A Fair and Effective Victoria Police Discipline System
LETTER OF TRANSMITTAL

To:

The Honourable the President of the Legislative Council

And

The Honourable the Speaker of the Legislative Assembly

This report is presented to Parliament pursuant to section 102J(2) of the Police Regulation Act 1958.

A modern policing service must have the highest level of ethical and professional standards among its members. One way standards are maintained and improved is by having an effective performance management and discipline system.

This report examines the current Victoria Police discipline system, and finds that it is archaic, punitive, bureaucratic, and slow. It fails to support the integrity of police members, undermines their well-being, impedes their professional development and hinders the effective management of Victoria Police.

Police have a unique and demanding role, but policing in Victoria is not so different from policing elsewhere. Recent reviews of police discipline systems in other jurisdictions, interstate and overseas, have been unanimous in recommending changes to radically reform the police discipline system, generally agreeing that it should be aligned with systems applicable in other employment areas.

The report acknowledges that the needs and requirements of the office of constable and policing services may require some specific adjustments or refinements from systems applicable to others in the public sector workforce, but makes recommendations based on re-aligning the Victoria Police discipline system with contemporary public sector employment practices. It identifies four fundamental changes necessary to reform the Victoria Police discipline system:

• Shift the focus from a punitive system bent on establishing guilt to one that concentrates on providing remedial assistance to individuals so that they can rectify their mistakes or bad habits and improve their performance.

• Simplify the system and remove the numerous intermediate sanctions for less serious misconduct that currently exist. If misconduct is not sufficiently serious to justify dismissal, the best means of getting someone do their job better in the future is not to punish him or her through a slow formal process, but to provide assertive management support that sets performance expectations to improve behaviour.

• Streamline and speed up the dismissal process, without compromising fairness to the individual facing dismissal. It is neither fair to an employee nor an organisation to have a long drawn out dismissal process. When the conduct is dishonest, criminal or otherwise inconsistent with the person remaining a member of
Victoria Police, or when performance improvement measures have failed, it should be straightforward for Victoria Police to dismiss the person.

- Ensure managers at all levels take an active role in managing people effectively and accept responsibility for setting expectations for those they manage, motivating and developing their staff and monitoring their performance.

The proposed scheme presents a number of significant implementation challenges for Victoria Police. In addition to the legislative change that will be required, the successful implementation of the proposals will require a fundamental change in attitude towards performance management and discipline. As Victoria Police moves from a punitive system to one focused on learning from mistakes and improving performance, a key to the success or failure of the reform will be how Victoria Police management, from sergeants to superintendents and above, implement the system and demonstrate by example the fundamental differences in the new approach. A cornerstone of the new system will be acceptance that a frank and open admission of an honest but reasonable mistake, will provide opportunities for a member to improve his or her performance, and will not work to the detriment of the individual.

Without a reformed performance management and disciplinary system, Victoria Police will be ill-equipped to meet the future needs of the Victorian community.

G E Brouwer
DIRECTOR, POLICE INTEGRITY
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GLOSSARY OF TERMS

ESD   Ethical Standards Department of Victoria Police
OPI   Office of Police Integrity
ROCSID Register of Complaints, Serious Incidents and Discipline
The Act *Police Regulation Act (Vic) 1958*
VPM   Victoria Police Manual

REFERENCES

The Inquiries referred to in this Report are:


The Kennedy Report - *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer, Final Report Vol II* (Perth, January 2004)


The Wood Report - *Royal Commission into the New South Wales Police Service,*

- *Interim Report* (Sydney, February 1996)

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1 Unless otherwise specified, any reference to a legislative section is reference to a section in the *Police Regulation Act 1958*
OVERVIEW

The overriding principle in considering disciplinary matters ... must be the enforcement of high standards of honesty, integrity and ethical behaviour in, and in connection with, the performance of policing duties.²

I endorse that principle and I do not consider that the Victorian system satisfies that test.³

A discipline system for Police has to serve three interests:

• The community, so it can have confidence police are honest, ethical and competent.

