

Commonwealth Ombudsman

Professional reporting and internal witness protection in the Australian Federal Police - a review of practices and procedures

November 1997

***Report pursuant to sections 21A and 31 of the
Complaints (Australian Federal Police) Act 1981***

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

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

'I didn't want to bring up the subject, I didn't want to know about it, I didn't want to be part of it, I didn't know what to do... it pissed me off and I tried to treat it in my own way as if it didn't happen. I just didn't want to know, so I never ever spoke to anyone about it.'

**AFP Constable on why he did not report theft
by another AFP officer - October 1991.**

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Executive summary

Background

This report is a review of practices and procedures for management and protection of internal witnesses in the Australian Federal Police.

The review was commenced in October 1996 as an own-motion investigation under section 21A of the Complaints (Australian Federal Police) Act 1981. This followed the Ombudsman's involvement in two cases of harassment of AFP officers, and the AFP's initiative of developing Professional Reporting Guidelines to deal with such situations - a first for the Commonwealth.

The investigation included general research; interviews with a number of serving and former AFP officers; review of investigation files; dialogue with AFP Internal Security & Audit, Internal Investigations, Health, Psychological and Welfare Services, and the General Manager (Professional Development); and review of Comcare records.

During the investigation the AFP appointed its inaugural Professional Reporting Coordinator, who kept the investigation informed of procedural developments and made a useful contribution to the project.

Investigation

The investigation selected 10 case studies identified by the Ombudsman's office through previous formal investigations.

The misconduct ranged from abuse of prescription medicines, to conspiracy to import cannabis. The experiences of the witnesses ranged from harassment-induced resignation, through to positive recognition from both peers and management, and successfully continued careers.

The cases and literature established several key issues of internal witness management, ranging from access to support services to basic investigation management. They also demonstrated the importance of effort being made in **risk assessment**, even in minor cases, at each stage of an internal case.

The review noted the central role of **middle managers** (Levels 3 and 4) in any support strategy or harassment prevention program, and the critical importance of implementing the new program at these levels.

The investigation also reviewed the three cases in which the AFP has conducted formal **inquiries into harassment** of internal witnesses. The most recent of these (see case study 9) has also been the subject of separate detailed review by the Ombudsman. Together the cases suggest the need for improved procedures on a range of issues including investigation planning, types of proof, and treatment of secondary counter-allegations.

The investigation also reviewed the risk of management actions becoming de facto or 'authorised' reprisals, including three relevant instances where internal witnesses were inappropriately subjected to **psychiatric assessments**, either under duress or without consent.

Findings

The review suggests that:

- AFP central and regional management have a strong and ongoing commitment to fair treatment and where necessary, active protection of internal witnesses;
- Many (but not all) internal investigators have a good track record in assessing issues of internal witness management; and
- Informal networks have effectively supported internal witnesses on occasion in the past, and are in the process of being updated and reinforced through new coordination of services and investigator training.

However, the review also succeeded in identifying key management issues that need to be addressed. A case study approach tends to emphasise 'problem' cases and is not representative of the large number of AFP internal investigations conducted each year, but it nevertheless suggests that:

- In the past, the formal obligation to report misconduct has been used as an excuse to not provide support to internal witnesses ('they are only following orders') - leaving little incentive for officers to comply with the obligation;
- Some managers and internal investigators assume that because internal witnesses are AFP officers, they should understand the context of their actions and should need no active management or workplace support;
- Middle managers are often insufficiently equipped to address workplace conflict involving internal witnesses, greatly increasing the risk of low-level harassment between operational police;
- Some managers and investigators have been too willing to target the personality and/or mental health of internal witnesses when problems arise, rather than confront issues in the workplace;
- Some managers and health professionals in the AFP have wrongly tried to decide management issues using psychiatric diagnoses;
- The AFP needs to improve its procedures for
 - general management of internal witnesses, including improved liaison and follow-up;

- dealing with both payback complaints against internal witnesses, and counter-allegations against victims of harassment; and
- negotiating and settling claims for compensation.

Recommendations

The review recognises that the AFP's new **Professional Reporting Guidelines** provide a framework for addressing these issues, and that many new initiatives are taking place. The AFP reacted positively to the draft report and is already acting on some recommendations, while for others further implementation and evaluation is still required.

The case studies established that in each case, fair treatment of internal witnesses relies on a variety of critical decisions, shared between a diversity of areas - line managers, internal investigators, independent mentors/confidants, support staff, and the AFP's central human resource managers. As a result, the report suggests a **manager's checklist** in some areas, setting out basic issues for consideration.

In addition, the review recommends:

1. Further improvements to internal investigator training;
2. Further development of both the roles of the Professional Reporting Coordinator, and the minimum responsibilities of support staff (including mentors/confidants and Support Groups);
3. Further review of the role of internal health and psychological services, to fully separate forensic and clinical responsibilities;
4. Increased external scrutiny of and involvement by the Ombudsman's office in investigations into allegations by AFP appointees;
5. Amendment to existing legislation, interim procedures and where necessary, further resources to:
 - Provide consistent statutory protection to AFP appointees making public interest disclosures; and
 - Give greater effectiveness to the Ombudsman's ability to monitor and investigate complaints from internal witnesses.

The review also confirms the need for legislative change to remedy the continued lack of a unifying 'best practice' whistleblower protection scheme across the wider Commonwealth jurisdiction.

Summary of recommendations

The AFP have responded positively to all the following recommendations.

Recommendation 1

That the AFP develop further practical guidance for managers and case officers as to their responsibilities under the Professional Reporting Guidelines, in the form of separate managers' checklists for:

- Appointees who first become aware of the professional reporting issue, and/or are tasked with investigation (chapters 2.1 and 2.2);
- Senior managers, in relation to ongoing involvement in case management, negotiations and resolution (3.2 and 4.2);
- Managers tasked to deal with allegations of harassment (4.1); and
- Middle managers, across a range of key responsibilities (chapter 5).

Recommendation 2

That the AFP internal investigation areas develop mandatory service standards for ongoing liaison and follow-up with internal witnesses, to minimise uncertainty and criticism about inadequate support.

(Chapter 2.2)

Recommendation 3

That internal investigation practice be amended to omit the name of original sources or witnesses from formal allegations - even if their identity may be disclosed later - in order to avoid focussing on individual personalities rather than substantive issues.

(Chapter 2.2)

Recommendation 4

That AFP management formalise criteria for the handling of counter-allegations or possible payback complaints against internal witnesses, including the option of a discretion, having regard to all the circumstances, that such allegations not be fully investigated.

(Chapter 2.3)

Recommendation 5

That the roles of support persons under the Professional Reporting Program be clearly defined, including through training, with a view to:

- Clarifying **between** the various roles collapsed into the AFP concept of 'confidant/mentor';
- Ensuring the position of support persons do not present a conflict of interest in their management of internal witnesses;
- Transferring responsibility for formation of support groups from II or ISA, to the professional reporting coordinator; and
- Developing a case officer capacity, to conduct the routine work of liaising with witnesses, support persons and other personnel.

(Chapter 3.1)

Recommendation 6

That AFP management conduct ongoing evaluation of the role of Health and Psychology Services in relation to professional reporters, including development of procedures to ensure that approval at least at General Manager level is obtained for any psychological testing of a reporter.

(Chapter 3.1)

Recommendation 7

That AFP senior management consider more formal means of providing recognition to internal witnesses in appropriate cases, including written notification that the witness' assistance is acknowledged and appreciated by the organisation.

(Chapter 3.2)

Recommendation 8

That AFP senior management develop its use of deployment in internal witness management, by:

- Developing personnel procedures to enable deployment to be an open means of rewarding suitable appointees for exceptional service; and
- Setting as standard that transfer of internal witnesses due to victimisation problems, while sometimes valid, is not acceptable as a sole solution; and that before any witness is transferred, consideration be given, in consultation with the witness' support personnel, as to whether other transfers are not also necessary.

(Chapter 3.2)

Recommendation 9

That pending further evaluation of the term 'professional reporter', the AFP's education strategy include efforts to promote a wide understanding among personnel about the breadth of roles that fall within this term.

(Chapter 3.3)

Recommendation 10

That objective criteria be developed, for registration and deregistration of internal witnesses on the professional reporting program.

(Chapter 3.3)

Recommendation 11

That the Professional Reporting Guidelines and role description of the professional reporting coordinator be amended to require him or her:

- to be formally consulted in advance in relation to any critical management decision relating to a program participant; and
- to directly brief (a) the Integrity Committee on any sensitive issue before the General Manager, Professional Development involving an internal witness; and (b) the Ombudsman's office in any case of significant difficulty or contention.

(Chapter 3.3)

Recommendation 12

That the categories for review of the professional reporting program be expanded, with a view to both broader evaluation and application at a practical training level through use of case studies.

(Chapter 3.3)

Recommendation 13

That AFP management develop a streamlined procedure for the initiation of investigations into alleged reprisals or victimisation against an internal witness, to promote speedy inquiries and resolution.

(Chapter 4.1)

Recommendation 14

That where possible, the task of investigating harassment allegations be given to middle or senior managers with direct experience of complex management issues; consideration be given to engaging an outside person if insufficient internal expertise is available; and that the existing primary case officer be included as an investigator in appropriate cases.

(Chapter 4.1)

Recommendation 15

That specific training be developed for investigators tasked with internal harassment or victimisation inquiries, within the context of the AFP's existing Integrity Investigations program.

(Chapter 4.1)

Recommendation 16

That in measuring the performance of middle managers on these issues, the AFP adopt the principle that failure to take active measures to detect and deal decisively and swiftly with harassment and ostracism of internal witnesses will, prima facie, be reason for loss of command.

(Chapter 5)

Recommendation 17

That the AFP take appropriate steps to make clear to middle managers that they have a clear responsibility, wherever a professional reporting issue is within their knowledge, to act proactively to assess possible harassment risk and anti-harassment measures at station or team level.

(Chapter 5)

Recommendation 18

That continued priority be given to (a) specific conflict resolution training for supervisors at squad/team leader level, about internal witness management; and (b) inclusion of identified leadership competencies in supervisors' appointment and performance evaluation criteria.

(Chapter 5)

Recommendation 19

That the AFP take appropriate steps to make clear to middle managers that, notwithstanding the principles of devolution and empowerment, middle managers should keep superiors informed of any and all sensitive matters involving internal witnesses, even where they feel they have authority and competence to deal with them.

(Chapter 5)

Recommendation 20

That the AFP complaints legislation be amended to include:

- abolition of the artificial distinction between complaints and allegations, to enable effective independent scrutiny of decisions such as to investigate counter-allegations (chapter 2.3),

- extension of the coverage of the s.88A victimisation offence to both internal and external complaints, with also the inclusion of a part reversal of onus onto the alleged harassor on the issue of intent (chapter 4.3); and
- an exception to s.5(3) of the Complaints Act, to provide that the Ombudsman is not precluded from investigating conduct related to employment where detriment is alleged to have occurred as a result of the making of a report under the Professional Reporting Guidelines, and the detriment is sufficiently serious or significant to warrant external review (chapter 4.3).

Further, that sufficient additional resources be dedicated to render these functions effective; and that so far as is possible, pending Commonwealth protected disclosure legislation (recommendation 21), and/or amendment of the existing legislation, the AFP and the Ombudsman enter into interim arrangements to the above effect.

(Chapter 4.3)

Recommendation 21

Further, the Ombudsman recommends that the Commonwealth Government undertake such legislative reform as is necessary to establish an effective 'best practice' protected disclosure scheme across the Commonwealth public sector, including:

- a statutory defence to the offence of disclosing official secrets, in certain circumstances including that the matter was first reported via official channels or there was good reason for not doing so; and
- extension of an offence of victimisation to protect all Commonwealth officers who make disclosures to or for the purposes of an investigation (equivalent to the offence created by s.88A of the Complaints Act, and including a part reversal of onus onto the alleged harassor on the issue of intent).

(Chapter 4.3)

Glossary

AFP	Australian Federal Police
Appointee	Officer or staff member of the AFP
Bulwark	Physical security project managed by ISA
Complaints Act	<i>Complaints (Australian Federal Police) Act 1981</i>
II	AFP Internal Investigations
ISA	AFP Internal Security and Audit
MPRA	Merit Protection Review Agency (now within Commonwealth Public Service and Merit Protection Commission)
Senate Select Committee	Report of the Senate Select Committee on Public Interest Whistleblowing, 1994 (see Bibliography).

Chapter 1. INTRODUCTION

1.1 BACKGROUND

This report is a review of practices and procedures for the management and protection of internal witnesses in the Australian Federal Police. The review was commenced in October 1996 as an own-motion investigation under section 21A of the *Complaints (Australian Federal Police) Act 1981*.

The Australian Federal Police (AFP) issued its first professional reporting guidelines in September 1996 (**Appendix**). These were initiated by AFP internal security staff, drawing on whistleblower protection developments in a number of State jurisdictions, and police services in particular. A notable case of harassment in the AFP's ACT Region in 1994 also gave impetus to development of a clear policy (see case study 6: **Novelty**). This case combined with another in 1996 (see case study 9: **Hoodwink/Moray**) led the Ombudsman to take a close interest in the policy's development.

WHAT IS AN INTERNAL WITNESS?

An internal witness is any AFP appointee who provides information about misbehaviour by colleagues or supervisors -

- from simple concerns about whether an appointee's conduct is ethical or professional, to hard evidence of misconduct or criminal activity;
- whether the reporter provides the information to a supervisor, a manager in another area, or to an official investigation;
- whether they provide the information willingly, reluctantly, or only when formally directed.

The term used most often in public for such staff, is 'whistleblower'. In this report, both 'internal witness' and the AFP's preferred term, 'professional reporter', include all of the above categories, right down to those appointees who do not go out of their way to provide information but simply tell the truth or voice concerns when asked.

A common criticism of 'whistleblower' protection schemes is that they assume officers or staff only ever report misbehaviour or mismanagement for pure motives. Many reports do make this assumption;ⁱ and some commentators go further, using the whistleblower category exclusively to identify only those 'totally or predominantly motivated by notions of public interest', and classing them as a new collective movement of principled organisational dissent.ⁱⁱ In law enforcement, the assumption may often be justified, since most appointees clearly join the service with high integrity. It was this that led the Royal Commission into the NSW Police Service to say the damaging effect of past deficiencies in the management of internal witnesses could

not be overstated, nor could the risks for “those members, otherwise honest, who have in the past declined to speak up”.ⁱⁱⁱ

This review works from the premise that an internal witness is entitled to fair treatment, regardless of the circumstances; and confirms that it can be limiting, if not counterproductive to stereotype the different personnel who provide evidence of misbehaviour.

There are two broad reasons or ‘theories’ why it is important to ensure fair treatment for officers and staff. The first is the ‘efficiency’ theory: that protection is important to encourage reports, uncover misbehaviour and under-performance, and enable management to better understand and control the organisation. This stresses that the reason for a report or evidence should not detract from its truth and weight, as stated in a leading Queensland report:^{iv}

‘... the public interest in the exposure and correction of illegal and improper conduct is just as well served by an allegation which proves on investigation to be accurate, but which was made purely out of spite, malice or revenge.’

This is confirmed by the Ombudsman’s experience, both in relation to the AFP and the Ombudsman’s wider Commonwealth jurisdiction. Internal witness or ‘whistleblower’ complaints should receive considerable priority if only because they often go to the heart of a problem of maladministration - rather than indicating possible symptoms of it. This seems further confirmed in NSW by the first year of the *Public Interest Disclosures Act 1994*; in 1995-96, 41.2% of internal disclosures were subject to inquiry or investigation by ICAC, as opposed to the normal 24.7% of external complaints.^v

The second broad reason is the ‘ethics’ theory, which says protection of whistleblowers is necessary because many reports are motivated by individuals’ integrity and moral choice. Unlike the efficiency theory, this says that the motive of an internal witness is vitally important - because:

- integrity and moral choice are values central to the core business of public service (including law enforcement), and have to be recognised in order to be promoted;^{vi}
- in an ethical organisation, even if a report is substantiated and appropriate action taken, if it can be safely concluded that it was made for malicious or self-serving reasons then the reporter should not be held up as possessing ethics he or she may not have; and
- motive has to be assessed at least to determine how a reporter’s colleagues will react to the findings - because if they can, less ethical colleagues will usually attribute self-serving motives to a professional report, even if that is far from the case.

This review confirms that for the AFP, like other law enforcement agencies, both sets of reasons apply.

The AFP's experience is consistent with studies suggesting valuable information will be brought forward for a variety and mixture of motives, sometimes even conflicting. As one commentator has noted, 'motives rarely are unitary and may be mixed with two parts honesty, one part ambition and one part vengeance'.^{vii} In the Ombudsman's view, although ethical behaviour and motives are to be encouraged, and will often be prevalent, whistleblowing is best understood as something on the same scale as informing activity in general - behaviour generally not purely altruistic, but more typically 'positive social behaviour that is not totally selfless'.^{viii}

For both reasons, the purpose of good practices and procedures is to give AFP personnel clear guidance about how professional reports and internal evidence should and should not be treated - the goals being effective support, impartial investigation, fair treatment and where possible, positive outcomes for internal witnesses as well as the organisation and others involved.

WHAT ARE THE PROFESSIONAL REPORTING GUIDELINES?

The means of achieving these outcomes have been under public debate in Australia for many years. In the last decade, debate on whistleblower protection in Australia has focussed largely on statutory protection, to remove legal obstacles to employees who wish to make disclosures in the public interest. Victoria and the Commonwealth are the only jurisdictions which do not have this kind of 'protected disclosure' legislation for public servants, including police. In addition, the ACT legislation does not cover the AFP, who remain Commonwealth employees.

The Queensland and SA schemes also extend to the private sector.

This type of legislation -

- protects a reporter from being sued for defamation, breach of confidentiality or other civil damages where they have made a bona fide disclosure according to procedure; and
- makes it a criminal offence for anyone to victimise, or cause detriment to, someone who has made such a protected disclosure.

Significantly, both these protections already apply to reports about actions of AFP appointees, whether from within or from the public, but provided they are made as complaints under the *Complaints (Australian Federal Police) Act 1981* - sections 45 and 88A.

In addition, following a number of Commonwealth inquiries including a Senate Select Committee, there are widely held views that the Commonwealth should have a consistent general scheme for protected disclosures across the public sector. The former government proposed a general scheme in October 1995, but beyond the principles proposed in a

limited way for Australian Public Service employees in the current Public Service Bill 1997, no further steps have been taken.^{ix}

In addition, as well as consistent statutory protection, it is clear all government agencies need their own procedures for effectively handling reports, and turning them to positive outcomes.^x These systems are critical for both management and employees who might make reports, because -

- it is generally in managers' interests to put internal dissent to constructive ends, quickly and with a minimum of conflict; and
- it will usually be in the interests of the individual reporter to receive support before it gets to the stage of external statutory protection - by which time the conflict could have been exacerbated and any reprisals (or perception of them) so entrenched, the whistleblower's career and wellbeing may well have been substantially damaged.

These systems are now coming into place in several States, with the most important example in law enforcement being the Internal Witness Support Program in place in the NSW Police Service, its critical role underlined by the recent Royal Commission.^{xi}

There is currently no statutory or policy requirement for Commonwealth agencies to develop such systems. However, AFP General Order 6 has for some time put the obligation on all AFP members to report suspected misconduct (paragraph 9(1)). This provides a strong basis for promotion of ethical conduct, creating a 'level playing field' approach rather than a special category of reporting personnel. By issuing the AFP's Professional Reporting Guidelines and commencing their implementation, the Commissioner has taken the initiative - appropriately so, in the Ombudsman's view.

The Guidelines apply to any concerns about 'misbehaviour' by other appointees, without limiting the meaning of that term - as opposed to the requirement under most legislative schemes that allegations must involve serious wrongdoing before they attract official protection.^{xii} They take in all from serious criminal matters to 'those complaining about, albeit serious to them, less serious administrative matters'.^{xiii} The policy framework itself suggests AFP central and regional management have a strong and ongoing commitment to fair treatment and active protection of internal witnesses.

