with regard to their involvement in the assessment and investigation of the complaint about Mr Jones. Two OPI officers in particular were brought to the attention of my investigators because of alleged conflicts of interest. However, I did not find any evidence that OPI officers wrongly influenced or directed the OPI's assessment or investigation nor that the OPI acted detrimentally to a person believed to be a whistleblower. However, I am investigating the conduct of Victoria Police as a separate investigation.
46. My investigation established that Mr Jevtovic's decision to accept the complaint was not discretionary in nature. Rather, as the Acting Director, Police Integrity at the time, he was obliged to accept a complaint about the conduct of a Deputy Commissioner either pursuant to section 40(4) (a) of the Police Integrity Act or because the complaint was a deemed disclosure under the WPA by virtue of section 39(2) of the Police Integrity Act.
47. I am unable to comment further on this due to concerns that a whistleblower may be identified.

The Director's own motion investigation into a Ministerial Officer

48. The Director provided my office with transcripts from an OPI hearing conducted under the Police Integrity Act using his own motion powers.
49. In a letter to me dated 9 September 2011, the Director stated that his own motion investigation concerns the relationship between 'Sir Kenneth Jones in his capacity as Victoria Police Deputy Commissioner and former Leading Senior Constable Tristan Weston in his capacity as a Ministerial Adviser'. In addition to this and with regard to a number of points concerning the Director's terms of reference for his investigation, he also stated that his investigation would consider:
 - whether the activities of the said Tristan Weston in that secondary employment were lawful and were consistent with the ethical and professional standards expected of a member of Victoria Police.
50. I consider that the basis for the Director's own motion investigation raises jurisdictional questions because it involves the Director investigating the activities of a Ministerial Officer and hence his advice to the Minister and the operation of Ministerial offices.

51. In response to my concerns, the Director stated that he considers he has jurisdiction because of:
- section 69(1)(e) of the Police Regulation Act which provides that:
A member of the force commits a breach of discipline if he or she -
is guilty of disgraceful or improper conduct (whether in his or her official capacity or otherwise)
 - the obligations in the Victoria Police Manual which require police on leave to remain subject to police codes of conduct and ethics, and the obligation that conflicts of interest must be resolved in favour of the public interest and Victoria Police.
52. According to the Director, Mr Weston's continuing obligations as a member of Victoria Police while he was a Ministerial Adviser are found in:
- ... his continuing occupation of the common law office of constable; the continuation of all powers, privileges, responsibilities and obligations vested in him as a Victoria Police member at common law and by statute - including liability to be dealt with for breaches of discipline; and that his continuing approval to engage in secondary employment was revocable, essentially at will, by the Chief Commissioner.
53. However, despite the term of reference for the Director's own motion investigation quoted at paragraph 49 above, namely that the Director's investigation concerns the relationship between Mr Jones and 'former Leading Senior Constable Tristan Weston in his capacity as a Ministerial Adviser', the Director has since stated 'I am not in fact investigating a Ministerial Adviser':
- I am investigating a member of Victoria Police (as Mr Weston then was). I will investigate the misconduct of members of Victoria Police whether they are on duty or off duty, whether they are on annual leave, sick leave, maternity leave, long service leave, leave without pay or are under suspension; whether they are acting within the scope of their employment or outside the scope of their employment or are undertaking secondary employment. My mandate is not only to investigate corruption and serious misconduct but to ensure that the highest professional and ethical standards are maintained within Victoria Police.
54. The Director has subsequently stated:
- The phrase in my Own Motion determination *in his capacity as a Ministerial Advisor* should, in hindsight, have read *purportedly or ostensibly in his capacity as a Ministerial Advisor*. But there has never been any doubt in my mind, or in Mr Jevtovic's, about what we set out to investigate.

55. If the Director's view of this is correct, it places police officers who are permitted to be Ministerial Advisers in an odd, and, indeed in a seemingly impossible position. As the Director has acknowledged, an 'irreconcilable conflict of interest ... arose as a result of Mr Weston's appointment as a Ministerial Officer' and that permission for him to undertake that role 'should not have been granted'. The police policies and instructions, if interpreted in the manner the Director favours, effectively hamper the ability of seconded police officers to perform the role as an adviser.
56. I consider that as a matter of practice it is not viable for a Ministerial Officer to perform his or her duties if their primary obligation is elsewhere. They are political aides and advisers to Ministers and for them to perform that role, their primary obligation must be to the Minister, not to their former employer.
57. I therefore consider that it is appropriate for the status of Ministerial Officers to be clarified in two ways: first, the issue of when a Ministerial Adviser's activities can be subject to investigation needs to be considered. Currently, a complaint cannot be investigated about advisers under the Ombudsman Act, nor can a disclosure be made about advisers under the WPA. The activities of advisers can only be investigated through a section 16 referral from Parliament under the Ombudsman Act (although, as my investigation into the The Hotel Windsor redevelopment¹² demonstrated, the former Solicitor-General disagreed with this interpretation). Another way to investigate the activities of advisers, if the Director is correct, may be if the adviser is a member of Victoria Police.
58. In my view this position is unsatisfactory and should be clarified. Advisers should be subject to investigation under the Ombudsman Act and the WPA given the important role that they play in government. I have therefore made a recommendation to the Premier and the Minister responsible for the establishment of an anti-corruption commission to address this shortcoming.
59. Second, consideration needs to be given to ensuring that the primary obligation of Ministerial Officers is to the Premier and Minister to whom they are assigned, and is not affected by any obligations or restrictions imposed by their former employer. This issue could be dealt with in a number of ways, including:
- amending the *Public Administration Act 2004* to address the obligations of Ministerial Officers
- or
- amending the Police Regulation Act to ensure that powers and privileges of members of the force who are seconded or transferred to non-policing roles cease during the period of their transfer or secondment.

¹² Ombudsman investigation into the probity of The Hotel Windsor redevelopment, February 2011.

60. In my report into WorkSafe's and Victoria Police's handling of a bullying and harassment complaint¹³ I identified similar problems in relation to The Police Association officials retaining their office as Constable for the duration of their service at the union. I recommended that the Police Regulation Act be amended to allow for the suspension of powers and privileges of members of the police force while on leave without pay from Victoria Police and seconded to The Police Association. My recommendation was included in the Police Regulation Amendment Bill 2008, however the Bill was rejected in Parliament on the basis of other issues.

¹³ Victorian Ombudsman *Investigation into a disclosure about WorkSafe's and Victoria Police's handling of a bullying and harassment complaint*, April 2007, pages 24 – 27.

Recommendations

61. To address the issues which I have identified in this report, many of which are of a legal nature, I recommend that:

1. The Office of Police Integrity review its procedures regarding complaints made pursuant to section 86L (2A) of the *Police Regulation Act 1958* to ensure that current and future assessments and investigations comply with the *Whistleblowers Protection Act 2001*.

The Director, Police Integrity's response:

I accept and have already acted on this recommendation.

2. The Attorney-General consider developing appropriate measures to allow the merit of telecommunication interceptions to be assessed and monitored in Victoria.
3. The Minister for Police and Emergency Services and the Minister responsible for the establishment of an anti-corruption commission consider developing legislative amendments to the *Whistleblowers Protection Act 2001* and/or the *Police Integrity Act 2008* to provide certainty regarding the following two issues:
 - Whether the Director, Police Integrity, can conduct an investigation using Police Integrity Act powers regarding a Whistleblowers Protection Act disclosure.
 - Whether information gained as part of a Whistleblowers Protection Act investigation can be used to initiate Police Integrity Act investigations.
4. The Minister responsible for the establishment of an anti-corruption commission consider developing legislative amendments to ensure that the Director, Police Integrity and the Office of Police Integrity are subject to investigation under the *Whistleblowers Protection Act 2001*.
5. The Premier and the Minister responsible for the establishment of an anti-corruption commission consider amending the *Ombudsman Act 1973* and the *Whistleblowers Protection Act 2001* to ensure that the activities of Ministerial Officers are subject to investigation.
6. The Premier and the Minister for Police and Emergency Services consider amending the *Public Administration Act 2004* and/or the *Police Regulation Act 1958* to ensure that:
 - the primary obligation of Ministerial Officers is to the Premier and the Minister to whom they are assignedand/or
 - the powers and privileges of police members transferred or seconded to non policing roles cease during the transfer or secondment.