The purpose of this report is to assist in implementation of the framework, by providing independent review of the AFP's handling of significant cases, and identifying areas where external scrutiny is needed to increase the accountability of internal systems.

1.2. INVESTIGATION

This review included general research; interviews with a number of serving and former AFP officers; review of investigation files; dialogue with AFP Internal Security & Audit and Internal Investigations; discussion with Health, Psychology and Welfare Services, the Manager, Workplace Environment and the General Manager, Professional Development; and discussion with Comcare.

The review consulted with both Whistleblowers Australia, and the Australian Federal Police Association.

During the investigation, the AFP also appointed its inaugural Professional Reporting Coordinator, who kept the investigation informed of procedural developments and made a useful contribution to the project.

The investigation selected 10 case studies identified by the Ombudsman's office through previous formal investigations. These are summarised in the rear of the report, and referred to by operation name throughout. The governing criteria were (1) demonstration of the range of both (a) circumstances and (b) experiences confronted by AFP appointees; and (2) diversity of management issues raised.

In this regard, the misconduct ranged from abuse of prescription medicines, to conspiracy to import cannabis; and the experiences of the internal witnesses ranged from harassment-induced resignation, through to positive recognition from peers and management and successfully continued careers.

While some positive experiences are therefore noted, the review recognises that a case study approach tends to emphasise 'problem' cases, and is not necessarily representative of the large number of AFP internal investigations conducted each year. This point was made by the Manager, ISA Investigations^{xiv}; and has been reflected in previous studies and reviews.^{xv}

In particular, the Royal Commission into the NSW Police Service noted that while officers' fears about harassment are genuine, contrary to common folklore not all internal witnesses are in fact subject to harassment.^{xvi} The Commission noted that half of the 24 registrants under the NSW Police 1994-95 internal witness program reported no harassment or victimisation, and that the situation appeared to have only improved since that time. However, more recent research suggests significant ongoing problems,^{xvii} and in any case, the critical issue to be focussed on, in relation to the AFP, is the necessity of continual improvement given the consequences of even a small minority of problem cases for the organisation as a whole.

Notes to chapter 1

ⁱ For example, US Senate Report 95-969 as quoted at paragraph 2.28, Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991; see also Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), pp 62-63.

ⁱⁱ De Maria, W, Queensland whistleblowing: sterilising the lone crusader, *Australian Journal of Social Issues*, v27, no4, November 1992, pp 248-261; De Maria, W, Jan, C, *Wounded Workers: Queensland Whistleblower Study, Result Release Two*, Department of Social Work and Social Policy, University of Queensland, October 1994, pp 5-7.

ⁱⁱⁱ Royal Commission into NSW Police Service, *Final Report, Volume II*, May 1997, p.419.

^{iv} Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, paragraph 7.31; see also Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), pp 170-172.

^v Committee on the Office of the Ombudsman and the Police Integrity Commission (NSW Parliament), *Review of the Protected Disclosures Act 1994*, September 1996, p 117.

^{vi} See McMillan, J, Whistleblowing, in ed. Noel Preston, *Ethics for the public sector - education and training*, Federation Press, Sydney 1994, p 166; and Vincent, M, Welcome Disclosure: the decline of whistleblowing as an ethical act, *Alternative Law Journal*, vol 20 no 2, April 1995.

^{vii} J. R. McCall, 'Whistleblowers: Curse or Cure?', *National Law Journal*, June 1989, p 15. See also Fox, R G, Protecting the Whistleblower, *Adelaide Law Review*, vol 5 no 2, 1993, p 144. Also note the comment in the Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, that "Identifying a person's true motivation would be difficult. The answer, in most cases, is probably that whistleblowers make their disclosures with a mixture of emotions and reasons."

^{viii} Or 'prosocial' behaviour: see Miceli, MP, Near, JP, Characteristics of organisational climate and perceived wrongdoing associated with whistle-blowing decisions, *Personnel Psychology*, no 38(3), 1985, p 527 citing Staub, E, *Positive Social Behaviour and Morality: Social and Personal Influences*, New York, Academic Press, pp 203-341.

^{ix} Review of Commonwealth Criminal Law - Final Report (Sir Harry Gibbs - Chairman), AGPS Canberra, December 1991; House of Representatives Standing Committee on Banking, Finance and Public Administration, Focussing on Fraud - Report of the Inquiry into Fraud on the Commonwealth (Paul Elliott, MP Chairman), November 1993, Parliamentary Paper No. 235 of 1993; Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994); House of Representatives, *Report of the Senate Select Committee on Public Interest Whistleblowing: Government Response*, Hansard for 26 October 1995. See Public Service Bill introduced in Commonwealth Parliament on 27 June 1997, particularly clauses 16 and 41(1)(c).

^x Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, paragraphs 2.57,4.45,6.42-6.44; See also Fox, R G, Protecting the Whistleblower, *Adelaide Law Review*, vol 5 no 2, 1993, p 160; and Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), pp 43, 169.

^{xi} Royal Commission into NSW Police Service, *Final Report, Volume II*, May 1997, p 402.

^{xii} For example, most schemes only apply to criminal acts, "gross" maladministration, or "serious and substantial waste"; or as in the ACT, conduct which is "actionable" by way of criminal or disciplinary proceedings, or by dismissal. See also Fox, R G, Protecting the Whistleblower, *Adelaide Law Review*, vol 5 no 2, 1993, pp 145-147.

^{xiii} For example, the distinction drawn by the SA Police Anti-Corruption Branch: Evidence to Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), 27 January 1994, Hansard, p 335.

^{xiv} 10.2.97: ISA's rough estimate for allegations it handled in the 1995 and 1996 calendar years was that four officers were believed to have experienced problems out of 124 allegations received, or 3.2%.

^{xv} See e.g. Queensland Whistleblower Study, cited in Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), p 66; and indications that while case study approaches can give the impression that rates of retaliation are quite high, US research indicates the incidence is lower than expected, and in Australia the position has not been well established: Anderson, P, Controlling and managing the risk of whistleblower reprisal, *National Occupational Stress Conference*, 1996, p 1.

^{xvi} Royal Commission into NSW Police Service, *Final Report, Volume II*, May 1997, p 405.

^{xvii} Harris, T, Police who blow the whistle pay the price, *The Australian*, 2 July 1997, p 5.

Chapter 2. Receiving and acting on reports - responsibilities of confidants and internal investigators

2.1. SHARED RESPONSIBILITIES

Responsibility for internal witness management begins with the AFP appointee who first becomes aware that a colleague has information or evidence making up, or relevant to, a report or complaint.

The review suggests anyone in this position should turn their mind to a number of critical responsibilities, which may be important to both a successful investigation and the witness' later welfare. This person will often be a friend or trusted colleague with no official responsibility for the appointee involved. It will also often be a direct supervisor or officer-in-charge. The roles of both of these are further discussed in chapters 3 and 5.

Decisions about how the matter should proceed will be very important. The review suggests five needs to be considered from the outset of the witness' role being identified:

- ensuring the witness has access to support services;
- identifying his or her own source of support (mentor/confidant);
- assessment of risks (harassment, as well as physical threat);
- arrangements for liaison about how the matter is being handled (e.g. liaison during an investigation), and for follow-up; and
- issues of how the handling (e.g. investigation) is to occur.

Responsibility for addressing these issues may well be shared between a number of managers and areas. However, if an internal investigation proceeds, the investigator's role dictates he or she will become aware quickly if the above issues have not yet been considered; and will also be in a position to collect the information to ensure they are. The investigator will also have the most control over how the investigation is to occur. For these reasons, while responsibility is shared, the issues are set out below as the basis of a checklist for internal investigators.

2.2 INTERNAL WITNESS MANAGEMENT

ENSURING ACCESS TO SUPPORT SERVICES

A basic responsibility - for the organisation, and for investigators - is to ensure a witness or potential witness has access to the existing range of services - i.e. knows they exist, and has sufficient confidence and understanding to use them.

The existing services are:

- Professional psychological support;
- Welfare officers;
- Threat assessment and protection (Project Bulwark, managed by Internal Security & Audit (ISA)); and
- Professional Reporting assistance (including coordination of an individual mentor/confidant).

Further details on these services themselves, are at chapter 3.

In the cases reviewed, the officers sought access to these services, but (on their account) did so on their own initiative, and in some circumstances long after problems commenced (see case studies **Alien 2** and **Moray**). Apart from physical security under Project Bulwark, none of the officers reported being either informed or reminded about the availability of professional support.

The accuracy of these claims, and reasons were not fully investigated. The review suggests one reason is an attitude, among the appointees themselves, that as appointees they did not expect to need management or workplace support. In my view, these assumptions are shared by many managers and internal investigators, and appear to be supported by the notion that since all appointees are obliged to report misconduct, they are only following orders and should not require special support.

The review confirms that, contrary to this attitude, support services, both professional and informal, are heavily relied on and can be vital.

In practice, the AFP's new Professional Reporting Guidelines also now place further responsibilities on first contact officers:

- To advise witnesses they can discuss issues of concern with either Deputy Commissioner or any General Manager, Director or equivalent in whom they have confidence, on a 'without prejudice' basis, simply to discuss likely consequences of making a report (except in the case of criminal offences, which may have to be investigated regardless);
- To advise witnesses they can approach the Ombudsman's office at any time, and receive advice on how a complaint would be handled, hypothetical or otherwise; and

- In the case of internal investigators (II or ISA), to document that they have discussed the available services with a witness early in an investigation; and even if a witness indicates they do not wish any support, to notify the existence of the case in confidence to the Professional Reporting Coordinator in case they experience problems at a later stage.

IDENTIFYING WITNESS' OWN SOURCE OF SUPPORT

A supervisor or internal investigator needs to ensure a witness has thought about their own form of support. The review confirmed that in most cases, even where the internal witness was a strong individual, in hindsight they felt that they needed more moral support.

Where a witness identifies their own support person, the Guidelines now provide for that person to be included in relevant discussions about the progress of the case and the witness' welfare. Where a witness is isolated and cannot suggest such a person, liaison with the Professional Reporting Coordinator becomes imperative.

As a practical issue, no investigator would interview an officer accused of misconduct without ensuring their entitlement to legal representation or other support. In none of the cases reviewed, however, was there indication of consideration being given to interview friends for internal reporters. This was despite subsequent criticism of at least one reporter (**Hoodwink/Moray**) for discussing the interview with perceived support persons, in breach of a direction - when realistically, provided confidentiality requirements are met, such support will often be necessary and may be far better managed as part of the investigation.

In the Ombudsman's view, best practice in future should involve expressly informing reporters or principal witnesses they can have a confidant or other trusted person present, and encouraging them to do so.

RISK ASSESSMENT

From experience, immediate risks to internal witnesses, by way of reprisal, can be both:

- physical, i.e offences or threats against person, family or property; and
- psychological, e.g poor treatment or harassment in the workplace.

Reprisals are discussed more fully in chapter 4. In general, the need for physical protection will be confined to more serious matters, where the stakes for a suspect appointee or associates are higher - and the likelihood of harassment by other workmates may well be reduced (see

Urchin). In the bulk of cases involving lesser offences and misbehaviour, experience suggests that while physical risk is not high, low-level harassment is frequently a potential problem (see **Alien 1 and 2, Novelty, Graft and Hoodwink/Moray**).

It is critical that assessment of any type of risk is commenced at the outset of an investigation, and reviewed as the matter progresses - rather than attempted as an afterthought when problems emerge.

If there are real concerns as to *physical* risk, these should be referred to ISA in accordance with Project Bulwark - an initiative providing security for AFP employees against threats regardless of source.

Concerns as to possible sources of *poor treatment or harassment* may seem less tangible, and therefore difficult to assess. As mainly psychological risks, they also have a high subjective content, varying from witness to witness. The Senate Select Committee on Public Interest Whistleblowing observed that events can 'snowball' so officers or staff are not aware they have become a whistleblower until they begin to suffer.^{xviii} This is supported by cases (e.g. **Alien, Hoodwink/Moray**) where even low stress can become a substantial problem for a witness who is not adequately equipped, and in turn increases their vulnerability, with colleagues able to inflict damage with little effort.

Dr Peter Anderson of the Queensland Criminal Justice Commission suggests potential internal witnesses fall into a number of categories:^{xix}

- *risk avoiders*, who over-estimate risks of reprisal, have low knowledge of protections, and are unlikely to come forward;
- *risk managers*, who can realistically anticipate the risks and develop some coping strategies of their own, and are likely to come forward if they see a reasonable prospect of support;
- *trusting* whistleblowers, who anticipate a risk of reprisal but come forward wrongly predicting it to be low;
- *naive* whistleblowers, who come forward unaware that there are any risks of reprisal or possible negative repercussions; and
- '*kamikaze*' whistleblowers, who come forward regardless of risk.

Without putting these labels on the cases reviewed, this review confirmed that investigations which include some risk assessment and management will help appointees come forward; and are imperative for the protection of many appointees who are trusting or naive.

In practical terms:

- assessment can and should be undertaken by anyone with sufficient knowledge of the facts, e.g. supervisors and mentors; and then updated on an ongoing basis as the case requires;
- the initial assessment should be made as early as possible; and

- the person best placed to establish this necessary information initially, will often be the internal investigator at the first meeting or interview - even if they are not then responsible for the officer's welfare.

Establishing this information should include:

- Asking both witness and mentor how they think the appointee subject to the allegation might respond, if he or she learned of the inquiry;
- Asking witness and mentor how they think associates of the appointee, including colleagues in general, might respond;
- Establishing details of the basis, if any, for these views, e.g.
 - Exploring the likelihood any possible harassor would develop a real **intention** to take a reprisal ('what has the officer got to lose?', 'what chance they would expect to get away with a reprisal undetected?'); and
 - Exploring their **capability** to take such reprisals ('what opportunity would they have?', and 'what power?'); and
- Taking any steps, or advising management to take steps, which are likely to help identify those responsible for reprisals if they do occur.

Case studies **Urchin** and **A recent case** provide examples of where investigators undertook this kind of assessment, aimed at physical threats.

However, even in less serious matters, an investigator should make a comparable attempt to objectify low-level harassment risks - both for their own purposes, and to help the witness to do so. The cases suggest that most investigators, while supportive of the witness, viewed harassment as something that either hopefully would not occur, or could be dealt with later if it did. For example, in only one case (**Poetic**) was there evidence of investigators placing a reverse call charge record on witnesses' home telephones in anticipation of possible harassing phone calls - even though this type of reprisal is one of the easiest and most obvious in such cases.

Perceptions of motive are a second but important level of information needed for effective risk assessment, especially in less serious cases where low-level harassment risk is high.

As stated in the Introduction, the motives of a reporter/witness will often be mixed, will be difficult to determine, and in any event are irrelevant to the investigator's task of determining the truth of the allegation. However, for witness management, the investigator should also ask a reporter why they have provided the information:

- To assess likely perceptions as to why they came forward (a necessary part of assessing how colleagues may respond);
- To identify and assess the motives of any appointees allegedly involved in reprisals (if a later investigation has to occur); and
- To assist both the witness and AFP management in any later deliberations about what is a fair and positive outcome, should counter-allegations or other controversies arise.

Questions about both (a) reprisal risk and (b) motive are potentially very discouraging to an internal witness. If asked too early, or insensitively, they may lead a witness to withhold their complaint, or feel they have been warned not to provide the information. These questions should only be asked after the primary information has been forthcoming.

Urchin and **Graft** provide examples of where this occurred, apparently to good effect; whereas if these issues had received greater attention in **Hoodwink**, it may have helped prevent some of the difficulties experienced later when harassment allegations arose.

ONGOING LIAISON AND FOLLOW-UP

In both criminal and internal investigations, a case officer's job is focussed on outcome (either charging and proceeding against a defendant; or producing an internal finding). Issues relevant to a complainant may become secondary, and a case officer may easily focus exclusively on primary issues as a case progresses.

The review indicated cases where internal witnesses established a good rapport with their investigators, and felt relatively informed and up to date about case progress. This appeared to be so especially where the witness' active participation in the investigation was required, creating direct need and/or opportunity to keep them informed (**Alien 1; Urchin**).

In contrast, in one case an absence of liaison at a critical time was later regarded as possibly unfair on the reporter, leaving him disadvantaged in dealing with harassment (**Hoodwink**). In another, investigators wrongly believed that secrecy requirements in General Orders and the Complaints Act precluded them from keeping a witness informed - when in fact the opposite was true, and they had failed to meet obligations to maintain ongoing liaison under ACT Victims of Crime legislation (**A recent case**). In some cases, investigators correctly believed they were helping protect a witness by minimising contact with them (and thus also risk of their identification), but had apparently not considered alternative contact arrangements, including use of support persons as go-betweens.

Similar concerns arose about follow-up: not only informing the witness of outcomes or findings, but maintaining contact over lengthy periods pending disciplinary or criminal proceedings or employment reviews. Witnesses appear generally more reliant on gossip, coincidence or their own enquiries for relevant information, than on updates from the internal investigation areas - a problem also documented in a 1994 review of NSW Police procedures, which identified regular briefing on the progress of matters as one of an internal witness' strongest needs.^{xx}

Consistent liaison and follow up, even where not mandated by legislation, is important for a number of reasons, both individual and in the public interest:

- It can be a key part of witness support, and reduce otherwise considerable feelings of isolation, for a witness to have confidence that they will get appropriate notice of any significant events or decisions, or even that nothing is happening; and
- For professional reporting to be accepted as 'part of the job' of a good appointee, the witness must be able to accept a 'merely instrumental role' in the process, rather than always feel the focus of the situation.^{xxi} Building this acceptance relies on ongoing confidence that the AFP is dealing competently with the matter, based on clear understanding about when and how information will be relayed.

Internal Investigations have recently introduced service standards to meet commitments to public complainants in this area. Similar standards should be developed and adhered to by internal investigation areas in relation to internal witnesses, to minimise both uncertainty and the opportunity for criticism about inadequate support.

INVESTIGATION MANAGEMENT ISSUES

The above issues, once considered, will affect the way an investigation is managed. This is rightly so. Just as criminal investigators must build the interests of key witnesses, informants and victims into any investigation strategy, so should internal investigators. There are good reasons why in an internal inquiry, it is even more important to manage a reporter as just one internal witness, rather than as the focus of the process.

Deciding to investigate

An AFP appointee, like any member of the public, is entitled to report a suspicion of misbehaviour based on personal perceptions or partial evidence, just as much as if they have conclusive proof.

It can be easy to dismiss such a suspicion; or even prove it wrong in a way which reflects adversely on a reporter (**Moray**). However, even if there is insufficient evidence or inadequate avenues, an investigator should look for a way to turn any report to the AFP's advantage. For example, information may be useful for retention simply as intelligence. In less serious cases, it might be passed to the relevant operational area as a signpost to management that issues need to be addressed (provided there is no risk of the reporter being unfairly treated as a result, or effort made to safely minimise the risk).

Either way, a decision not to investigate does not mean an officer's concerns are not valid; and they should not be treated as such.

Drawing up allegations

When a decision is made to investigate, allegations are formally summarised for the purpose of authorising the inquiry officers, and directing appointees to answer questions. Often the written allegations formally identify the appointee who triggered the matter, as the maker of the allegations, but in most cases that is not necessarily appropriate:

- The judgement as to the issues that warrant official inquiry, is not the reporter's - it belongs to the officers who assessed the information and authorised the task;
- Naming the source in the allegation suggests that person is putting up a formal case against other members, like a plaintiff in court - when they may simply have raised a matter of concern;
- The reporter probably put the issues in different terms, and is not responsible for their rephrasing in a more formal context; and
- The issues may be further clarified or changed altogether in the course of the inquiry; or other witnesses or information sources identified which are far more important to the outcome.