Attachment 1: Identification of the subject of a whistleblower disclosure

62. This report is made pursuant to the *Ombudsman Act 1973* and names a person who has been the subject of a whistleblower disclosure. Although there is no impediment to naming that person, I consider it appropriate to comply with requirements in the *Whistleblowers Protection Act 2001* (WPA) even though this report has not been made under that Act.
63. Section 22A of the WPA provides that I may disclose, in a report referred to in section 103, particulars likely to lead to the identification of a person against whom a protected disclosure has been made if I determine that it is in the public interest to do so and if I set out in the report the reasons why I have reached that determination.
64. Having considered the four matters referred to in section 22A(2), I have determined that it is in the public interest to identify the subject of a protected disclosure in this matter by disclosing the following particulars: the name, profession, former occupation and personal details of the subject. I have made this determination for a number of reasons.
65. I consider that it is in the public interest for the subject of a protected disclosure to be identified in a report to Parliament when the report concerns an investigation into the actions of those who received and investigated the disclosure and the disclosure concerns allegations of improper conduct by a person holding a public position of significance, such as being a senior member of Victoria Police.
66. Furthermore, in this instance I do not consider that it would be possible to serve the public interest if the report did not disclose the identity of the individual. This is because the report deals with facts and circumstances which have been the subject of press reporting and speculation during recent months which have identified both the public body involved and the subject of the protected disclosure. Accordingly, I consider that even if my report to Parliament 'de-identified' the subject of the disclosure or attempted to maintain confidentiality in some other way, the subject of the disclosure would still be readily identifiable.
67. The only way to avoid such identification would be to omit from any report to the Parliament any information relating to the subject. In my view, this would mean that I would not be able to make any form of meaningful report to the Parliament on my investigation. I consider that confidentiality in such circumstances would be inappropriate and contrary to the public interest.

Attachment 2: Dealing with whistleblower disclosures

68. If a public body such as the OPI receives a disclosure, it is obliged to assess it and form a view within 45 days as to whether it is a public interest disclosure. To be a public interest disclosure the disclosure must show or tend to show that a public officer or public body has engaged, is engaging, or proposes to engage in improper conduct in their capacity as a public officer or body (section 24 of the WPA). The person making the disclosure, who must be a natural person, must have reasonable grounds for their belief that a public officer or body has engaged in improper conduct. In addition, the allegation must satisfy the criteria of 'improper conduct' and if proven, constitute a criminal offence or conduct which warrants dismissal from employment.
69. Should the OPI or any public body, conclude that a disclosure is a public interest disclosure, it is obliged to provide me with details of the disclosure (within 14 days of it concluding that the disclosure is a public interest disclosure) so that I can make a determination. If I determine that a disclosure is a public interest disclosure I can decide to investigate it or refer it to the public body for investigation.
70. If I determine that a disclosure made under the WPA is not a public interest disclosure I must notify the person who made the disclosure of their right to have their disclosure dealt with as a complaint under the Ombudsman Act or the Police Regulation Act.

Attachment 3: Obtaining a warrant for telecommunication interceptions

71. The Commonwealth Telecommunications (Interception and Access) Act lists a number of law enforcement and integrity agencies that are authorised to intercept a communication passing over a telecommunications system. The OPI is one of the agencies.
72. For the OPI to use its telecommunication interception powers it must apply for a warrant which can only be issued by an eligible Federal Judge or nominated Federal member of the Administrative Appeals Tribunal (the Tribunal). In applying for a warrant, the OPI would need to provide an affidavit to the Judge or Tribunal member which demonstrates that the granting of a warrant is appropriate and satisfies requirements in the Telecommunications (Interception and Access) Act.
73. Section 46 of the Telecommunications (Interception and Access) Act states that a Judge or Tribunal member can issue a warrant when satisfied with a number of criteria, including that the telecommunication interception would likely assist an investigation into a serious offence.
74. A 'serious offence' encompasses a number of crimes, including:
 - a. serious offences, such as: murder, kidnapping, drug offences, terrorism, serious fraud, people smuggling, sexual servitude, child pornography, money laundering and serious drug offences
 - b. significant cybercrime offences
 - c. offences involving planning and organisation with significant penalties, such as: theft, tax evasion, extortion, harbouring criminals and bribery or corruption of a government official
 - d. competition and market misconduct offences
 - e. witness offences, such as: false testimony, fabricating evidence, corruption of witnesses, conspiracy to defeat justice, attempting to pervert justice and escaping from detention
 - f. offences relating to criminal organisations.
75. Where a warrant is granted, the OPI has to provide a copy of the warrant to the Minister for Police and Emergency Services as soon as practicable and the Attorney-General within 28 days after the warrant ceases to be in effect.
76. The Telecommunications (Interception and Access) Act also has provisions for emergency powers. Emergency powers allow the interception of telecommunications prior to the application for a warrant. In this instance, the urgency of the intercept must be paramount. For example, the information obtained through emergency procedures would need to be considered as likely to assist in an investigation where possible loss of life or serious injury is likely and imminent. An application for a warrant must be made as soon as practical after the

telecommunication interception has commenced. Emergency procedures are only permitted for use by a police force. As such, the OPI cannot use emergency powers or apply for an emergency warrant.

77. The OPI's alleged use of telecommunication interception powers cannot be investigated by my office. While I have oversight of the OPI, my powers afforded under State legislation are superseded by Commonwealth legislation. Specifically, the Telecommunications (Interception and Access) Act prevents the disclosure of telecommunication interception information to any person. This includes my office.