The result of naming the source up front can be to unfairly focus on that individual as if they were responsible for the process, and generally, on personalities rather than substantive issues. Standard practice should be for the name of the original source or witness to be omitted from the formal allegation - even in minor cases, and where the appointee is already known or believed by others to have made the relevant report. This does not prevent investigators from revealing the identity of the original source, if this becomes necessary at any stage of the investigation.

Keeping witnesses' identity confidential

The above practice is consistent with the confidentiality requirements in the AFP's Guidelines, that:

- Every effort must be made to protect the identity of reporting personnel from being disclosed, explicitly or by implication;

- Where any attempt is made to compel identification of witnesses, the issue should be referred to Legal; and
- In any other case, e.g. where disclosure is necessary for investigation or prosecution, it must not occur without contacting the Director, II or ISA, who is responsible for consulting with the witness and other relevant parties (e.g. support persons).

To serve these requirements, the professional reporting coordinator generates a registration number for each internal witness on the program, for use in formal communications.

The requirements reflect that, where possible, freedom from identification is the single greatest protection an internal witness has against recrimination - and sometimes the only one.

Furthermore, psychological research appears to confirm that this fact is well appreciated by the appointees from whom evidence of misconduct is most needed - i.e. junior officers of high potential, who fall into the *risk manager* category identified above. One significant study found that any measures against reprisals “short of guaranteeing anonymity” were unlikely to affect the behaviour of this group.^{xxii}

It is often argued that those subject to allegations are entitled to know the identity of their accuser as a matter of natural justice. This has much sympathy with AFP appointees, who often contend with such rights in the criminal area, and AFP management has itself argued that whistleblower protection has to be “tempered with appropriate regard for the rights of persons exposed”.^{xxiii} However, in the Ombudsman’s view it is a myth that an accused appointee has a right, in all circumstances, to know the identity of informants:

- In criminal procedure, it has long been recognised that the persons who are the means by which crime is detected should not unnecessarily be disclosed;^{xxiv} and
- In internal proceedings, such as disciplinary inquiries or employment reviews, procedural fairness simply requires that an appointee is fully apprised of the substantive issues against them, and not deprived of the opportunity to explain themselves or mount a defence - neither of which necessitate knowing the identity of all witnesses.

The situation may change if the matter needs to go to trial or a tribunal hearing. At the investigation stage, however, if a report is untrue or unjustified, an appointee is free to deny or explain the claims and have confidence the matter will be resolved. If a report is malicious, the appointee is similarly free to state that as the likely explanation. These issues are for the investigator to decide, not the accused appointee - especially since the motive behind a report may be separate from its truth.

It may require more effort to find independent evidence to rely on when putting issues to other officers, than to adopt a simplistic 'He said; what do you say?' technique; but the investigator's job is to make every reasonable effort to find and present any evidence tending to support the issue - as much as in any other type of case.^{xxv} The extra effort is necessary to give appointees confidence that they will not unfairly become the focus of what they report, and that the AFP is interested in the substantive issues raised, not personalities. A witness must have a genuine suspicion or belief to support their report, but once the decision to investigate is made, it is up to the investigator, not the witness, to substantiate the claim.

Acting on the anonymous complaint

There is no legal barrier to AFP personnel making anonymous allegations; nor should there be.^{xxvi} There may be valid reasons why an appointee is reluctant to come forward in person, especially if they are able to provide sufficient indication of where corroborating evidence can be found.

The risks for the anonymous witness, are that the AFP will be less able to protect them from exposure in the course of an investigation; will not be in a good position to respond if they are harassed; and may include them as a possible target of the investigation itself.

However, if a report is anonymous this does not mean the above considerations cease to apply. The AFP still owes a duty of care toward the reporter, even if the investigator is frustrated by the extra difficulties and does not have the benefit of knowing the officer's motives for anonymity. In NSW, the assumption is that anonymous disclosures will become protected disclosures in the event the identity of the author becomes known.^{xxvii} AFP investigators should take the same approach internally, and proceed on the basis that if they eventually identify the reporter, all the above considerations will have to be addressed.

2.3. COUNTER-ALLEGATIONS AND PAYBACK COMPLAINTS

An issue requiring careful handling by any manager or internal investigator receiving an internal complaint, is the likelihood of the witness attracting counter-allegations or 'payback' complaints from other affected appointees.

Whether such issues are formally registered depends on the specific issues and skills/experience of the receiving officer, but the general issue was raised in almost all the cases reviewed.

This review does not suggest all such complaints are necessarily invalid. In at least one case, such a complaint was properly substantiated; and others are still under inquiry. It is also possible that:

- A report may fairly create management scrutiny of unrelated misbehaviour or poor performance by an internal witness, and simply bring it to notice at an earlier time (i.e. both allegations valid);
- A counter-complaint could be more valid than the first complaint, which might have been a 'pre-emptive strike' by an officer against another officer (i.e. counter-allegation more valid than the first); or
- A complaint may be manufactured for entirely malicious or self-serving reasons; and a counter-complaint about this conduct might be substantiated (i.e. only counter-allegation valid).

However, each of these scenarios - while possible - is unlikely. If a reporter's misbehaviour is sufficiently serious to warrant complaint, why was it not noticed at an earlier time? Also, an appointee guilty of misconduct, not as yet uncovered, is even less likely to draw attention to him or herself by reporting someone else. Furthermore, in reality the incidence of entirely malicious or vexatious reports is extremely low, due to both the likelihood and the consequences of discovery.

Against the above, the likelihood that the subject of a valid allegation will seek to defend themselves by raising counter-allegations of whatever weight or accuracy, is however relatively high.

The review identified issues relating to both (a) types of counter-allegation to be particularly guarded against; and (b) procedures for their handling.

TYPES OF COUNTER-ALLEGATION

The two clearest types of common counter-allegation related to:

- Alleged or suspected complicity, and
- Alleged abuse of process.

Complicity

This issue was raised in three of the cases:

- **Alien 1** where notwithstanding his innocence, the officer was not indemnified from possible prosecution as an accomplice to theft until the matter went to trial;
- **Urchin** where the role of the informant in the conspiracy to import drugs was a central plank in his corrupt friend's defence;
- **Poetic** where victims of sexual harassment were accused of "spurious counter-allegations of such vulgarity that a reasonable person would be offended by the suggestion" (using the words of the initial investigators).

In each of these cases, on an individual basis, the investigators dealt with the counter-issue effectively - although in the rare criminal matter where an indemnity from prosecution might be appropriate, investigators need to be aware of the procedures for seeking an indemnity, and address the issue early where a witness might be complicit in the offence.

In general, the cases confirmed such counter-allegations are fertile ground for anyone who might take an unsympathetic view of the witness. They appear to be a routine form of rumour in a number of cases, and require little official endorsement to gain a currency capable of damaging a witness' ability to survive in the workplace. This stresses the importance of a clear and proper procedure for determining any such counter-issue.

Abuse of process

This issue was evident in three cases:

- **Ace** where the officer's reluctance to report his colleague's possible criminal conduct was later formally reported on by supervisors as indicating he was "lacking and deceptive" and "lacked appreciation of his obligations";
- **Moray** where the officer was at one time targetted for breaching a standard direction not to discuss with any person the fact that he had provided information to ISA (in circumstances where such a direction was not necessarily realistic); and
- **Poetic** where a further formal investigation was commenced into whether a witness had breached disciplinary regulations by speaking to the media about the original investigation (which was already in the public domain).

It is understandable that internal investigators or AFP management would see these as opportunities to enforce discipline; and in rare cases, this may be necessary. The questions are whether, or in what circumstances, it is fair, and/or in the overall interests of good conduct and internal security, to prosecute this type of apparent misconduct. This further highlights the need for clear procedures.

ASSESSMENT AND INVESTIGATION PROCESS

In general, internal informants or witnesses should be aware that coming forward will place at least some scrutiny on their own actions, and possibly expose them to counter-claims. In words of advice given by a AFP senior manager in one case, reporters should ensure from the outset there are “no skeletons in their closet that are going to come back and bite them on the bum.”

This does not mean, however, an AFP appointee should not come forward unless he or she has a pristine record of behaviour and performance, and understanding of the internal investigation system. It simply means they should be aware of the issue.

To achieve this:

- The AFP needs to give appointees confidence that all the issues, including anything about their own conduct, will be handled consistently and fairly with regard to all the circumstances; and
- Having that confidence, appointees should alert their managers or investigators early to all issues that might become relevant, including obvious counter-allegations if likely to be made.

A recently reported NSW Police case, if correct, exemplifies the possible damage if management fails to give this confidence. In that case a Constable who came forward with information, has claimed management failed to honour a commitment that he could admit his own very minor, and comparatively innocent wrongdoing with impunity.^{xxviii}

Internal investigators, or officers receiving an internal report, should cautiously remind the reporter about these issues. Due to their sensitivity, these should also be covered in the same way as questions relating to risk assessment, i.e. only after the primary information has been forthcoming. The purpose of the questions should be clearly stated, along with explanation of what use will be made of any disclosures.

The fundamental principle is that an appointee should not be penalised for their own honesty in coming forward about misconduct, especially if management has given assurances that their own misconduct will be looked on in an understanding light.

To achieve this, a decision to investigate any such disclosure or counter-allegation should be made using set criteria:

- *Credibility test*

Some investigators may assume that because one professional report leads to a formal investigation, in fairness and to avoid accusations of being less than even handed, so should any counter-allegation.

This is not so. It is open to an investigator/management to not pursue a counter-claim as having insufficient basis to warrant inquiries, or as likely to have been fabricated, especially where the matters raised against the officer are serious and the risk of a self-serving or vengeful response is high (**Urchin; Poetic**). As in normal circumstances, if the credibility of the claim is under question, then some independent evidence should be required before any action is considered at all.

- *'But for' test*

But for the report or evidence provided by the original witness, how likely is it that allegations in general, and this one in particular, would have been raised against them? If it is not likely, then unless it is serious, AFP management should particularly consider avenues other than formal investigation and discipline.

This is most particularly so where the issue is one of alleged abuse of process. In many circumstances, it is not unlikely appointees will commit technical breaches, either in good faith or as self-protection in the subsequent investigation. Sometimes these may be reasonable; if not, they are firstly issues of workplace education and management. Constructive advice may be timely, but it may be unrealistic and quite counter-productive to discipline appointees over such problems.

- *Seriousness*

The seriousness of any counter-issue should be assessed on its merits. If investigation or management action is required, it should be the same as if the issue had arisen in isolation. Action should also be expedited and not hang over the reporter's head (e.g. if an official caution is all that is possibly required, it should be given and not await the outcome of the investigation into the first matter).

A likely scenario is that a counter-allegation is about something far less serious than the primary allegation, but far more provable (**A recent case**). This is consistent with NSW Police Service experience that many such 'payback' complaints may have far-reaching effects on an officer's career, but in fact are relatively trivial in nature.^{xxix} If also dealt with by investigation, the result can be a finding of insufficient evidence to substantiate the primary matter, but substantiation of the counter-allegation. Because the issues were inappropriately linked, the net result is an unfairly adverse outcome for the reporter, irrespective of the trivial issue - damaging their credibility and sending a negative message to other potential reporters.

In the NSW Police Service, assessment of such complaints is made taking into account all the circumstances, with recommended courses

of action including the complaint being declined from the outset, or preliminary enquiries in the first instance rather than full investigation.^{xxx}

If a decision is taken to investigate a counter-allegation, consideration also needs to be given to ensuring the process is fair under the circumstances:

- Careful judgement should be exercised as to the identity of the investigator(s). In some circumstances it may be efficient to use the same investigator who handled the original case. However:
 - it may also be difficult for that investigator to remain objective if, not unreasonably, they have developed empathy with one party or another;
 - if the primary investigation is difficult or unsuccessful, the reporter may provide a scapegoat for this result, and the second investigation process a ready excuse; and
 - it may be unreasonable to place even the most objective investigator in the 'devil's advocate' position of adjudicating on two colleagues' simultaneous competing claims.
- Effort should be made to ensure the nature of the counter-allegation is made clear in the investigation, so that the special circumstances are also reflected in judgements about penalty or remedial action.

For example, a reporter is entitled to point out (and have management recognise) that their behaviour may not have been called into question but for their action of reporting misconduct by another. In one case, although the error was corrected in the investigation report, an officer was denied this entitlement because she agreed with the investigators' request that she not raise the primary case, even though there was no reason in procedure or law for this approach (**A recent case**).

EXTERNAL SCRUTINY

A major safeguard for both the AFP and individual witnesses, in ensuring these judgements are exercised fairly, is independent oversight.

This safeguard was adopted as fundamental for any general Commonwealth scheme, in the 1995 Government response to the Senate Select Committee on Public Interest Whistleblowing.^{xxxii} It is reflected in the NSW Police Internal Witness Support program, which involves close monitoring of payback complaints. The issue of the role of the Professional Reporting Coordinator in this process is further discussed at chapter 3.3, but in NSW this process includes the State Ombudsman.^{xxxiii}

At present, the Ombudsman has a monitoring role in relation to all matters received as complaints from the public under the *Complaints (Australian Federal Police) Act*; but not allegations, no matter how serious, raised by AFP appointees - section 6(4). The AFP Guidelines do provide that the General Manager, Professional Development will notify the Ombudsman of any allegation that an internal witness has suffered detriment or been unfairly dealt with.^{xxxiii} However, the review suggests that this arrangement, while positive, is not sufficient to provide the necessary level of quality assurance, and will not give sufficient notification to enable the Ombudsman to assist in preventing problems, rather than reacting after they occur.

The Ombudsman's office has recently proposed, consistently with the 1995 Government model, that it be notified of all internal investigations, whether triggered by public complaints or internal allegations, so that it may monitor those that are serious or otherwise sensitive.^{xxxiv} In some cases this will also assist the Ombudsman to better exercise discretion not to investigate matters that are already subject to internal processes, either temporarily or permanently. Internal witness protection also dictates this should occur.

In the Ombudsman's view, the complaints legislation requires amendment so that the artificial distinction between complaints and allegations is abolished. Informal administrative arrangements have been entered into to this effect between II and the Ombudsman's office. Not only should this be formalised in due course, but AFP appointees should be informed that this is the process, and that they can approach the Ombudsman's office at any time with concerns about an internal investigation.

Notes to chapter 2

^{xviii} Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), pp 62-64.

^{xix} Anderson, P, Controlling and managing the risk of whistleblower reprisal, *National Occupational Stress Conference*, 1996.

^{xx} Royal Commission into NSW Police Service, , *Volume II*, May 1997, p 399.

^{xxi} Whitton, H, Whistleblowers and whistleblower protection - trouble-makers or open government?, *A.I.C. Conference - Achieving quality decision-making at administrative law*, 21-22 November 1996; see also Anderson, P, Controlling and managing the risk of whistleblower reprisal, *National Occupational Stress Conference*, 1996, p 1

^{xxii} Miceli, MP, Near, JP, The relationships among beliefs, organisational position, and whistle-blowing status: a discriminant analysis, *Academy of Management Journal*, no 27, p 703; see also Anderson, P, Controlling and managing the risk of whistleblower reprisal, *National Occupational Stress Conference*, 1996.

^{xxiii} AFP cited at Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), p 172.

^{xxiv} Fox, R G, Protecting the Whistleblower, *Adelaide Law Review*, vol 5 no 2, 1993, p 155.

^{xxv} See also the Senate Select Committee's concerns about the unacceptably high variability in the reported quality of investigations of internal complaints: Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), p 82; and research suggesting the many variables affecting the judgements of internal reviewers: Miceli, MP, Near, JP, Schwenk, CR, Who blows the whistle and why?, *Industrial and Labor Relations Review*, vol 45 no 1, October 1991.

^{xxvi} The Senate Select Committee recommended that whistleblower protection should not apply to anonymous reports, due to a perceived risk of false or malicious allegations: Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), p 165. Section 16 of the ACT Public Interest Disclosure Act also provides that authorities are not required to investigate a disclosure from an unidentified source. The Commonwealth rejected this in 1995, in line with existing provisions in the complaint legislation - e.g. s. 5(1)(c) of the Complaints Act. The AFP Discipline Regulations were also amended in 1995 to remove the previous offence (Reg 13(1)(b)) of making an anonymous communication. This is consistent with the principle that "the quality of the information disclosed... should be the determining factor as to whether or not further investigations are pursued", irrespective of whether the source is known: Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, paragraphs 9.43-9.65.

^{xxvii} See Recommendation 23, Committee on the Office of the Ombudsman and the Police Integrity Commission (NSW Parliament), *Review of the Protected Disclosures Act 1994*, September 1996, p141.

^{xxviii} The case of Constable Craig Raymond: ABC TV, *The 7.30 Report*, *Sacked Cops*, 11 February 1997; and *Sydney Morning Herald*, *Good Weekend*, 24 May 1997.

^{xxix} Royal Commission into NSW Police Service, *Final Report*, *Volume II*, May 1997, p 407.

^{xxx} *Ibid*, p 408.

^{xxxi} 26 October 1995, response to recommendation 13.

^{xxxii} Smith, C, Development and management of the Internal Witness Support Program in the New South Wales Police Service, *R.I.P.A.A. Investigation Techniques Conference*, 25-26 June 1996, p 3; and Royal Commission into NSW Police Service, *Final Report*, *Volume II*, May 1997, p 408.

^{xxxiii} See AFP Professional Reporting Guidelines and Commissioner's undertaking of 28 August 1996.

^{xxxiv} Commonwealth Ombudsman's Submission to the Attorney-General's Department, March 1997 (Response to Australian Law Reform Commission, *Report No 82, Integrity: but not by trust*, November 1996).

Chapter 3. The professional reporting program - Support, outcomes and coordination

There is now little debate about the importance of appropriate internal witness support, especially in law enforcement agencies. In the workplace, however, attitudes may be different. The review suggests three common attitudes that have worked against management's previous efforts to address harassment problems:

- The view held by many, including some internal witnesses, that as AFP appointees they expect to be able to independently manage whatever circumstances arise as a consequence, and do not require support;
- The view that appointees are simply doing their duty by reporting misconduct or misbehaviour, and should not benefit from any special support even if they did require it;^{xxxv}
- Some middle managers' view that it is undesirable to prolong too much focus on colleagues' misconduct, once uncovered - with the consequence also of failing to monitor and support the witness or reporter.

The special role of middle-management attitudes is addressed in chapter 5.

A chief objective of the AFP's Professional Reporting Program is to remedy, and tackle such attitudes. Consistent with experience in other organisations, the program is voluntary, and should remain so. It involves both working in tandem with existing employee support services, and new strategies to provide (a) individual AFP appointees with the support they should rightly expect for complying with their obligations, and (b) individual AFP managers with early guidance to achieve quick resolution of problems that may arise.

The review confirmed the importance, addressed in more detail below, of continued effort by central AFP management to:

- Provide effective support services:
 - Support networks (confidants/mentors/support officers);
 - Welfare Officers;
 - Project Bulwark;
 - Health and Psychology Services.
- Facilitate positive outcomes (including, where necessary, remedies); and
- Promote strong development of the program overall.

3.1. SUPPORT SERVICES

SUPPORT NETWORKS (CONFIDANTS ETC)

A cornerstone of the AFP program is that internal witnesses who wish to take up the option of a centralised support arrangement, are encouraged to nominate a colleague who they trust, to (a) act as a support person for them in the workplace and (b) assist them in their interaction with the internal investigation and/or AFP management generally.

The person in this role has been termed a 'mentor' or 'confidant'. At present, AFP management has cleared a list of such officers nationally, who can be approached to act in those roles for any personnel unable to identify a colleague of their own. In addition, the guidelines provide for a coordinating support group to be formed on an as needs basis, including representatives of II/ISA (as appropriate), employee support services, a friend of the witness and the witness' mentor/confidant.^{xxxvi}

The review confirmed a definite need for internal witnesses to be encouraged to nominate support personnel, for inclusion thereafter in whatever formal or informal arrangements are entered into in relation to the witness' welfare. In most cases, the relevant personnel had or found their own support persons, and in some cases these and existing employee support services acted as effective informal networks. In all cases, however, the success of the arrangement was limited (and in some cases neutralised) by the fact there was no provision for recognising these arrangements in investigation and management contexts.

For example:

- In one case (**Alien 1**), after agreeing to stay and 'tough out' likely harassment, one officer reported that his main support person (the Sergeant he first approached) was several weeks later transferred out of the station, without consultation or any new strategy;
- In another (**Hoodwink/Moray**), one of the officer's main support persons later had his credibility unduly targetted by investigators simply as a result of the support he provided; and the officer himself was unfairly criticised for breaching formal confidentiality requirements by speaking to perceived support persons;
- In a number of cases (**Alien 1, Novelty, Hoodwink**), officers reported receiving initial solid support from colleagues in middle or senior management positions, and accepted assurances this would continue, only to find that for a combination of reasons, command responsibilities prevented this from occurring.

The responsibilities of investigators, and middle managers to recognise the role of chosen support personnel is addressed in chapters 2 and 5.

The roles of support persons themselves are under development, as is specialised training for those roles. They also need to be clearly defined - not because they need or should have a position description, but so the obligations of others, especially investigators and managers, are clear. In particular, in my view, four issues need to be addressed:

- Clarification is needed between the various roles collapsed into the AFP concept of 'confidant/mentor'. Under the NSW Police model,^{xxxvii} there is a distinction between:
 - a mentor (generally senior to the internal witness, and available to assist, but not necessarily in a position to monitor their situation on a continual basis), and
 - a support person (of whatever status, who has more immediate contact and can pursue issues on the witness' behalf, monitor for victimisation, intervene to influence matters, provide regular reports to the Professional Reporting Coordinator, and generally anticipate problems and take the initiative).

Without clarification, there is a risk of repetition of previous problems, especially where witnesses accept a mentor/confidant from the central AFP list. Clarification should be based on a premise that in each case, a mentor is highly desirable but not necessarily imperative, and can be arranged centrally (most AFP senior managers should be able to fill the role); whereas an identified support person is imperative, should be in or around the immediate workplace, and except in unusual circumstances can only be volunteered by the appointee concerned.

- In all circumstances, care should be taken to ensure a support person's position does not present a conflict of interest in their management of the internal witness - e.g. someone with command-line responsibility for the appointee (possibly suitable as a mentor, but not as a support person), or someone too closely involved in the same or a similar matter (who may be unable to provide the objective support needed).^{xxxviii}
- The current guidelines provide the composition of any support group will be determined by the Director of Internal Investigations or Internal Security (as appropriate), which could also involve possible conflicts. Responsibility for forming and documenting any such groups should lie with the professional reporting coordinator, whether on his or her own initiative or on request, if necessary, with consultation with II or ISA.
- There is currently no provision in the AFP program for a case officer, to conduct the routine work of liaising with internal witnesses, their support persons and other relevant personnel. Even a small number of participants will generate sufficient work to warrant consideration of this once the program becomes

established. In the Ombudsman's view, one Coordinator position alone is unlikely to be sufficient to maintain the program, given the need for that position to be flexible and able to deal with diverse circumstances on an urgent and time intensive basis, as well as conduct ongoing program development and evaluation.

There may be various options for meeting this workload (e.g. the existing Welfare Officer network), but the sensitivity of the role demands that the options receive careful consideration and that whatever the outcome, the role is properly resourced.

WELFARE OFFICERS

The review strongly supported the role of the existing network of nine AFP Welfare Officers. In some cases Welfare Officers played an instrumental role in identifying problems experienced by internal witnesses, and seeing them addressed, on their own initiative as well as in response to being consulted by appointees.

The role of a Welfare Officer was criticised in only one case. In the Ombudsman's view this was beyond that officer's control, and highlights the importance of a clear relationship between AFP management and support personnel (see *Health and Psychology Services*, below).

Welfare Officers should continue to have a central role in the program, particularly if, as indicated above, they can help to meet case management requirements.

PROJECT BULWARK

An investigation into harassment in 1994 noted that the physical security services available under Project Bulwark were not widely enough known or understood within the AFP at that time (**Novelty**). Since then, it appears that the project has become widely understood among AFP members generally, as well as among employee support services and managers responding to their needs. The recent cases indicated a very favourable attitude toward the project from the appointees involved (**Hoodwink/Moray, A recent case**). Its professional reputation was marked by the fact that in neither case did the officer report having any concerns about any difference in response by Internal Security to potential threat from within the ranks of the AFP (as opposed to outside).

HEALTH AND PSYCHOLOGY SERVICES

A clinical psychology practice within the AFP is an important resource, and in some cases has proved the only tangible form of support experienced by internal witnesses at their most vulnerable and isolated.

The practice has the potential to remain a cornerstone for effective internal support, especially in cases of serious personal stress.

The review also noted the ability of the practice to organise external support, for internal witnesses who need support but develop a reduced trust in AFP services or the ability of AFP management to protect them. In these cases, the AFP meets the expense but further distances itself from the service in the interests of client confidence.

However, certain professional lapses in Health Services, and management deficiencies within the broader AFP have also combined to demonstrate the fragility of any effective support capacity in this area. This relates chiefly to the use and abuse of external psychiatric resources in relation to internal witnesses. The relevant case studies (**Alien 2, Moray**) are set out in chapter 4.2 because they now relate more to issues of how AFP management responds to claims of detriment suffered, than the current service arrangements themselves.

As a result of its investigation in **Moray**, the Ombudsman's office is satisfied that the current arrangements involve:

- Renewed adherence to principles of client confidentiality, consistent with the standards of professional clinical practice, and
- Improved autonomy in each area, meaning that psychological services both are no longer 'under' medical services, and have the independent resources mentioned to arrange external support for those appointees with concerns about the independence of in-house staff.

It is crucial that AFP appointees have trust in these services, and particularly that they are not being used by management to obtain information or make assessments of them without their knowledge. In the Ombudsman's view, this means the AFP must minimise use of these services in a 'remote' forensic capacity (i.e. without the relevant appointee's knowledge), even if the appointee is not an existing client. For example, where an appointee is assessed for inclusion in Project Bulwark, and a psychological assessment of the relevant fears is necessary, there is no reason why the assessment process should not be fully transparent to the appointee concerned.

Even if managers were to become concerned about an officer's fitness for duty, the need for a psychological assessment should be dealt with openly. A 'remote' forensic capacity should only be necessary in exceptional circumstances, such as alleged serious criminal conduct by an AFP appointee where their propensity to harm needs to be assessed covertly for the investigation or witness protection. In any event, any proposal for psychological testing of a professional reporter should first be approved at least at General Manager level.

In the Ombudsman's view, provided there is ongoing evaluation to minimise the need for a 'remote' capacity, and this procedural safeguard is developed, AFP appointees can have confidence in these services. If in doubt, an internal witness should approach the Ombudsman's office.

3.2. OUTCOMES AND REMEDIES

The AFP internal witness support program relies on the ability of AFP management to support both theory and these services, by delivering fair outcomes in any circumstance where an officer's professional or personal life is affected by their having fulfilled their duty.

The review confirmed that most early critical decisions in this area will fall to middle-managers (Work Levels 3 and 4: see chapter 5); and what is fair will vary from case to case. It also confirmed that senior AFP management have frequently been flexible and attempted to act positively in those circumstances that have come to their attention.

However, the cases also suggest that high-level commitment to professional case management of internal witnesses is imperative in relation to **all** cases, because in **no** case is it likely an officer's life will remain unaffected. Even those officers with good support, and who experienced minimal harassment, reported considerable personal stress. Despite being part of their duty, giving information about misbehaviour of colleagues remains outside the training, expectations and core business of most AFP personnel.

Senior management needs to ensure fair outcomes in all cases, not only those with a high profile or where problems arise. Ability to achieve this will involve responsiveness in a number of key areas:

- Official recognition;
- Flexibility and care in deployment; and
- Compensation.

OFFICIAL RECOGNITION

In most of the cases, the internal witness received considerable informal recognition from senior management. This usually involved a meeting with a senior manager (e.g. Assistant Commissioner) either early in the investigation, or after reported workplace problems, for the purpose of reassuring the witness of the value placed on their contribution.

In some cases (especially **Moray**), senior management have also clearly demonstrated their commitment to officers in a public way, through deployment as set out below.

However, the cases also suggest a lack of **formal** recognition. In some of the above cases, the impact of the recognition appears to have been reduced by the contextual events, further reduced by time, or was understandably felt to be in some way qualified. In addition:

- One internal witness, who reported positive management efforts to reward and support him through deployment, also reported that since it was made clear the appointment was also due to him on merit, official recognition of his actions was notably absent; and

- Another witness said a supervisor agreed that official recognition should be forthcoming, but also indicated such recognition may be dependent on a 'successful' outcome to the protracted investigation - i.e. a substantiated outcome - notwithstanding that the merits of the witness' actions had already been conclusively established.

The type of official recognition discussed was generally not public, which could have negative effects of stirring up conflict or attracting further hostility from disgruntled employees, but rather documented reassurance from an appropriately senior level as to the value placed on and served by the individual's action.

The review suggests this kind of more formal recognition would be appropriate in many cases, to assist both the individual with a satisfactory sense of closure to the matter, and other managers and investigators in their approach to subsequent issues. The AFP should also observe the recommendation of the Royal Commission into the NSW Police Service, and consider, on a case by case basis, formal notification that the internal witness' assistance is acknowledged and appreciated by the organisation.^{xxxix}

DEPLOYMENT

The cases support AFP management's strategic use of deployment to both prevent possible harassment, respond to harassment when it occurred, and as noted, reward some personnel where appropriate and where the appointment was also supported on merit.

A positive development is a trend away from always pressuring harassed personnel to remain in the same work environment to 'tough out' problems; to an acknowledgement that low-level harassment was the responsibility of local workplace management, and could have been contained if the problems had been identified and addressed early (chapter 4). In **Alien 1**, a Welfare Officer reported that a senior manager appeared to have easily intimidated the officer into remaining in an overtly hostile environment against his own better judgement, and medical and other professional advice. In **Hoodwink/Moray**, some managers apparently continued to hold a similar view, but wider discussions and greater use of professional advice led to a more balanced decision, and the officer was redeployed.

In the Ombudsman's view, senior management need to use the opportunity of the professional reporting program to clarify two areas:

- If deployment is to be developed as a means of rewarding personnel for exceptional service (including as internal witnesses), this should be done openly and explicitly (i.e. through development of existing promotion, transfer and performance management procedures). Clearly the individuals involved need to have the suitable skills and/or potential, but the procedure and the message need to be

clear to both AFP personnel generally and the individuals concerned.

The review attempted to canvas this issue in particular with the AFP Association, but the opportunity to provide a view was not taken up.

- If deployment is to be developed as a fair and effective means of controlling victimisation and responding to alleged harassment, senior management needs to set a standard for how this is to occur.

In general, the AFP focus continues to be on transferring the internal witness in anticipation of or response to problems. This may be both (a) unfair on the witness, if it is their desire or in their interests to remain, and (b) ineffective in dealing with the social structure in the workplace that has permitted a hostile environment to occur.

In addition, a suggested barrier to any other approach is often that any personnel who stand accused of misbehaviour or ancillary harassment are entitled to remain in their position until the issue is determined. In fact, where there is prima facie either a case of misbehaviour to be answered, or sufficient workplace conflict to warrant relocations even if only temporary, then as personnel practice this is not correct.

Management should mandate that before any witness is transferred, active consideration must be given to whether other transfers are not also necessary (either in preference or in addition), this consideration must include consultation with the witness' support personnel, and the reasons for decision must be documented.

COMPENSATION

Financial compensation can never be more than one possible part of what should be a multifaceted response, and can only be determined case by case. However, the cases suggest compensation issues may arise in various instances, for example:

- where an internal witness incurs financial loss or out-of-pocket expenses through transfer or other arrangements during an investigation (e.g. a covert investigation into criminal activity);
- pecuniary loss through transfer, due to harassment or an otherwise unworkable work environment;
- out-of-pocket expenses for professional services (e.g. counselling support for stress, or legal advice on payback complaints), where the witness cannot reasonably be expected to obtain these by other means;

- damages, for mental distress and/or hurt and humiliation (in cases of serious victimisation or harassment); or
- where all else fails and an appointee separates from the AFP due to poor treatment, any of the above combined, if appropriate, with early termination of employment.

The other, most simple compensation issue is where a person takes sick leave and requires professional counselling support as a result of the stress created by harassment or subsequent ill treatment in the workplace. In that case, a Comcare claim is lodged and externally assessed. In several cases AFP appointees were assessed as having compensable stress disorders, for which the Commonwealth accepted liability.

The cases suggest three areas where management initiative is required to see these issues through to resolution.

Support for valid Comcare claims

The AFP's role is to provide Comcare with relevant and factual information regarding claims, whereupon it is up to Comcare to accept or reject the claim. The review established that AFP management is frequently supportive of the need to seek the appropriate compensation, but needs to improve its approach to both establishing whether or not such support is deserved, and seeing that support through in a tangible form.

In **Moray**, regional management encouraged the internal witness to lodge a claim in order to recover his sick leave, and was told the AFP would support the claim - an important if largely symbolic expression of support. However, there is no evidence that any AFP manager or the medical officer took any active step to convey this support, and the claim was summarily refused. In **Graft**, an AFP officer's claim was supported by a statement from an internal investigator that the facts (misbehaviour and mismanagement) were at least partly as alleged, but this form of support appears exceptional rather than the rule.

Other staff told the investigation that general deficiencies in the AFP's handling of claims and case management of claimants meant that there were few safeguards for ensuring that an internal witness' claim received fair consideration. At the very least, senior managers need to follow through by ensuring the factual circumstances are documented in cases where an internal witness may have a valid claim, and where a claim is supported, confirm with a detailed report to Comcare.

Consideration of general claims

The cases suggest the AFP has only recently acknowledged the need to consider the other forms of compensation identified above, in appropriately serious instances. The traditional approach has been one of 'all care, no responsibility', where services and moral support have been offered to personnel fearing or experiencing harassment, but responsibility has been actively or implicitly denied if these limited efforts have proven unsuccessful (e.g. **Novelty**).

Clearly, the AFP has a duty to consider compensation where it falls short of a reasonable duty of care to its personnel. This should also not be defined too narrowly. For example, if AFP managers suggest a course of action to internal witnesses (such as 'toughing out' harassment in the workplace) in preference to other options open to them (e.g. taking a transfer on merit), then in my view the AFP should accept responsibility for the outcome (e.g. **Alien 1**).

This principle is being increasingly advanced, that there is an onus on agencies to either protect or compensate internal witnesses - meaning that if efforts to combat harassment fail, then the fact the AFP made those efforts does not exempt it from a responsibility to remedy any damage caused by the officer's observance of his or her duty.^{x1}

In the Ombudsman's view, while more effective internal witness management should reduce the need for compensation, AFP senior management needs to continue to anticipate this possibility in occasional serious cases, and if necessary to make provisional budgetary allowance.

Negotiation processes

Claims for compensation necessarily involve a complex process, large claims requiring both the involvement of the Australian Government Solicitor under Finance Directions, and careful consideration of the responsibility of the AFP, within and beyond its duty of care. Any claim must also be properly substantiated.

Given these complexities, wherever compensation or other outstanding management action is required to resolve claims by an internal witness, senior management need to take an active role in ensuring that negotiations are undertaken quickly and constructively to the earliest possible conclusion.

The potential for damaging delays in negotiations is demonstrated by both **The first ever complaint** and **Poetic**. While explanations vary, both cases appear to form examples of the lapse of attention that easily occurs in relation to outcomes for witnesses/victims of

workplace misbehaviour, even where a factual investigation is conducted quickly to a high standard, and action in relation to the perpetrators is swift.

In **Poetic**, the Commonwealth's (AFP's) challenging of the victims' claims relied in part on counter-allegation evidence about their behaviour, chiefly from officers who had been dismissed. This was notwithstanding the original investigators' findings that most, if not all the allegations were baseless; and that to the extent that some of the witnesses/victims had acquiesced to misbehaviour, this had been 'an overt form of dealing with the situation and assimilating' which was 'acceptable in the circumstances'.

In the end, at the suggestion of the Ombudsman's office, the AFP did not press these issues, and apologised. This was not the only reason for the delay, but the issue was certainly a significant reason why the negotiations became bogged down. Arguably, the case demonstrates the need for senior management to extend case management to an active role in finalising all such negotiations.

3.3. COORDINATION, MONITORING & EVALUATION

The cases reviewed provide some lessons from the past, but predate expected improvements in the case management of internal witnesses due to the introduction in September 1996 of the Professional Reporting Program.

Apart from providing a statement of principles in the form of the Professional Reporting Guidelines, as reflected earlier the program relies on a national coordinator, whose primary responsibilities involve:

- monitoring the well being of program participants to ensure that they receive effective support and positive reinforcement; and
- coordinating information flow between confidants/mentors and support persons, internal witnesses, internal investigators and AFP management.

Measures already implemented include:

- awareness-raising about the guidelines and program across AFP regions;
- development of a list of confidants/mentors, for AFP appointees unable to identify their own support person (chapter 3.1);
- development of internal investigation procedure to include notification to internal witnesses about the program, and notification to the coordinator as cases come on foot; and
- development of a case management database.

While all the developments so far are positive, considerable enhancement is yet to occur. Some of my views about how this might occur, in relation to the roles of support persons and case officer(s), are set out above (chapter 3.1). In addition, I believe the published literature, the documented experience of the NSW Police and past cases suggest a number of further issues to which the AFP needs to give attention.

DEFINITIONS: ENSURING 'PROFESSIONAL REPORTER' INCLUDES 'INTERNAL WITNESS'

The AFP program focusses on the concept of professional reporting, as a process for managing all issues arising from internal concerns about conduct and probity - and an attempt to remove the focus from individuals. In my view, this is a highly appropriate approach. The term 'professional reporter' includes all possible forms of internal witness, including those who provide corroborative evidence (see Introduction).

The normal use of the term 'reporter', however, implies a person with an active role - not necessarily also those who need management support after having had a purely passive role, particularly if they have provided evidence which is more significant than they themselves understand. This concern was one reason for the NSW Police Service

transforming its original 'internal informer' program to the 'internal witness' program.

In my view, the best means of combatting 'whistleblower' stereotypes and the role of the term 'professional reporter' within those efforts should be further evaluated. In the short term, the AFP should consider efforts to ensure that personnel understand the term includes all categories of internal witnesses, lest the definition become self-restricting.

REGISTRATION CRITERIA

At present there appear to be two criteria governing who will be registered on the program:

- voluntariness (i.e. only those who wish to participate will have their well being fully and directly monitored); and
- good faith (e.g. the notice on professional reporting to be handed to internal witnesses by investigators identifies that the program is for those personnel who 'make Professional Reports in good faith').

Any criteria need to be sufficiently flexible to allow for the highly individual nature of the cases. However, in my view the AFP needs to further consider objective criteria for both registration and deregistration, so that the reasons for decisions are consistent and clear. In particular:

- Criteria will help in the identification of the exact purposes for which personnel are registered (i.e. the purposes the program is intended to serve), and require structured assessment of the officer's needs.

For example, in the NSW Police Service, one of the key criteria is the current location of the officer, involving assessment of current exposure to reprisals and access to support.^{xli} Considering such criteria will ensure the coordinator establishes whether risk assessment is necessary, and if so whether the investigator or another manager has conducted one, or how it should be carried out (chapter 2.2).^{xlii}

- Objective criteria will increase the credibility of the program, by preventing the criticism that anyone can seek favourable treatment from management simply by making a 'professional report' and asking to be on the program, regardless of need.
- 'Good faith', however, should be abandoned as a criterion. Experience suggests that 'good faith' is an unhelpful benchmark because (a) it is difficult to establish, (b) valid evidence of misbehaviour may come from persons with mixed motives for providing the information, (c) it is inconsistent with the current obligation to report misconduct, regardless of motive, and (d) even

an appointee who provides evidence substantially for self-serving reasons is entitled to fair treatment, including protection from unauthorised reprisals.