Ombudsman's Reports 2004-11

2011

SafeStreets Documents - Investigations into Victoria Police's Handling of Freedom of Information request
September 2011

Investigation into prisoner access to health care
August 2011

Investigation into an allegation about Victoria Police crime statistics
June 2011

Corrupt conduct by public officers in procurement
June 2011

Investigation into record keeping failures by WorkSafe agents
May 2011

Whistleblowers Protection Act 2001 Investigation into the improper release of autopsy information by a Victorian Institute of Forensic Medicine employee
May 2011

Ombudsman investigation - Assault of a Disability Services client by Department of Human Services staff
March 2011

The Brotherhood - Risks associated with secretive organisations
March 2011

Ombudsman investigation into the probity of The Hotel Windsor redevelopment
February 2011

Whistleblowers Protection Act 2001 Investigation into the failure of agencies to manage registered sex offenders
February 2011

Whistleblowers Protection Act 2001 Investigation into allegations of improper conduct by a councillor at the Hume City Council
February 2011

2010

Investigation into the issuing of infringement notices to public transport users and related matters
December 2010

Ombudsman's recommendations second report on their implementation
October 2010

Whistleblowers Protection Act 2001 Investigation into conditions at the Melbourne Youth Justice Precinct
October 2010

Whistleblowers Protection Act 2001 Investigation into an allegation of improper conduct within RMIT's School of Engineering (TAFE) - Aerospace
July 2010

Ombudsman investigation into the probity of the Kew Residential Services and St Kilda Triangle developments
June 2010

Own motion investigation into Child Protection - out of home care
May 2010

Report of an investigation into Local Government Victoria's response to the Inspectors of Municipal Administration's report on the City of Ballarat
April 2010

Whistleblowers Protection Act 2001 Investigation into the disclosure of information by a councillor of the City of Casey
March 2010

Ombudsman's recommendations - Report on their implementation
February 2010

2009

Investigation into the handling of drug exhibits at the Victoria Police Forensic Services Centre
December 2009

Own motion investigation into the Department of Human Services - Child Protection Program
November 2009

Own motion investigation into the tendering and contracting of information and technology services within Victoria Police
November 2009

Brookland Greens Estate - Investigation into methane gas leaks
October 2009

A report of investigations into the City of Port Phillip
August 2009

An investigation into the Transport Accident Commission's and the Victorian WorkCover Authority's administrative processes for medical practitioner billing
July 2009

Whistleblowers Protection Act 2001 Conflict of interest and abuse of power by a building inspector at Brimbank City Council
June 2009

Whistleblowers Protection Act 2001 Investigation into the alleged improper conduct of councillors at Brimbank City Council
May 2009

Investigation into corporate governance at Moorabool Shire Council
April 2009

Crime statistics and police numbers
March 2009

2008

Whistleblowers Protection Act 2001 Report of an investigation into issues at Bayside Health
October 2008

Probity controls in public hospitals for the procurement of non-clinical goods and services
August 2008

Investigation into contraband entering a prison and related issues
June 2008

Conflict of interest in local government
March 2008

Conflict of interest in the public sector
March 2008

2007

Investigation into VicRoads' driver licensing arrangements
December 2007

Investigation into the disclosure of electronic communications addressed to the Member for Evelyn and related matters
November 2007

Investigation into the use of excessive force at the Melbourne Custody Centre
November 2007

Investigation into the Office of Housing's tender process for the cleaning and gardening maintenance contract - CNG 2007
October 2007

Investigation into a disclosure about WorkSafe's and Victoria Police's handling of a bullying and harassment complaint
April 2007

Own motion investigation into the policies and procedures of the planning department at the City of Greater Geelong
February 2007

2006

Conditions for persons in custody
July 2006

Review of the Freedom of Information Act 1982
June 2006

Investigation into parking infringement notices issued by Melbourne City Council
April 2006

Improving responses to allegations involving sexual assault
March 2006

2005

Investigation into the handling, storage and transfer of prisoner property in Victorian prisons
December 2005

Whistleblowers Protection Act 2001 Ombudsman's guidelines
October 2005

Own motion investigation into VicRoads registration practices
June 2005

Complaint handling guide for the Victorian Public Sector 2005
May 2005

Review of the Freedom of Information Act 1982
Discussion paper
May 2005

Review of complaint handling in Victorian universities
May 2005

Investigation into the conduct of council officers in the administration of the Shire of Melton
March 2005

Discussion paper on improving responses to sexual abuse allegations
February 2005

2004

Essendon Rental Housing Co-operative (ERHC)
December 2004

Complaint about the Medical Practitioners Board of Victoria
December 2004

Ceja task force drug related corruption - second interim report of Ombudsman Victoria
June 2004