The appropriate criterion is that the program will be available to any AFP personnel who provide information or evidence which they honestly believe tends to show, or which regardless of their belief does show, the misbehaviour alleged.

EXTENT OF MONITORING ROLE

At present, the professional reporting coordinator is responsible to the General Manager, Professional Development and to the AFP Integrity Committee (which consists of both Deputy Commissioners).

This ensures high-level access and in general, suggests an ability to input into a range of critical management decisions. However, it is not currently clear how this is to occur - especially in relation to decisions such as:

- whether or not a payback complaint or counter-allegation is to be investigated (chapter 1.3); or
- whether an employment review or proposed non-renewal of fixed term appointment is fair under all the circumstances.

The program will have little efficacy if the first that the coordinator knows of a management action that is ill-advised or less than fully informed, is from a stressed internal witness or their support person.

In my view, the program guidelines and/or role description for the coordinator and other relevant managers need to be written to ensure that the coordinator is formally consulted in advance in relation to these, and any other critical management decisions.

UPWARD REPORTING

In addition, experience stresses the importance of a separation between investigation and witness support in an internal investigation process.

As a result of a 1994 review, the NSW Police Service transferred its internal witness support unit from the Professional Responsibility command (including Internal Affairs and Professional Integrity branches) into the Human Resources command, specifically due to a conflict between the investigation and support roles.^{xliii}

The risk of such conflict has also been demonstrated in the AFP (e.g. the damaging confusion between investigation and employee support roles in *Moray*: chapter 4.2). At present, the greatest risk of conflict between these roles lies with the position of General Manager, Professional Development, as the senior manager responsible for both internal investigation areas and all human resource areas.

While this risk also represents opportunity for strategic decisions, the professional reporting coordinator should be clearly and explicitly required to furnish a report directly to the Integrity Committee (both Deputy Commissioners) on any sensitive issue before the General Manager involving an internal witness. In addition, in any cases of significant difficulty or contention, the coordinator should be required to directly brief the Ombudsman's office on the issue.^{xliv}

EVALUATION

The guidelines already provide for regular effectiveness reviews of the program, to take in:

- the number of reports, and their nature;
- action taken as a result of reports; and
- surveys to identify the attitude of AFP personnel towards, and experience with the program.

The review framework is important because all information gathered in the course of the program must be structured in a form convenient for effective evaluation. In my view, the elements for review (and therefore the program database and/or file structure) should also include:

- the regions/areas the subject of the report or investigation;
- any difficulties with procedures for disclosure;
- if a risk assessment was performed, and if so, when;
- the support measures used (inc. support group, confidant);
- resources used in support;
- any reprisal or unfair action action reported;
- when the reprisal actions was reported to management; and when it was reported to the Ombudsman;
- action taken in relation to the reprisal(s), and the outcome;
- dates on which each specific case was reviewed and evaluated; and
- any issues identified through the program, for management training.

This report also acknowledges that the critical area for the program to have impact, is in the behaviour of AFP personnel at large - to turn around cultural attitudes that someone who breaks ranks and 'dobs in' a colleague or colleagues is automatically to be condemned for it.^{xliv}

The rest of the report deals with measures to combat harassment or other unfair detriment, and specific issues for the attention of middle managers in implementing the program at this practical level. It is also important, however, that the information gathered in the course of the program is also turned to this use, for example through the development of better training and workplace education using real case

studies of both (a) misconduct identified and rectified and (b) what represents workplace harassment, and why it should not be tolerated.

Notes to chapter 3

^{xxxv} For example, Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, paragraph 2.21.

^{xxxvi} On the model of NSW Police Internal Witness Review Committees. See Smith, C, Development and management of the Internal Witness Support Program in the New South Wales Police Service, *R.I.P.A.A. Investigation Techniques Conference*, 25-26 June 1996, p 8; See also NSW Police Internal Witness Support Policy, 16 September 1996, pp 8-9.

^{xxxvii} NSW Police Internal Witness Support Policy, 16 September 1996, p 9; Royal Commission into NSW Police Service, *Final Report, Volume II*, May 1997, p 400.

^{xxxviii} Smith, C, Development and management of the Internal Witness Support Program in the New South Wales Police Service, *R.I.P.A.A. Investigation Techniques Conference*, 25-26 June 1996, p 5.

^{xxxix} Royal Commission into NSW Police Service, *Final Report, Volume II*, May 1997, p 411.

^{xl} See objects of draft Queensland legislation at clause 3, Whistleblower Protection Bill 1992; Fox, R G, Protecting the Whistleblower, *Adelaide Law Review*, vol 5 no 2, 1993, p 141. Cf. however s. 3, Whistleblower Protection Act 1994 (Qld).

^{xli} Smith, C, Development and management of the Internal Witness Support Program in the New South Wales Police Service, *R.I.P.A.A. Investigation Techniques Conference*, 25-26 June 1996, p 2.

^{xlii} Anderson, P, Controlling and managing the risk of whistleblower reprisal, *National Occupational Stress Conference*, 1996.

^{xliii} Royal Commission into NSW Police Service, *Final Report, Volume II*, May 1997, p 399. The issue is also reflected in general literature: see Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, p 12, "it is important that there be seen to be independence between the counselling and investigative stages of the whistleblowing process", and also note the Commissioner for EO, SA queried the wisdom of "charging one agency with the responsibility of providing investigation services, counselling and protection", both comments being cited in Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), p 191.

^{xliv} This requirement is consistent with the NSW approach that the internal witness support program needs to be open to scrutiny by Ombudsman: Smith, C, Development and management of the Internal Witness Support Program in the New South Wales Police Service, *R.I.P.A.A. Investigation Techniques Conference*, 25-26 June 1996, p 2. It would also act to discharge the AFP's undertaking to notify the Ombudsman of any instance where an internal witness may be being unfairly dealt with: see AFP Professional Reporting Guidelines, and Commissioner's undertaking of 28 August 1996.

^{xlv} See Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), pp 83-87.

Chapter 4. Dealing with detriment

WHAT IS 'DETRIMENT'?

The key element of the professional reporting program is to prevent detrimental action or unfair treatment towards an AFP appointee as a result of their role - real or perceived - in bringing misconduct or mismanagement to light. It is also to deal with and remedy any such action if it does occur.

The AFP's definition of 'detriment' reflects that used in most whistleblower protection legislation, with some development for the AFP's own circumstances. Under the AFP guidelines, detriment includes:

- injury, damage or loss;
- intimidation or harassment;
- discrimination, disadvantage or adverse treatment in relation to a person's employment;
- threats of reprisals; and
- impeachment of reputation.^{xlvi}

These categories are aimed at both main types of detriment: 'authorised' actions by middle or senior management (official steps such as transfers, adverse performance appraisals and disciplinary action); and 'unauthorised' actions (reprisals such as harassment by an officer's peers).

The review confirmed the most common detriment likely to be suffered by some appointees, is 'unauthorised' reprisals by way of low-level harassment. The adverse behaviour reported and in some cases substantiated, was both active (e.g. harassing phone calls, derogatory notes, interference with personal property and duties), and passive (workplace ostracism, lack of back-up, general impeachment of reputation). As in other police services, this behaviour can have an impact out of all proportionate with its apparent triviality, and historically has also been difficult to detect.^{xlvii}

Significantly, the relevant cases also indicated a likely mixture of motives in such circumstances (leading also to forms of 'semi-authorised' reprisals) and a potential for middle management to take its lead from peer attitudes, increasing the risk of purely negligent 'authorised' reprisals.

Whereas chapters 2 and 3 dealt with management, handling and support for internal witnesses, this chapter and the next address the risks of detrimental action at source, wherever such behaviour can be positively identified as either deliberate or negligent ill-treatment.

4.1. INVESTIGATION OF 'UNAUTHORISED' REPRISALS

The cases reviewed included the only three AFP cases, known to the Ombudsman, involving formal investigations into inappropriate actions towards officers who had provided information about misbehaviour. All three occurred in the ACT: **Alien** (1992), **Novelty** (1994), and **Moray** (1996).

In **Alien**, one internal witness reported that a squad Sergeant had announced that the Alien 2 investigation was concluded and the officers exonerated - when this was not the case. The authorised investigator described the action as 'untimely, inappropriate' and demonstrating 'a complete lack of man management skills' (sic), while the Director, Internal Investigations found the Sergeant had an attitude which was 'anti-discipline' and 'undermines administration's efforts at promoting integrity and better ethical standards.'^{xlvi}

The Sergeant was paraded and counselled. However, the investigator also collected general evidence of harassment which, being outside the specific allegation, was not addressed.

In **Novelty**, the investigators found that the senior Constable 'may have been the subject of some vilification and harassment by members of the AFP' but no specific evidence could be found and 'the identity of the members involved in this cannot be established'. They also found that AFP management had offered 'all available support' to the Constable, but that:

'... perhaps some other mechanism should have existed... to offer support and guidance to AFP personnel who find themselves in this situation. This mechanism should provide proactive support rather than reaction to events that have already occurred.'

In **Moray**, the investigators found the Constable was harassed, and were able to identify a number of colleagues and supervisors whose inappropriate responses also compounded the harassment. After a reinvestigation by my office, a total of five AFP officers were formally counselled.

These cases, and particularly the most recent one in which my office took a close interest, suggest a number of key issues for harassment investigations:

- Initiation of the investigation;
- Choice of investigators;
- Investigation planning;
- Standard and types of proof;
- Secondary counter-allegations; and
- The risk of targetting the complainant.

INITIATION OF INVESTIGATIONS

In each case, the harassment investigation was initiated in different ways:

- In **Alien**, even though two witnesses reported harassment, supported by the Welfare Officer and Police Psychologist, there is no indication AFP management addressed this, apparently regarding transfers of both witnesses and likely perpetrators as having resolved the problem.
- In **Novelty**, middle management again had general notice that harassment was being experienced, but an investigation to assess the extent of the problem was only initiated when the senior Constable took steps to leave the organisation (which he then did).
- In **Moray**, management decided against investigation at the request of the Constable, supported by the psychologist; but the lack of any immediate documentation of the issues created a problem when, three months later, the issues were still unresolved.

The cases show a range of dilemmas. On the one hand, management should not wait for a specific complaint of victimisation before taking the initiative to review what has gone on in the workplace.^{xlix} On the other, the wishes and needs of the alleged victim, along with other management issues, are relevant considerations in any decision as to whether formal investigation is appropriate and if so, what form it should take.

In my view, the cases suggest a streamlined procedure as follows:

- Wherever there is evidence of harassment or unease, it should be immediately forwarded to the professional reporting coordinator, and documented. Regardless of how they are to be addressed, such concerns should not be left hanging.
- The coordinator, after discussion with the internal witness and their support person, should liaise directly with the relevant General Manager, to enable a joint assessment as to whether the issues can be dealt with at management level, or factual investigation is required.
- Formal investigation should only occur (a) where there is a real chance covert investigation may identify an harassor, (b) where there is overt workplace conflict which, after a few days of management review, still involves any significant contention as to what happened, and/or (c) where there is evidence of serious or criminal misconduct.

In such cases, however, investigation should occur as soon as possible.

- Any internal witness who has experienced repercussions, is unlikely to wish to see more investigations. This should not normally prevent the investigation from occurring. It should be a

primary factor, however, in decisions about how it is to occur; how support can be increased; and temporary measures, such as where the appointee **and** any likely perpetrators should be deployed.

CHOICE OF INVESTIGATORS

In each case, the investigators were highly experienced police officers. In **Moray**, in particular, care was taken to assemble an inquiry team which would have the confidence of the Constable involved, including a senior officer (Work Level 4) from outside the Region where the events occurred.

While these issues are important, further skills are also required, including alertness to complex issues of organisational culture. In **Moray**, for example, the Ombudsman criticised an investigator for asking inappropriately leading questions, when this was inclined to represent an officer's evidence in the best possible light and, to make it more consistent with that of other witnesses. The fact the team did not correct this imbalance, also indicated a lapse in professionalism and objectivity.

This loss of objectivity was a natural, if unfortunate consequence of the fact the investigators felt sympathy towards the officers who claimed to have lost trust in the internal witness in that case. The problem is that:

- Such questioning of trust is a natural response, wherever personnel end up in a position (often not of their choosing) where colleagues see them as having upset the normal order of things;
- It is also natural for colleagues to see such personnel as different to themselves (given that only a statistically small number have sufficient independent judgement to see misbehaviour and feel obliged to speak up) - and therefore, to also treat them differently;
- It is further natural that many colleagues will not understand the actions of such personnel - and respond negatively.

These responses have been identified in most organisations, as underpinning hostile and harassing environments, even among otherwise skilled and professional officers.¹ An harassment inquiry takes the difficulties faced by internal investigators to their highest order, because they must judge appointees who, at one level, have done no more than act on their feeling that a colleague is untrustworthy. An harassment inquiry can call on the investigator to side either with the individual, or the group - and in police organisations, in particular, the loyalty and cohesion of the group has often been regarded as all-important.ⁱⁱ

Apart from highlighting its difficulty, this issue suggests that in making such taskings, AFP senior management should consider either releasing a middle or senior manager, or including an outside person, with direct experience of these issues. In addition, where the primary

case involving the internal witness was substantiated and/or the case officer retains the confidence of the witness, then that case officer should be considered for inclusion, for their familiarity with existing dilemmas.

INVESTIGATION PLANNING

Clear investigation planning is required not only for resource reasons, but to ensure other aspects of efficiency and balance in the inquiry:

- To ensure the right evidence is obtained, and no more than that evidence which is sufficient, to resolve the matters in issue; and
- To do so without unnecessarily exacerbating the risk of further harassment, or of continued stress to the appointee concerned.

This second risk is critical in relation to both how the inquiry is to occur, and how support can be increased. In **Moray**, for example, despite outward concern for the complainant's welfare, the inquiry team interviewed all officers who might have knowledge of any harassment, even where nothing indicated they did. This 'trawling' strategy gained a small amount of evidence, but also detailed all the allegations, linked expressly to the Constable's name, to upwards of 50 general duties police. The possible gains of the approach did not appear to have been weighed against the risk of exacerbating adverse attitudes in the workplace.

These issues should be determined by developing an investigation plan, in a manner consistent with MOSC (Management of Serious Crime) methodology, and testing key elements of it with the complainant's support person and/or mentor. Provided this liaison is undertaken, it should assist investigators in developing an appropriate strategy.

STANDARD AND TYPES OF PROOF

The cases indicated some development in understanding of the standard of proof usefully to be applied in such cases. In **Novelty**, the investigators concluded that harassment 'may' have occurred, but felt unable to say that it did. However in **Moray** - a comparable case - the investigators broke the issue down, by first satisfying themselves that the workplace was an environment conducive to harassment, and then assessing, even on limited corroboration and circumstantial evidence, that on a balance of probabilities at least some of the harassment did occur.

This was a correct approach. This experience suggests that in order to assess the allegations sufficiently to resolve the issues for management, investigators do not necessarily have to find conclusive evidence of overt acts of victimisation ('body on floor' type evidence).

Similarly, the fact that an harassor's motive cannot be definitively established does not mean harassment has not occurred, or management action is not required. The cases suggest detriment can vary - from active to passive, and deliberate to unconscious, making some negative responses difficult to assess according to intent. For example, 'the silent treatment' can be either deliberately inflicted ostracism, or a passive response by staff seeking to stay out of a conflict, and frequently both.

Any deliberate or negligent ill-treatment should be identified as such wherever possible - and this will be necessary in any case prosecuted as an offence under existing or proposed victimisation provisions (in which case the normal criminal onus of proof beyond reasonable doubt will apply). However, in customary low-level cases an assessment should still be made as to whether the workplace environment was conducive to the harassment alleged, and if so, what management action is required.

SECONDARY COUNTER-ALLEGATIONS

Having clear objectives, investigators also need to have realistic expectations about the types of evidence they are likely to receive.

In all three cases where harassment was alleged, the response of many colleagues and supervisors showed a significant tendency towards negative characterisation of the internal witness involved - even where previously, their attitudes had been quite positive. This varied from:

- deliberate defence from colleagues who knew, or had subsequently realised their behaviour was wrong or questionable; to
- assumptions by supervisors that the situation would reflect badly on them in any event, and that this criticism should be deflected.

This evidence most commonly took the form of counter-explanations, that the problems experienced by the internal witness were due to his or her own personality or incompetence. These 'secondary' counter-allegations are different to payback complaints (chapter 2.3), in that they do not allege misconduct but rather form exculpatory evidence about why the witness wrongly sees themselves as having been harassed. This occurred to a limited extent in both **Alien** and **Novelty**, and a large extent in **Moray**.

The Senate Select Committee described this situation as one where:^{lii}

'The onus of proof falls onto the whistleblower - not to prove the truth or otherwise of the allegations, but to prove that he or she is not incompetent or unbalanced or vindictive. Organisations and the agency investigating disclosures ought to be particularly sensitive to the use of such labels about whistleblowers.'

The largest difficulty facing investigators is these counter-explanations will often seem plausible, and in some aspects may prove to be true. As also documented by Queensland's Electoral and Administrative Review Commission (EARC), this places investigators in a unique position:^{liii}

'Deciding on the appropriate standard which should be adopted becomes very difficult in "dual motivation" cases where a personnel action may have been taken against an employee for both prohibited reasons (i.e. as a reprisal for whistleblowing) and legitimate reasons (i.e. unsatisfactory work performance).'

The question is whether, even if partly or wholly true, these counter-explanations adequately resolve all issues about the witness' treatment. As documented in the **Moray** report, investigators must both know to expect this evidence, and have a model with which to evaluate it, by:

- Testing it on normal factual premises;
- Further testing the surviving claims against the wider evidence (e.g. if the officer's alleged personality or work disorders have only been discussed since he or she became an internal witness, they must still be regarded with suspicion); and
- Finally, also focussing on whether, even if those issues are valid, there is any evidence that adverse attitudes toward the appointee were also influenced by their role as an internal witness.

In the US, since 1989, this assessment has been made on the basis that if the officer's role as an internal witness was 'a contributing factor' in adverse action taken towards him or her, then the action constitutes an illegitimate reprisal. It need not be the only factor, or even the main factor. It is then up to the employer, to provide 'clear and convincing evidence' that the action would have been taken regardless of the witness' role.^{liv}

In NSW, where five pieces of legislation make it a criminal offence to engage in reprisals against those who provide different types of evidence or disclosures, the primary test is that the detrimental action must be at least 'substantially' in reprisal for the giving of the evidence or disclosure.^{lv} In three cases, the legislation also works to provide that where the fact of such detrimental action is proved, the onus reverses onto the employer to prove that action was **not** taken in reprisal.^{lvi}

The only Commonwealth legislation creating such an offence - s.88A, *Complaints (Australian Federal Police) Act 1982* - gives no guidance on how different reasons for adverse actions might be separated (further below).

In my view, the most workable test for the AFP remains that developed by Queensland's EARC in 1991. This was whether the officer's role as an internal witness was a '**ground of any significance**' in adverse action.

EARC chose this standard after considering a number of others (e.g. 'a contributing factor' and 'the major contributing factor'), and in my view it better meets most circumstances than the 'substantially in reprisal' test.

Under this test, if the employer, supervisor or alleged harassor wishes to then explain the adverse action away as **not** harassment, they must show:

- that 'just and lawful grounds' existed for taking the action prior to the disclosure issue arising; and
- that 'a significant step' had been already taken toward implementing that action, again prior to the disclosure issue arising.

RISK OF TARGETTING COMPLAINANT

In most circumstances, the above principles should assist investigators to arrive at a useful outcome. However, the **Moray** case in particular highlights the risks when investigators are not prepared or equipped to assess these issues and deal with such evidence.

In that case, two attempts were made to invite a psychiatric opinion to the effect that the internal witness was paranoid to the extent of being delusional. The internal investigators provided the less than correct advice reflected in the first referral; and commenced to obtain the second referral on their own initiative.

Given their context, and the question of overall responsibility for such actions, these events are set out below in chapter 4.2. However, they demonstrate clearly how easily the focus of attention can turn from the alleged events to the character and competency of the complainant.

While the review suggests the AFP is and should be able to conduct its own harassment inquiries, such action undermines the integrity of internal investigations. The continuing risk of this type of incident demonstrates the need for strong external oversight of these processes.

The review also suggests that specific training needs to be developed for internal investigators tasked with such inquiries. To date some attention has been given to the broad issue of professional reporting within the AFP's Integrity Investigations program, in the form of a research paper and group discussion. In my view this training needs to be further developed to increase the pool of integrity investigators with specific knowledge about some of these issues.

4.2. MANAGEMENT ACTION

‘AUTHORISED’ REPRISALS

None of the case studies involved investigation of formal allegations of official reprisals by senior management (i.e. by transfer, adverse performance appraisals or disciplinary action). However, complaints of inappropriate responses arose in a number of cases:

- **Alien 2** where the Constable claimed that supervisors and managers never understood him, and treated him harshly in relation to transfers, from late 1991 until his appointment was terminated in 1995;
- **Ace** where a question of possible unfairness was raised by the fact the probationary Constable’s appointment was not affirmed, three months after he brought alleged misconduct to light; and
- Other cases where officers were investigated or disciplined in connection with the case in which they provided information (see 2.3).

The review did not investigate these matters in detail. However, it is of concern that although management reprisal was claimed, or could reasonably be suspected, there was no evidence that senior management sought to address these allegations.

For example, the Constable in **Alien 2** lodged a number of grievances in the period 1991-95, all alleging mistreatment due to his having provided information to Internal Investigations. The last of these was provided to an investigator in the **Poetic** case in 1995, but were simply referred to the EEO area. He also later claimed he only accepted the involuntary termination on the basis of ‘certain threats and inducements’; a claim which was answered by AFP Employment Standards, but as with the others, never seems to have been conclusively put to rest.

In **Ace**, the Ombudsman’s investigation established that there were other substantial reasons why the Constable’s probation was terminated, and his role as an internal witness was probably not a factor of any significance. However, while the result may have been no different, the process was defective, because it included reports that were tainted by what had occurred (notably an original report by the officer implicated by the Constable’s evidence, and two further reports which, with reference to the investigation, said he was ‘lacking and deceptive’ and ‘lacked appreciation of his obligations’). In fact, it would have been possible to prevent any allegation of reprisal, by expressly excluding this evidence.

While the low incidence of such allegations is consistent with the responsiveness of senior management to such issues, it is important

that where problems arise, they are directly addressed and not left to fester.

NEGLIGENCE AND INACTION

A second, and related issue, is the risk of management action becoming de facto 'reprisals by negligence', with the effect of unfairly disadvantaging an internal witness even where there is no possible intention. This issue is raised by the number of cases (e.g. **Novelty**, **Moray**) which involved a general complaint that managers were:

- not sufficiently in touch or in control of the workplace environment to contain low-level harassment; and
- either insufficiently capable or unwilling to investigate when reports of underperformance might be attributable to an officer's role as an internal witness - leading to unsympathetic decisions that contributed to problems, rather than relieved them.

These concerns appeared to generally relate to middle management (Work Levels 3 and 4; Sergeant and Superintendent level). The review found some evidence to support this concern:

- The findings in **Alien**, that the squad Sergeant not only showed 'a complete lack of man management skills', but had an attitude which was 'anti-discipline' and 'undermines administration's efforts at promoting integrity and better ethical standards';
- In **Moray**, the actions of the Constable's Sergeant, who despite initial support was ultimately not prepared to challenge peer attitudes and accepted a decision by the Constable's squad that they were no longer prepared to work with him (effectively 'semi-authorising' the adverse treatment the Constable was receiving);
- Again in **Moray**, the fact the Station Superintendent was given sufficient reason to inform himself of what was going on, but failed to manage the situation in a proactive way; and
- The advice of central management staff on work environment matters, that where an appointee seeks compensation for stress, arrangements for managing claims in the workplace involve little safeguard against the risk of negative influence at middle management level.

Management steps intended to assist an internal witness, unless taken with due care, may also end up constituting unfair treatment - as in the case of the repeat psychiatric referrals in **Moray**, which due to lack of professionalism of the AFP officers involved, effectively constituted another layer of reprisal.

The issue for management to assess, is the risk of simple breakdowns rendering them ineffective in dealing with harassment, and causing their decisions to become part of a cycle of passive or negligent ill-treatment.

In my view, both these issues need to be included in the AFP's efforts to develop management training, and its consideration of increased lateral entry at management level.

USE AND ABUSE OF PSYCHIATRIC OPINIONS

The misuse of psychiatric diagnosis as a de facto management tool has been previously documented, both in general principle and in the popular press. Sissella Bok in her book *Secrets: On the Ethics of Concealment and Revelation* reported that US Congressional hearings as early as 1978 had uncovered 'a growing tendency' for employers to order outspoken civil servants to take psychiatric 'fitness for duty' examinations, leading to medical discharge, originally stemming from simple conflict between employees and supervisors over internal allegations.^{lvii} More recently, considerable anecdotal evidence has been assembled in Australia about the practice, and its self-fulfilling effects as a form of mental assault.^{lviii}

In law enforcement, both the potential and the effects were demonstrated in the case of former NSW Police Detective Sergeant Philip Arantz.^{lix} A comparable case was claimed in the Queensland Police Service in 1994.^{lx}

As touched on in chapters 3.1 and 4.1, the review suggests the AFP has a deficient history in this area.

My office is aware of four relevant instances since 1992 where the AFP has arranged for officers to undergo inappropriate psychiatric assessments, either under duress, or without their knowledge or consent. Two of these were arranged by the AFP chief medical officer, and two by internal investigators (with at least part knowledge by the medical officer). One related to an officer the subject of an internal investigation.

Three instances related to internal witnesses: **Alien 2** involving one referral, and **Moray** involving two referrals. In both cases, the psychiatric question was raised not in response to the officers' original reports of misconduct (both of which were treated seriously), but in response to their later claims of ill-treatment or harassment.

Alien 2

In this case, the chief medical officer was contacted by an AFP manager trying to cope with an earlier internal witness. After transferring from another area, and complaining of harassment and of inaction in response, the Constable had mentioned to colleagues that perhaps his only means of attracting attention was to go into public and 'let a few shots fly'. There was no evidence the comment was made seriously.

The medical officer responded, however, by ordering an AFP Welfare Officer to visit the Constable at home, take him to the psychiatric unit at a public hospital, and if possible, have him admitted. Further, the medical officer told the Welfare Officer that if he refused, she should use her powers as a police officer to arrest him and have him compulsorily assessed under the *Mental Health Act*.

The Welfare Officer told this review she knew these instructions were 'ridiculous', and was able to persuade the Constable to undergo a voluntary assessment. No psychiatric disorder was found. Fourteen months later, managers again approached the medical officer about the Constable's 'paranoia' and 'persecution complex', but this time the Welfare Officer pointed out the underlying problems had still not been addressed, and warned: 'it is too easy for peers, and in some cases management, to label someone a "nutcase" and try to have them relocated as a means of solving a behavioural problem within the workplace.'

No further assessments occurred, but nor were the underlying problems ever addressed. It remains unfortunate that the Welfare Officer's advice was never fully taken up, especially where alleged behavioural problems are related to a history of unaddressed complaints about harassment.

Moray - first referral

This psychiatric referral was a significant factor in the Constable concerned coming to the Ombudsman's office in May 1996. It occurred in circumstances where the Constable believed he was attending a consultation to receive supportive counselling or 'coping' skills.

While the Ombudsman accepted that the referral was partly well-intentioned, it also became clear that the AFP medical officer responsible for the consultation had failed to make its dual purposes adequately clear to the Constable, and had gone beyond his role. On advice from internal investigators, he had told the psychiatrist the investigation was not supporting the Constable's account of harassment. This imputed that a valid question had arisen whether the Constable could be believed, when in fact this was incorrect. The doctor then invited an opinion to the effect that the Constable was paranoid to the point of delusional.

After assessing the Constable, the psychiatrist did not arrive at this opinion, and instead properly explained the full purpose of the request. He also later told my office he found the referral 'extraordinary'.

As a result, the Constable suspected the AFP - as even the medical officer responsible put it - of 'trying to brick him up as a nutter'. The incident had a serious effect, not least because it prevented him from

taking up other external counselling support which the Police Psychologist **had** properly arranged, with his knowledge.

The Ombudsman's investigation established that the referral was unprofessional and inappropriate, given the task at hand. Fortunately, the medical officer involved in both **Alien 2** and the first **Moray** referral is no longer with the AFP; and in both cases, other professional staff disagreed with the approach and actively attempted to curtail it.

Moray - second referral

The apparent depth of the problem was further demonstrated, however, by what occurred even without the medical officer's involvement. Less than two weeks after the above events, the internal investigators on their own initiative took steps to obtain a further psychiatric opinion. This was notwithstanding that they knew the first referral had already been made, and found no evidence the Constable was delusional.

The Constable was not made aware of the proposal; nor was there an intention to make him aware. Instead, it was to be based on an initial recorded conversation with him, after which the inquiry team intended to travel from Canberra to Sydney to meet the consultant - a specialist in forensic psychiatry, especially in 'remote' profiling of mentally disturbed offenders and persons of interest (e.g. targets of siege situations).

This situation demonstrated that the Constable's concerns were even better founded than he knew. The arrangement was never finalised, because the Ombudsman's office advised against it as soon as it came to notice. A formal investigation established that the inquiry team had set out to discredit the complainant in an entirely inappropriate manner:

- Contrary to the investigators' denials, the proposal went to the central issue of whether the Constable should be believed - and was intended to establish a basis for rejecting his evidence of harassment.

(One investigator claimed that the proposal was intended to help the Constable 'cope' with the stress; but he was contradicted by his colleague, none of the team had any knowledge of the doctor's clinical experience, and it was never intended that he even see the Constable.)

- Even if the purpose **had** been related to the Constable's wellbeing and deployment, it would still have been inappropriate for the investigators to approach the doctor:

- These were issues for the employee support services (during the inquiry), and for AFP management once the investigation was concluded - not the investigation team; and
- In any event, they already knew it was inappropriate to seek any assessment without the Constable's knowledge and consent.
- In any event, no adequate explanation was given for why the investigators felt it necessary to obtain a second psychiatric opinion, when they knew the results of the first. The evidence suggested only that they did not regard the first assessment as satisfactory - leaving, as the only reasonable conclusion, that they did not agree with the first doctor's opinion, and instead sought confirmation of their own opinion, from a source already known to them.

This was despite the fact that one of the team was already aware, from a previous case involving the same doctor, that my office disapproved of this type of 'remote' psychiatric assessment as an internal investigation tool.^{lxi}

The investigators' actions left the AFP open to the accusation that they were 'shopping around' for psychiatric opinions until they obtained one that excused them from completing an investigation on its merits. The decision to seek a psychiatric explanation was a clear departure from normal standards of thoroughness and objectivity. The two senior investigators were both counselled over the proposal.

Taken together, these three instances demonstrate that:

- There is a real risk of internal professional staff being insufficiently clear on whether their roles relate to the welfare of AFP appointees (i.e. clinical diagnosis and assistance with illness or distress), or more forensic functions aimed at assisting AFP management (in effect deciding discipline, credibility, and general employment suitability);
- There is a likelihood, if management are similarly unclear, that regardless of intent, the result will be an abuse of professional roles, the employer's powers, or police powers - or all three; and
- In no circumstances is the result likely to benefit either the individual appointees, or the development of management skills within the AFP.

In my view, AFP management needs to be make an effort to ensure the roles are clear, by further reviewing its expectations of both the internal psychological practice, and the standards expected of internal investigators. These cases, the most recent in 1996, were almost textbook examples of anecdotal evidence reported by the Senate Select Committee in 1994, that personnel who make disclosures may find themselves referred for psychiatric assessment 'for reasons which are

tenuous and sometimes fabricated'; and that a whistleblower's experience of stress can be used and turned into a self-fulfilling prophecy.^{lxii} It is the responsibility of management to prevent such circumstances from arising.

4.3. EXTERNAL AND LEGISLATIVE PROTECTIONS

Two forms of legislative protection need to be available to internal witnesses such as AFP appointees:

- protection against civil actions (e.g. defamation or breach of confidence) or criminal actions (e.g. breach of secrecy), which might otherwise be brought by other appointees or the AFP as an employer; and
- treatment of victimisation or other reprisals as a criminal offence.

There should also be independent oversight of the handling of public interest disclosures, to ensure that internal evidence of misconduct or mismanagement is appropriately investigated; and that those who provide the evidence are fairly treated, including, where appropriate, the prosecution of victimisation offences.

The review suggests that, while the AFP framework is more advanced than many Commonwealth agencies, it remains inconsistent and incomplete. These issues also demonstrate the continuing lack of a consistent framework across the wider Commonwealth public sector.

PROTECTION AGAINST CIVIL OR CRIMINAL ACTIONS

The scheme of protection in this area, in relation to the AFP, is largely complete. Even at common law, persons who have disclosed information as 'whistleblowers' have sometimes had appropriate legal defences.^{lxiii} In the case of AFP appointees:

- All appointees are protected by the fact they are obliged both by law and the conditions of their employment to report misconduct - through the AFP Discipline Regulations, Schedule 1 and General Order 6;
- If concerned about how a report will be handled internally, all appointees also have an unfettered right to discharge this obligation by way of a report to the Ombudsman - par. 42, General Order 6, and the new Guidelines; and
- Any appointee who makes a report to the Ombudsman, or provides information in good faith about a matter already under investigation, is further protected from any civil proceedings for any loss, damage or injury suffered by another person as a result - section 45, *Complaints (Australian Federal Police) Act*.

In addition, any appointee who provides information in response to a formal direction either by an internal investigator or the Ombudsman, is protected from having that information used against them in any criminal or civil proceedings (provided their evidence is not false or misleading).

An area where an appointee remains unprotected, is in relation to information given to persons outside the AFP or the Ombudsman - for example, the media. In this case, personnel may be in breach of secrecy provisions with criminal penalties - e.g. 60A of the *Australian Federal Police Act 1979*.

The Senate Select Committee, and the Gibbs Committee before it, recommended that public officials should be protected from such penalties in circumstances where they could show reasonable excuse, such as reasonable belief in the futility of reporting through official channels.^{lxiv} This was rejected by the then Government's response, principally on the grounds that public disclosures would impede proper investigation.^{lxv}

However, there remains the chance, however small, that an investigation may not reveal the truth. In that case, personnel with a genuine belief that a serious matter warrants further attention are left with no other option than to go outside the AFP and the Ombudsman's office. While none of the AFP cases reviewed raised this issue, legislative reform in this area should reflect a half-way position, such as in existing NSW legislation.^{lxvi} This should provide that it is a defence to any such secrecy breach, if the person involved can show that:

- he or she first reported internally or to the Ombudsman, or had a reasonable excuse for not doing so;
- if reported, the matter was either not investigated, or found unsubstantiated, or not determined within a reasonable time; and
- in any case, the report was believed to be, and was, substantially true.

VICTIMISATION AS A CRIMINAL OFFENCE

Six pieces of Commonwealth legislation currently make it an explicit offence to victimise or take reprisals against a person who makes a complaint or provides information to an investigation.^{lxvii} These include section 88A of the *Complaints (Australian Federal Police) Act 1981*, inserted in 1994, which provides that:

“A person must not cause, or threaten to cause, detriment to another person ('the victim') on the ground that the victim, or any other person:

- (a) has made or might make a complaint under this Act; or
- (b) has given or might give a document or other information to a person under this Act.

“Penalty: Imprisonment for 6 months.”

The provision does not include any definitions of the type of detriment envisaged, nor what might occur should an accused also claim other grounds for causing the detriment, but in my view this is an advantage, rather than a disadvantage.

The provision protects:

- Any person, whether from the public or the AFP, who complains directly to the Ombudsman about the conduct of AFP personnel;
- Any member of the public - but not AFP appointees - who complains to the AFP about the conduct of AFP personnel;
- Any person, whether from the public or the AFP, who provides information to any investigation conducted by the Ombudsman; and
- Any person, whether from the public or the AFP, who provides information to any investigation conducted by the AFP under the Act (but not other internal investigations, e.g. under General Order 6).

In other words, while it is wide, the protection does not apply to AFP appointees unless their report is a complaint to the Ombudsman, or their evidence is subsequently taken under the Complaints Act. This does not include most matters handled by Internal Security & Audit, and many of those handled by Internal Investigations. This is because the Complaints Act does not apply to allegations, no matter how serious, made by one AFP appointee to another - section 6(4).

In my view, this inconsistency should be rectified in the following ways:

1. As set out at chapter 2.3, the Complaints Act should be amended to cover both complaints and allegations, and to also extend the offence to all matters dealt with internally by the AFP, i.e. removing the effect of section 6(4); and in the interim:
2. The arrangement where my office is notified of all internal investigations, whether triggered by complaints or allegations, should be developed so as to extend the coverage of the victimisation offence as appropriate to a larger range of matters; and
3. It should be made clear to AFP appointees that the causing of detriment to an internal witness will be considered to be disgraceful conduct, punishable under AFP Discipline Regulations.

However, this issue also demonstrates, by comparison, the even greater absence of such protections across the Commonwealth public sector. Recently proposed reforms to the Public Service Act 1922 provide, for the first time, that victimisation of whistleblowers is not to occur. However, they lend little reassurance in this controversial area, in that they fail to stipulate any explicit sanction, do not provide any clear

power for the investigation of such acts (especially when abolition of merit protection and review provisions is also proposed), and only apply to departments of the Australian Public Service - not other statutory bodies.^{lxviii}

This review suggests, above and beyond regularisation of the position in relation to the AFP, that the situation would be best addressed by legislative amendment to:

- extending the offence of victimisation to protect all equivalent disclosures by Commonwealth officers, whether internal, or to my office under the Complaints Act or Ombudsman Act;
- attain consistency in the penalties, in and across jurisdictions;^{lxix} and
- given the practical difficulties in proving such an offence, and the public interest in promoting disclosures, to include a partial reversal of onus onto the harassor/employer concerned to satisfy a court that any detriment suffered was not in reprisal for a protected disclosure.^{lxx}

EXTERNAL OVERSIGHT

The review generally confirmed the value of external oversight of many internal allegations; and also many, if not all, cases where an internal witness may have suffered either authorised or unauthorised reprisals.

The need for this oversight is particularly demonstrated where questions arise about the adequacy of an internal harassment inquiry, and/or it is alleged that management has been implicated in an authorised reprisal, both of which will normally always call for an external investigation.^{lxxi}

The need for external involvement is further extended by the creation of the offence of victimisation, and the question of who should investigate such criminal acts. In the case of unauthorised reprisals, the review suggests that experienced AFP investigators remain the most appropriate to investigate offences under section 88A, with oversight by the Ombudsman's office. However, where internal investigators or senior AFP management are themselves accused of such reprisals, it is clear that an independent investigation is required.

In NSW, as under the Complaints Act, there is yet to be a prosecution for victimisation - but there are two means of independent investigation: the Independent Commission Against Corruption (which can investigate such an offence as being 'corrupt conduct' under that legislation) and the NSW Ombudsman (whose legislation was specifically amended to allow this).^{lxxii} The NSW Police Service confirmed that for an offence of victimisation under s.206 of the *Police Service Act 1990* (NSW), if police management were accused then the

Ombudsman would be the appropriate person to conduct the investigation and prepare the criminal brief.^{lxxiii}

The situation, in relation to both the AFP and the wider public sector, has been further affected by the limited jurisdiction and proposed abolition of the Merit Protection Review Agency (presently within the Public Service and Merit Protection Commission).

AFP

Under the previous Government's response to the Senate Select Committee,^{lxxiv} it was proposed that:

- the Ombudsman would conduct, or provide independent oversight of primary investigations into whistleblower complaints; and
- the MPRA would oversight the collateral issues of personnel management, harassment or victimisation.

However, the MPRA has only had partial jurisdiction over the AFP, and no power to investigate general grievances. This lack of oversight only stands to be extended under the most recent proposals, whereby the Public Service Commissioner will have no statutory powers at all in relation to the AFP, nor over many other Commonwealth agencies.

At present, only the Ombudsman's office is in a position to fill this gap; but is effectively barred from doing so by limited resources, and the fact that it cannot investigate most actions relating to 'the employment of members generally or to the employment of a particular member' of the AFP - sections 5(3), Complaints Act, and 5(2)(d), *Ombudsman Act 1976*. These provisions have already prevented inquiries that the Ombudsman would otherwise logically have made, in reviewing all the circumstances of a matter within her primary jurisdictions, with disadvantages to the agency, complainants and the public interest.

There has been some recent public debate about which body or bodies should fulfil any of the external oversight functions in relation to the AFP. The review suggests that, with adequate resources and exceptions to the legislative barriers, the Ombudsman's office could enhance its capacity to effectively oversight and conduct inquiries into alleged reprisals.

The issue of resources is not insignificant, even without regard to the wider Commonwealth jurisdiction, given:

- The workload involved in screening, reviewing and in some cases investigating, a substantial body of matters not currently formally reported to the Ombudsman's office;^{lxxv} and
- The need for provision of resource-intensive counselling, follow up and other support in a significant proportion of cases.^{lxxvi}

The review also suggests that in addition to resources, legislative action is required to amend the Complaints Act, in a manner consistent with the NSW Ombudsman Act under the protected disclosure system.^{lxxvii} This would provide an exception to section 5(3) that employment-related actions may be investigated, in appropriately serious cases, where alleged to relate to a disclosure or evidence under the Act, General Order 6 or the Professional Reporting Guidelines. This would not give the Ombudsman any general power (or obligation) to investigate employment matters, but be restricted to issues arising from a specific report under the guidelines.

Wider Commonwealth public sector

The model of external oversight proposed by the previous Government has now lapsed, and been partially superseded by the proposed reforms of the Public Service Bill 1997. Even under the previous model, however, issues such as highlighted by this review were not fully addressed, with a range of matters likely to escape effective oversight arrangements. This appears to be only further the case under the present proposals:

- There is no proposal, as previously, for effective oversight of APS agencies by way of requirement to report such allegations centrally;
- Although the Public Service Commissioner is proposed to be empowered to investigate whistleblower allegations, there is no clear role in relation to collateral issues of victimisation (the primary role assigned to the Commissioner under the previous model).

This situation, while therefore not providing guidance for the independent oversight of how alleged victimisation is handled, also represents a reversal of the previous model in that there is no proposed reference to the Ombudsman (who already deals with many substantive whistleblower allegations). This is inconsistent with the recommendations of the Gibbs and Elliott Committees, Professor Paul Finn (as he then was),^{lxxviii} and the previous Government in response to the Senate Select Committee, that the Ombudsman have a coordinating role in relation to whistleblower disclosures and protection at the Commonwealth level.

Regardless of the coordination issue, however, the absence of a clear oversight function in relation to issues of victimisation and the lack of any coverage to non-APS agencies such as the AFP, suggests a continued need for a statutory protected disclosure scheme across the Commonwealth. This was also the view reached by the Joint Committee on Public Accounts which, as well as noting other limitations, recognised that the Public Service Bill was 'not the ideal framework within which to provide extensive whistleblower protection'.^{lxxix}

In the Ombudsman's view, there should be action to establish such a scheme. This should be accompanied by a similar amendment to section 5(2)(d) of the Ombudsman Act 1976, providing an exception so the Ombudsman may investigate employment-related actions where they allegedly relate to a primary investigation into maladministration. Again, this would be limited to circumstances where the actions were associated with a defined category of protected disclosure falling within the Ombudsman's jurisdiction.

Notes to chapter 4

^{xlvi} See Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, paragraph 8.82; *Whistleblower Protection Act 1993 (SA)*; *Public Interest Disclosure Act 1994 (ACT)*. The category “impeachment of reputation” was added by the AFP on the suggestion of the Ombudsman’s office, as indicating a special category of injury or damage at which much low-level harassment can start.

^{xlvii} Royal Commission into NSW Police Service, *Final Report, Volume II*, May 1997, p 402. This is also consistent with Professor Fox’s observation that it is more difficult to shield dissenters from the subtle and not so subtle pressures brought to bear on them “day by day, minute by minute”: Fox, R G, *Protecting the Whistleblower*, *Adelaide Law Review*, vol 5 no 2, p 143.

^{xlviii} AFP II 912/30054, Report 11 February 1993, p 14.

^{xlix} An advantage over some statutory schemes, which can require a complaint to be made about victimisation before an investigation is initiated - see evidence of SA Police Complaints Authority to Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), p 45.

¹ See Bok, 1982, pp 214-215, as cited in Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, paragraph 2.35 and more generally see paragraphs 2.30-2.47; see also Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), p 68.

^{li} See, for example, Horne, E, *Blowing the police the whistle*, *IPA Review*, v45, no 4, 1992, pp 22-23, who reported that in 36 years in the Victoria Police, neither he nor anyone he knew “had the requisite motivation or courage to break with the police code of silence - a code which young men and women, however high their integrity on joining the police, quickly absorb and apply”.

^{lii} Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), p 69.

^{liii} Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, paragraphs 9.1-9.42.

^{liv} *Ibid*; and Caiden, G E, Truelson, J A, *Whistleblower Protection in the USA: Lessons learnt and to be learnt*, *Australian Journal of Public Administration*, Vol XLVII, no 2, June 1988, pp 119 - 129; and also Caiden, G E, Truelson, J A, *An update on strengthening the protection of whistleblowers*, *Australian Journal of Public Administration*, v53, no 4, December 1994, pp 575 - 583. “Clear and convincing evidence” is a hybrid between “balance of probabilities” and “beyond reasonable doubt”.

^{lv} *Ombudsman Act 1974 (NSW)*, s 94; *Independent Commission Against Corruption Act 1988 (NSW)*; *Police Service Act 1990 (NSW)*, s 206; *Protected Disclosures Act 1994 (NSW)*, s 20; and *Police Integrity Commission Act 1996 (NSW)*, s 114.

^{lvi} *Ombudsman Act 1974 (NSW)*, *Independent Commission Against Corruption Act 1988 (NSW)*, and *Police Integrity Commission Act 1996 (NSW)*: see the recommendation of the Committee on the Office of the Ombudsman and the Police Integrity Commission (NSW Parliament), *Review of the Protected Disclosures Act 1994*, September 1996, recommendation 9 p 78, that the Protected Disclosures Act be amended in the same way.

^{lvii} Bok, S, *Secrets: On the Ethics of Concealment and Revelation*, Pantheon, 1982, p 212, cited in Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, paragraph 2.27.

^{lviii} Cribb, J, ‘Committed to truth’, *The Australian*, 8 September 1993, p11; see also Roberts, G, *Tell and be damned*, *Bulletin (Sydney)*, 4 October 1994, 40-41; and : Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), pp 181-185.

^{lix} Arantz, P, *A Collusion of Powers*, Dunedoo, 1993.

^{lx} De Maria, W, Jan, C, *Wounded Workers: Queensland Whistleblower Study, Result Release Two*, Department of Social Work and Social Policy, University of Queensland, October 1994, p 17.

^{lxi} C/92/81526 (IID 923/20104); Report of 15 March 1994, pp 10-11.

^{lxii} Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), pp 70, 72, 181-185.

^{lxiii} For example, qualified privilege against defamation, and other public interest defences: McMillan, J, Whistleblowing, in ed. Noel Preston, *Ethics for the public sector - education and training*, Federation Press, Sydney 1994, p 122.

^{lxiv} Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), pp 169, 203.

^{lxv} Response to Recommendation 28 in House of Representatives, *Report of the Senate Select Committee on Public Interest Whistleblowing: Government Response*, Hansard, 26 October 1995.

^{lxvi} Protected Disclosures Act 1994 (NSW), section 19.

^{lxvii} See also National Health Act 1953 (Cth); and the discrimination legislation - Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth), Human Rights & Equal Opportunity Commission Act 1986 (Cth), and Disability Discrimination Act 1992 (Cth).

^{lxviii} Public Service Bill 1997, introduced 27 June 1997.

^{lxix} For example, Police Service Act 1990 (NSW), s.206, which carries a maximum penalty of 50 penalty units or imprisonment for 12 months, or both.

^{lxx} Ombudsman Act 1974 (NSW), Independent Commission Against Corruption Act 1988 (NSW), and Police Integrity Commission Act 1996 (NSW): see the discussion and recommendation of the Committee on the Office of the Ombudsman and the Police Integrity Commission (NSW Parliament), *Review of the Protected Disclosures Act 1994*, September 1996, p 78; see also Goldring, J, *Blowing the Whistle*, *Alternative Law Journal*, vol 17 no 6, December 1992, p 300.

^{lxxi} See Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), p 80.

^{lxxii} See Ombudsman Act 1974 (NSW), section 31AB and Schedule 1, Item 12.

^{lxxiii} C. Smith, 29 May 1997.

^{lxxiv} Response to recommendations 18, 19, and 25 in House of Representatives, *Report of the Senate Select Committee on Public Interest Whistleblowing: Government Response*, Hansard for 26 October 1995.

^{lxxv} Noting especially Senate Select Committee on Public Interest Whistleblowing (Commonwealth Parliament), *In the public interest*, August 1994 (Parliamentary Paper No. 148/1994), paragraph 6.8, p 79.

^{lxxvi} *Ibid* pp 190-193.

^{lxxvii} Ombudsman Act 1974 (NSW), Schedule 1, Item 12. This precludes the Ombudsman from investigating conduct relating to employment in all circumstances - "unless the conduct arises from the making of a protected disclosure".

^{lxxviii} Finn, P, Whistleblowing, *Canberra Bulletin of Public Administration*, no 66, October 1991, p 171 - where, in addition to a central coordinating and original investigatory role, he recommended "that the Ombudsman be empowered to make such arrangements as are necessary to protect a reporter if he considers that the reporter's safety may be prejudiced or that the reporter may be subject to intimidation or harassment."

^{lxxix} Joint Committee on Public Accounts, *An Advisory Report on the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997*, Report No. 353, 29 September 1997, Chapter 6 and Recommendation 13.

Chapter 5. Middle management - the key roles

All the cases reviewed emphasise the importance of the roles of middle managers (Work Levels 3 and 4 - formerly Sergeants and Superintendents) in preventing and controlling work environments which are conducive to ill-treatment of internal witnesses.

The cases show the importance of prevention, or early steps to minimise negative attitudes - so as to minimise both actual conflict, and perceptions of conflict or antagonism which can quickly and reasonably amount in an internal witness' mind.

The importance of management roles demonstrates the reality that without a capability and commitment to address these issues in the workplace, the AFP's Professional Reporting Guidelines themselves are likely to accomplish little. As Professor Fox noted, the value of new legislation or guidelines is 'largely symbolic', with the real value being 'as much to do with ethics, education and morale as with law'.^{lxxx} Research into the implementation of other systems, e.g. the NSW Protected Disclosures Act, has similarly suggested that for such systems to achieve their 'fundamental aim' of removing the fear from reporting wrongdoing, 'considerable cultural changes' are needed within both organisations and the wider community.^{lxxxi}

Obviously, the attitudes and skills of middle-managers are critical in this process of change.

However, it has also been pointed out for some time that the creation of workplace climates where internal complaints are treated appropriately, is also no more than simple good management. Queensland's Electoral and Administrative Review Commission identified that not only should managers be 'active and innovative' in identifying and addressing areas of risk and conflict, but as a related responsibility, they should 'ensure that the organisational culture is tolerant and receptive to reasonable criticism and complaint, and is responsive (and seen to be so) when justified criticism or allegations of wrongdoing are made through proper internal channels'.^{lxxxii}

The importance of middle-management responsibilities was also identified as a key issue by the Royal Commission into the NSW Police Service.^{lxxxiii} In a finding that mirrors this review, the Commission found that in most instances, the most common harassment could have been prevented by 'an exercise of leadership on the part of commanders who should have taken strong action when they became aware of harassment taking place'.

The Royal Commission's recommendation was that failure to take 'active measures to detect and deal decisively and swiftly with instances of harassment and ostracism of internal witnesses' should be viewed seriously, and prima facie should be reason for loss of command.^{lxxxiv}

This review suggests the same standard needs to be adopted by the AFP.

The following is suggested as a basis for a managers' checklist on issues that need to be addressed, arising from the case studies, particularly in areas of:

- Receiving information or allegations from officers and staff;
- Support in any investigation context;
- Dealing with conflict, including harassment;
- Upward reporting; and
- Remedies.

RECEIVING INFORMATION / ALLEGATIONS

As set out in chapter 2.1, a direct supervisor or trusted senior officer in the immediate workplace will often be the first person to know that an AFP appointee has information or evidence which may make up, or be relevant to, a valid report or complaint.

The responsibilities of that manager commence at that point. In that case, the issues set out at chapter 2.2, relating to how the matter is handled and how liaison is conducted between the appointee and AFP management and investigators, apply.

There was little evidence, in most cases, of any direct involvement by immediate supervisors in any form of case management of the internal witness concerned; or efforts to ensure that they were aware, and made use, of available support services.

The most critical responsibility faced, is contribution to early and effective risk assessment. Immediate supervisors should be in a key position to evaluate, objectively, the way an internal witness' position will be seen in the workplace if or when it becomes known, what might be done to support and protect the witness, and how the situation is best to be monitored for problems that may arise.

In any situation where supervisors know or become aware that an officer or staff member within their influence is in this position, they have both a duty and an interest in approaching the witness, their support person, or the relevant internal investigation area to ensure that risk management issues have been appropriately considered.

SUPPORT IN INVESTIGATION CONTEXT

The cases showed both an overwillingness, and an underwillingness by managers to involve themselves in support issues. In general they demonstrated the difficulty of striking the right balance.

In **Alien 1**, AFP management gave the internal witness clear messages of support, but the most immediate expression of this - within two days of the investigation commencing - was an announcement by an ACT

senior officer, naming the Constable in front of a station parade for the purpose of ordering that he be supported and that there be no reprisals.

Not only was this done without consultation, but it placed a high level of focus on the individual involved, and may well have contributed to his isolation. In addition, as reported later by a welfare officer, it may well have promoted an 'unrealistic expectation' on the part of the Constable about the behaviour he could expect from his colleagues.

The opposite occurred in **Hoodwink/Moray**, where a number of supervisors had knowledge that the Constable had assisted ISA and that an investigation was ongoing, and, according to their later accounts, should have had reason to anticipate that the Constable may experience difficulties. None of these officers took any proactive steps, however, and claimed afterward that such responsibilities fell to the internal investigation area, with secrecy preventing them from becoming involved.

The cases make it clear that regardless of steps taken by internal investigators and central employee support personnel, the way an internal witness fares will depend largely on attitudes and behaviour in their immediate workplace environment. In turn, the ability of managers to provide meaningful support if problems are experienced, is dependent on (a) their having a pre-existing familiarity with the witness' circumstances and relationships in the workplace, and (b) their readiness to anticipate problems - both objective and subjective - and nip them in the bud.

While many internal investigations (or aspects of them) will remain confidential, the new AFP Professional Reporting Guidelines rightly envisage that internal witnesses, support persons or investigators may well provide line managers with information, for the purpose of preventing and addressing detriment in the workplace.

Middle managers therefore have a clear responsibility, wherever a professional reporting issue is within their knowledge, to act proactively by assessing possible harassment risk and considering anti-harassment measures at station or team level. AFP senior management needs to expand on the current Guidelines by providing further clear guidance to middle managers to this effect.

DEALING WITH CONFLICT (INCLUDING HARASSMENT)

Experience suggests that many middle managers are insufficiently equipped to address workplace conflict involving internal witness issues.

This is central to the AFP's ability to prevent or effectively deal with unauthorised reprisals, and create and reinforce positive work environments. The review indicates that open verbal conflict (e.g. on the issue of whether or not an officer has 'done the right thing') is a

strong initial indicator that the work environment has become conducive to harassment; and that even before that, the way in which personnel anticipate such conflict will be treated will influence the likelihood of deliberate harassment (e.g. interference with property, harassing phone calls).

The **Alien 1** and **Hoodwink/Moray** case studies again demonstrate the risks in this regard. The direct supervisors in each case, rather than alleviating the objective and subjective pressures being experienced by the internal witness, adopted a path that exacerbated the harassment. This was most noticeable in **Hoodwink/Moray**, where the squad Sergeant, who was originally supportive of the Constable, responded to a 'decision' by the Constable's colleagues that they were no longer prepared to work with him, by passing this advice on to him as a fait accompli. The Ombudsman's investigation found that at the key moment, he abrogated his responsibility as a supervisor.

There is no doubt that any deficiency in this area greatly increases the risk of low-level harassment between operational police.

The review suggests there are several elements to creating competence in dealing effectively with such conflicts, including ability to lead by:

- Exercising independent judgement, and stand apart when necessary from the attitudes and assumptions of subordinates;
- Responding flexibly and proactively to demands - remembering that even though a professional reporting issue may generate conflict which is disruptive to normal routines, and therefore prove quite inconvenient, stability and efficiency are not 'absolute values' for which the overall good the organisation can be sacrificed;^{lxxxv}
- Developing simple strategies for influencing and control workplace innuendo about internal witnesses, both independently and in consultation with other supervisors and superiors;
- Confronting general workplace prejudices regarding the act of 'giving up' a colleague; e.g. by citing suitable cases and calling on subordinates to put themselves in the same position, or by attacking obvious 'furphies' (such as the common theory that professional reports are often generated by desires for self-advancement^{lxxxvi});
- Reinforcing that even where colleagues' antagonism towards an internal witness is more understandable - e.g. where there appears to be substance to a claim that a witness acted out of malice - it is the role of management to create a fair outcome to the situation, not any 'kangaroo court' or summary justice dispensed by peers.

The **Moray** internal investigation recommended enhanced training for supervisors at squad/team leader level, in conflict resolution in such

circumstances. The Ombudsman endorsed this recommendation. In response, the Commissioner noted that the AFP has also recently promulgated fresh guidelines for dealing with conflict, to be incorporated in training and development packages and used as a basis for ongoing education/counselling programs.

The development of specific conflict resolution training, in the context of internal witness management issues, and inclusion of the above leadership competencies in appointment and performance evaluation criteria should both remain priorities.

UPWARD REPORTING

The cases highlighted the need for middle managers to communicate openly and frequently with their own superiors about internal witness management issues. **Hoodwink/Moray**, in particular, suggested that changes in work structure within the AFP, based on principles of devolution and empowerment, can be misinterpreted by middle managers as a discouragement to seeking guidance from superiors on sensitive issues. The result was that the manager ultimately responsible for the work environment was apparently unaware of developments on which he believed he should have been briefed, and which would have prompted earlier and different action.

A devolved management structure is advantageous only in so far as it promotes flexibility and communication flow, not restricts it. Middle managers should not fail to keep superiors informed on any and all sensitive matters, just because they feel they have authority and competence to deal with them. In the Ombudsman's view, AFP senior management should consider means of fostering this understanding as it proceeds with ongoing change to management structures.

REMEDIES

Cases such as **Alien 2** and **Hoodwink/Moray** indicate that both middle and senior management need to plan more carefully for ongoing remedial support, at follow-up stages after the critical decisions are taken in relation to handling of an internal witness.

For example, where resolution of a conflict over professional reporting includes transfer of the witness at their request, in the absence of proper planning that 'solution' may lead to ongoing problems if the managers inheriting the witness are not appropriately informed:

- At best, the new manager will be unfamiliar with their subordinate's experiences and less able to anticipate subjective problems or provide support; and
- At worst, a new manager may draw adverse inferences from the transfer and prejudge their new subordinate's abilities or motivations in a negative way.

Professor Fox has noted the 'communal ambivalence' towards an internal witness that may accompany him or her well after the event, even among otherwise reasonable supervisors and staff. By this he meant the fact that in the minds of many:^{lxxxvii}

'Admiration for the moral courage and social utility of those who defy the system in order to expose corruption or incompetence... is balanced by discomfort at their perceived disloyalty and by an awareness of the danger of encouraging mischief and malcontents.'

Such attitudes are a reminder that problems have the potential to be ongoing, or to resurface, even after critical decisions are made and solutions embarked upon. This is despite the fact that in many instances, the internal witness, senior managers and support personnel will have entered into those solutions with the intention that the witness continue or resume their career 'as if nothing happened'.

One objective of the improved support systems under the AFP's Professional Reporting Guidelines is to provide ongoing support to minimise such problems. However, a responsibility also lies on a manager who inherits part of a previous conflict, to take some initiative to inform themselves of the facts and issues involved in what occurred, make fresh and independent judgements, and if necessary, set up their own support strategy. If nothing else, such initiative will prevent managers from becoming entangled in problems that may well have been avoided.

The review suggests, in general, that the AFP should develop further guidance for middle managers as to their responsibilities under the Professional Reporting Guidelines, in the form of a manager's checklist setting out these and any other relevant issues.

Notes to chapter 5

^{lxxx} Fox, R G, Protecting the Whistleblower, *Adelaide Law Review*, vol 5 no 2, 1993, p 162

^{lxxxi} Independent Commission Against Corruption (NSW), *Monitoring the impact of the Protected Disclosures Act 1994, Phase 1: Survey of NSW Public Sector Agencies and Local Councils*, Interim Report, April 1996, p 16.

^{lxxxii} Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, paragraphs 2.53-2.56.

^{lxxxiii} Smith, C, Development and management of the Internal Witness Support Program in the New South Wales Police Service, *R.I.P.A.A. Investigation Techniques Conference*, 25-26 June 1996, pp 6-7.

^{lxxxiv} Royal Commission into NSW Police Service, *Final Report, Volume II*, May 1997, pp 405, 420. See also NSW Police Internal Witness Support Policy, 16 September 1996, Item 15: Responsibility of Commanders.

^{lxxxv} See e.g. Electoral and Administrative Review Commission (QLD), *Report on protection of whistleblowers*, October 1991, paragraph 2.38.

^{lxxxvi} This common 'furphy' is easily answered by the observation that only the most naive of staff could believe that such reporting will, overall, improve their standing or be worth the stresses and discomforts involved; and this is supported by psychological research suggesting that officers with 'lofty executive ambitions' and capabilities were often less likely than others to report misbehaviour:

Miceli, MP, Near, JP, Characteristics of organisational climate and perceived wrongdoing associated with whistle-blowing decisions, *Personnel Psychology*, no 38(3), 1985, p 539, citing Hacker, A, Loyalty and the whistleblower, *Across the Board*, no 15, 1978, pp 4-9, 76.

This research has been supported by observations in Australia that 'utilitarian approaches are probably the least likely ethical reasons used for deciding to be a whistleblower. A utilitarian or other consequentialist approach is almost bound to come to the conclusion that whistleblowing is not worth the risk': Vincent, M, Welcome Disclosure: the decline of whistleblowing as an ethical act, *Alternative Law Journal*, vol 20 no 2, April 1995, p 75.

^{lxxxvii} Fox, R G, Protecting the Whistleblower, *Adelaide Law Review*, vol 5 no 2, 1993, p 159.

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CASE STUDIES

1. The **first ever** complaint, 1981-85
2. Operation **Alien (Part 1)**, 1991-92
3. Operation **Alien (Part 2)**, 1991-95
4. Operation **Urchin**, 1991-92
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9. Operations **Hoodwink & Moray**, 1995-96
10. A recent case, 1996-97

CASE 1. THE FIRST EVER COMPLAINT, 1981-85

Harassment in response to discipline

In 1981, an AFP Sergeant visited a NSW sub-regional office in the course of his duties and witnessed misbehaviour and unprofessional work practices by junior officers, including drinking alcohol in the office while on duty.

Investigation

He reported this, but no action was taken. He drew the matter to the attention of more senior managers. An internal investigation was held but focussed wrongly on the Sergeant's own personality and professionalism. He was ostracised by colleagues and subordinates, and his professional reputation unjustly damaged.

External investigation

On 1 May 1982 - the first day of operation of the *Complaints (Australian Federal Police) Act* - the Sergeant complained in person to the Ombudsman's office. This was the first ever complaint about the AFP to be received and reviewed by the Ombudsman.

The complaint of inadequate investigation and harassment was promptly and thoroughly investigated by a Special Investigator reporting to the Ombudsman and the Commissioner. This investigation vindicated the Sergeant and led to disciplinary charges against the officers guilty of the misbehaviour.

Result

The investigation recommended, and the AFP accepted, that substantial compensation be paid to the Sergeant, who had developed a stress-related illness due to his treatment and so was then retired on invalidity grounds. The former Sergeant also separately lodged his own legal claim.

Unfortunately, it was May 1984 before the AFP and Attorney-General's Department offered to settle the legal claim - which the former Sergeant felt unable to accept, as it was conditional on a release from all claims including non-financial damages outside the sum offered. After further involvement from the Ombudsman, the AFP and Attorney-General's Department finally offered a substantially larger settlement in July 1985.

Ref: Commonwealth Ombudsman Annual Report 1984-85, pp.160-161.

CASE 2. OPERATION ALIEN (PART 1), 1991-92

Theft from commercial premises on duty

On 28 September 1991, on a Saturday night late shift, an AFP Constable witnessed two more senior Constables stealing furniture and equipment from two garden centres in the Belconnen area of Canberra.

Investigation

The next Monday, he asked his supervising Sergeant to transfer him to a new squad. When pressed for an explanation, he explained what had occurred. After his own enquiries, the Sergeant reported the matter to Internal Investigations who immediately commenced an inquiry.

Two other officers came forward with supporting evidence, including one who heard a specific theft was under investigation, and on reflection, recalled being present (see opening quote to this report). Three officers were criminally charged; two pleaded guilty and resigned or were dismissed.

Support, harassment and no harassment

AFP management supported the officers who came forward. However, this included - within two days of the investigation commencing - a senior officer naming the first Constable in front of a station parade, for the purpose of ordering that there be no reprisals.

The officer advised the Constable to 'tough out' any harassment, and he agreed; later he requested a transfer, but was talked out of it. He reported continual low-level harassment for five months: ostracism by all but good friends, property going missing, lack of back up on duty, and harassing phone calls to his home (a voice imitating a gunshot). When he finally requested action, supervisors suggested he was becoming inappropriately paranoid. However the welfare officer and psychologist found his stress to be normal and assisted him to gain a transfer.

The second Constable was three years senior, openly informed colleagues he had come forward, and acknowledged to investigators he was not as worried about colleagues' attitudes. He reported no harassment.

Result

Both Constables are still AFP officers. The first Constable has reported no further harassment since 1992.

Refs: Ombudsman C/92/00177, 178; AFP II 912/30028, 30, 37, 38, 54 (Alien et al).

CASE 3. OPERATION ALIEN (PART 2), 1991-95

Alleged theft from commercial premises on duty

In June 1991, a supermarket was burgled in Belconnen, Canberra. There was suspicion that the first police to the scene may also have stolen some alcohol. A junior Constable heard about this story secondhand.

Investigation

When further thefts came under investigation some months later (see Case 2), this Constable mentioned the story to his supervisor, who appropriately informed the internal investigators. The Constable was then directed to repeat the story again, becoming the third officer to provide supporting evidence, albeit secondhand.

The allegation eventually proved incapable of determination.

Harassment

During a late shift soon after, three colleagues confronted the junior Constable on a back road, demanded his silence on matters out of his knowledge, and said they no longer trusted him. The Constable reported low-level harassment from then on, including ostracism and colleagues making gunshot noises behind his back. He sought and received a transfer, but claimed the harassment continued, including radio interference and lack of back up, because his position involved ongoing contact with Belconnen officers.

The Constable acknowledged he had a working style that often brought him into conflict with colleagues, but nevertheless claimed ongoing lack of understanding from managers, and inappropriate responses to his complaints, including attacks on his mental health.

Result

The Constable's appointment was terminated early in September 1995, in the context of a separate internal investigation (see Operation Poetic). However he maintains the AFP treated him poorly as a result of his whistleblowing.

CASE 4. OPERATION ACE, 1991-93

Misappropriation of suspected drug money (possible bribe)

On 29 November 1991, a probationary constable and his Sergeant were called to Sydney airport to investigate a man trying to leave the country with illegal hidden cash. The Sergeant interviewed the suspect and seized the money, but two days later returned it and let him leave.

The Constable said he never understood why the man was not charged. However, he later discovered records indicating his Sergeant had only confiscated and lodged US\$15,200, when his notes of the incident said US\$21,000 was seized - a possible misappropriation of about US\$6,000.

Investigation

The Constable said nothing until June 1992, when asked about the incident by a colleague. He was close to the end of an extended probation and feared his appointment would not be confirmed. He eventually reported the incident to Internal Investigations. In the meantime, the Sergeant himself had heard about the allegation, and also reported it, denying it.

A preliminary investigation concluded in October 1992 there was "considerable suspicion" that the Sergeant had misappropriated the money. Internal Security & Audit investigated further, but eventually concluded (January 1994) that the matter was incapable of determination. Following a fresh complaint, the Ombudsman's office reinvestigated the matter in 1996, and found the allegation of theft of the money substantiated.

The Director of Public Prosecutions agreed the events were highly suspicious, but both he and the Australian Government Solicitor found insufficient evidence to support criminal or disciplinary charges. The AFP is reassessing the Sergeant's suitability for employment.

Result

The Constable's extended probation ended in October 1992 and he was not reappointed. There were a number of reasons - some predating the airport incident - but another officer said the Sergeant pressured him to put in an adverse report on the complainant, an adverse report from the Sergeant himself was a key part of the termination, and two other reports on the Constable also made adverse references to the internal investigation.

Refs: Omb C/96/11704, Report Mar 1997; AFP II 923/30007, ISA 92/50097 (Ace).

CASE 5. OPERATION URCHIN, 1991-92

Conspiracy to import cannabis

On 21 October 1991, an AFP Sergeant was approached by a Constable stationed in Cairns - a friend who had been best man at his wedding. The friend said he and a former AFP officer wanted to import \$500,000 worth of cannabis from Papua New Guinea.

The Sergeant did not initially believe his friend, who was isolated in the AFP and worried about his career. However the friend repeated the approach and asked the Sergeant to help. The friend had already stolen drugs and leaked information to a target in the lead up to the importation.

Investigation

The Sergeant reported the matter to his regional Assistant Commissioner. Within hours he was sent to Canberra, and after repeating the story to Internal Security & Audit was asked to assist by joining the conspiracy in an undercover role. He agreed.

During the two-month investigation, the conspirators arranged a plane to fly to PNG to buy the drugs and then return to Cape York. Arrests were made on 4 January 1992 as the plane went to leave. The Constable and former officer eventually pleaded guilty to criminal charges and were sentenced in the Queensland Supreme Court on 15 June 1993.

Minimal harassment : a good news story

The Commander, ISA began addressing witness protection early in the investigation, due to the serious charges and an assessment of likely retaliation by the Constable involved. Protection services were provided to the Sergeant and his wife at key times. After the charges were laid, in 1992 senior management arranged an overseas post for the Sergeant. This was subject to him being sufficiently experienced and suitable for the posting, but the arrangement was explicitly both for his protection and 'a reward for exemplary service'.

The Sergeant reported some low-level attacks on his reputation, from the office where he and his former friend first met (to the effect he was also guilty and 'sold out' his friend when the friendship went bad). However, he reported no other harassment in any form. He is still with the AFP.

Ref: AFP ISA 93/50020 (Urchin).

CASE 6. OPERATION NOVELTY, 1993-95

Assault in the police station

On 30 December 1993, a youth was arrested by a Senior Constable for making a grunting noise when three police drove past. The young man was not charged, but taken back to the station where his face was pushed against a wall by the Senior Constable, and he was kicked and forced to crawl on the ground making pig noises.

Investigation

The young man's father lodged a complaint that night. The complaint may have been difficult to substantiate, except that when Internal Investigations interviewed the other two officers, they supported the complainant's story.

The Senior Constable pleaded guilty to assault on 22 September 1994. Eventually, in September 1995, the AFP terminated his contract.

Harassment

Both witnesses reported low-level harassment - ostracism, adverse innuendo and 'being made to feel uncomfortable'. They took periods of leave, at least partly due to the stress caused. The more senior of the two also reported harassing phone calls, and interference with his wife's place of business, while the junior officer reported break-ins to his car and house.

The senior Constable also reported offers of support, including an early meeting with the Assistant Commissioner solely for that purpose. However, the junior officer complained that management was abrupt, e.g. by confiscating his weapon in case he might commit suicide.

A further internal investigation was held when the senior officer applied for a redundancy. The inquiry found the officers may indeed have been the subject of harassment, but could not identify evidence or the identity of anyone involved. It also found the AFP needed to provide 'proactive support' to internal witnesses rather than react to events as they occurred.

Result

The senior Constable left the AFP in June 1994 as a result of the events. The junior Constable transferred to Sydney and resigned after admitting unrelated misconduct in December 1994; but complained that most of his problems related to his unsympathetic treatment over the assault.

Omb C/94/191, OI/95/25, C/96/414; AFP II 934/20225, ISA 94/50061 (Novelty).

CASE 7. OPERATION GRAFT, 1994-97

Noble cause corruption - alleged false search warrant

In September 1993, detectives investigating a major drug ring discovered an AFP officer in Sydney was assisting the targets. Security was tightened. In February 1994, officers working on the operation throughout the country were directed to report any outside interest.

In February 1994, a junior detective in Brisbane was approached by a former supervisor, a Detective Sergeant, asking questions on the issue even though he was no longer on the operation. Suspicious of this, the detective and other colleagues then remembered behaviour by the Sergeant before he left the operation, which had seemed inexplicably unprofessional.

Investigation

The detective reported the Sergeant's approach to his team leader, as directed. It was then reported to Internal Security & Audit, who interviewed both the detective and a colleague about a range of the Sergeant's activities suspected to be consistent with corruption.

A number of allegations including the original breach of security were found substantiated. Criminal charges were also laid about another specific matter - it was discovered the Sergeant had breached procedure when taking a suitcase from a bus, to be searched for drugs, and then allegedly arranged for a false search warrant to be drawn up and backdated.

He and a civilian were charged with attempting to pervert the course of justice and are awaiting trial.

Result

The first detective separately applied for a transfer interstate, but when he returned to Brisbane on duty he reported some low-level harassment in the form of attacks on his reputation, including by quite senior regional management. He also reported support from other colleagues. He fully intends to remain with the AFP.

The other detective initially interviewed, took sick leave from July 1995, claiming illness due to both the Sergeant's original behaviour and regional management's inaction on it. After protracted negotiations he accepted an early termination and left the AFP reluctantly in early 1997.

Ref: AFP ISA 94/50023 (Graft).

CASE 8. OPERATION POETIC, 1994-97

Sexual harassment in the workplace

In June-August 1994, an ACT public servant working in the AFP's ACT Legal Services Branch observed serious sexual harassment by male officers towards other officers and staff. She reported this on her return to her employer. On 18 November 1994, the Commissioner met with female officers and staff to air and assess the issue.

Investigation

At the meeting, officers and staff confirmed the report, and Internal Security & Audit was tasked with a full investigation in January 1995. In all, 15 complainants came forward - three female officers, one male officer and 11 female staff. The "two main complainants" were two of the female police officers, subject to 20 of the 29 main allegations.

The investigation confirmed an environment of severe physical and verbal harassment, unchecked since before June 1993. In June 1995 the contract of the officer in charge was terminated early, followed by eight other officers.

Support, compensation and delay

The complainants were given supportive counselling, steps were taken to detect victimisation, and the investigation was conducted in consultation with the Human Rights & Equal Opportunity Commission. Ten complainants claimed compensation for their treatment in the branch.

Six claims were settled within a year, but the rest were delayed. These included the two main complainants, who complained to the Ombudsman about the delay in December 1996. They reported mixed experiences, including both support and lack of it from different managers, stress disorders, and difficulty continuing their careers. A large source of their distress arose from attempts by the AFP and Australian Government Solicitor to renegotiate the claims using counter-allegations about their own behaviour from the sacked officers.

Result

One of the two main complainants left the AFP in October 1995; the other is still with the AFP. In February 1997, the AFP retracted the counter-allegations, apologised and paid compensation.

Refs: Ombudsman C/96/23856 & 7; AFP ISA 95/50002 (Poetic), Legal 97/6243

CASE 9. OPERATIONS HOODWINK & MORAY, 1995-96

Use and abuse of anabolic steroids

In April 1995, a general duties Constable made enquiries into possession of illegal anabolic steroids, and was given an intelligence task on the subject. His enquiries confirmed what he already knew - a former colleague in a sensitive national area was heavily using steroids for body-building, despite adverse security and public safety implications.

Investigation

The Constable informed his supervisor and reported the issue to Internal Security & Audit. ISA commenced its own enquiries into steroid use by AFP officers, focussing on legality and public safety. ISA executed search warrants on four officers' houses, and found some issues substantiated. The investigation led to a new policy on abuse of pharmaceutical products (1 July 1996) and disciplinary action against one officer.

Harassment

The Constable finished his intelligence task and returned to general duties. However, after ISA's searches he reported low-level harassment including attacks on his reputation, interference with property and harassing phone calls. In November 1995, influenced by attitudes to the ISA inquiry, his squad members told their Sergeant they would no longer work with him - whereupon the Sergeant told him he would be transferred.

The Constable took sick leave and reported the events. He resisted pressure to return and instead accepted a transfer to another area.

AFP management began a further investigation into the harassment, in February 1996. The Constable approached the Ombudsman in May 1996 concerned about this investigation. It substantiated the harassment, but the Ombudsman's office also found serious deficiencies in way in which it was conducted, including two attempts to undermine the Constable's credibility by seeking adverse psychiatric opinions on his mental health.

Result

The officer is still with the AFP. Five officers and supervisors were disciplined as a result of the Ombudsman's review.

Refs: Ombudsman C/95/10086, C/96/8598, Report July 1997; AFP ISA 95/50043 (Hoodwink), II 956/30039 (Moray).

CASE 10. A RECENT CASE, 1996-97

Alleged sexual assault outside workplace

In July 1996, an AFP officer approached the ACT Sexual Assault & Child Abuse Team (SACAT) with concerns that her former partner - also an AFP officer - may have had an unhealthy interest in her young son from a previous marriage. She then contacted SACAT again and said her son had disclosed sexual abuse.

Investigation

SACAT interviewed the complainant (the boy) and then contacted Internal Investigations and referred the matter, also later providing assistance on request. The investigation led to a brief of evidence being submitted to the ACT Director of Public Prosecutions.

Victim liaison & support

The subject of the complaint lay outside the official duties of either the mother or her former partner as AFP officers. However, the case raised issues of practice and procedure for the AFP in dealing with officers (or their dependents) who have victim/complainant status in criminal proceedings against another AFP officer.

The mother complained to the Ombudsman that she and her son were disadvantaged by the fact the matter was handled as an internal investigation. She said the appropriate specialists (SACAT) were denied control of the case, and other standard procedures were not followed, including victim liaison requirements under ACT legislation, and liaison with interstate police about alleged offences in NSW.

She also complained about counter-allegations raised against her by the male officer, and said the process used to assess these left her unfairly exposed to a payback complaint.

The result

The male officer has since been committed for trial on a number of criminal charges. The Ombudsman's investigation found the standard of case management was not equal to the standard that would have been applied to an equivalent, completely external matter.

Refs: Ombudsman C/96/16875 & 18383, C/97/4961; AFP II 967/30006&9