• The individual member, to ensure that a fair and just result is achieved.

• Victoria Police, to ensure that ethical and professional standards are maintained to the highest level, that poor performance is corrected and that any incompetent or corrupt police are removed.

To date, the balance between those interests in the Victoria Police discipline system is askew and has been heavily weighted in favour of those who have engaged in misconduct at the expense of the interests of the majority of members, Victoria Police as a whole and the community.

This imbalance arises both from the design of the current system and the way that it is applied and understood within Victoria Police. The result is that the processes in practice are slow, vastly over-engineered and poorly appreciated within Victoria Police. They encourage an adversarial relationship between members and management and do little to assist poor performers to improve. At the same time, the removal of corrupt or incompetent members is far too difficult. The end result is that everyone loses.

The defects in the system are well-known and widely appreciated. In a rare display of consensus, none of the submissions I received supported retention of the current Victoria Police discipline system. Each of the major stakeholders considered that fundamental changes were necessary.

In its submission, the Police Association of Victoria warns against “tinkering” with the current system and states its position “that the current discipline system should be entirely replaced with a contemporary model that deals with professional conduct”.

The Police Federation of Australia has similar views. Its submission states:

² Kennedy Report p205
³ A detailed analysis of the current discipline system, using case studies, appears in the section titled ‘The Slow, Broken, Convoluted Victoria Police Discipline System’. A detailed outline of the legislative provisions dealing with the discipline system is contained in Appendix Two.
Our view is that Victoria’s current punitive system, based on the traditional paramilitary approach, is not conducive to achieving best-practice police discipline in a modern police service.

The reasons for the discipline system’s failings arise from its design and history.

A Slow, Broken, Convoluted System

Within Victoria Police, the discipline provided is predominantly punitive and the system that delivers it is modelled on a court martial process.

Succinctly put, punitive discipline is:

constructed on an illogical premise: namely that an employee will get progressively better by being treated progressively worse.4

The court martial process used by Victoria Police to deliver discipline is extremely formal and, despite the absence of lawyers is legalistic. It is aimed at proving that a member of police has done something wrong so that he or she can be punished for it. It does not assist Victoria Police or the member to determine the cause of the problematic conduct, nor how it can be overcome. As a result, managers have little or no opportunity to develop modern managerial skills aimed at improving performance.

The system is extremely complex, if not convoluted or tortuous. Characterised by too many rules and too many punitive sanctions, there are overlapping elements and procedures that are very detailed, formal and slow. Not surprisingly, the objectives of the system are poorly understood and rarely achieved. Those who may not have done anything wrong are punished by the lengthy delays associated with resolving matters and wrongdoers can manipulate the system using avoidance tactics or escape punishment because the system is wrongly balanced in their favour.

How to Fix It?

In considering how to rectify or replace the existing discipline system I sought public submissions, interviewed numerous individuals and undertook an extensive review of police discipline systems in other jurisdictions, and discipline systems applicable to other workplaces.5

A number of police jurisdictions in Australia and overseas have recently commissioned their own reviews which found the same defects. Each made a number of recommendations based on similar principles.

4 RCMP External Review Committee, Sanctioning Police Misconduct – General Principles (Ottawa; Minister of Supply and Services Canada, 1991) p6
5 A detailed overview of what happens in other jurisdictions and workforces is contained in Appendix Five.
**How Unique are Police?**

One of the preliminary questions many of the reviews considered was whether the unique nature of policing requires a unique discipline system markedly different from that applicable to other workforces.

While police perform a special and important role in any community, the approach favoured by the recent reviews is to bring the police discipline systems within the “wider context of employment relationships”. I too, “cannot see any compelling reason for police officers to be treated differently” from others in the workforce.

Some of the reviews in other Australian jurisdictions suggest that the obligations placed on police should be greater and their rights less, than those applicable to others in the public sector workforce, owing to the obligations of police to the community and their extraordinary powers. A fairer and more equitable approach, in my view, is that a reformed discipline system should provide police with no significant benefits or disadvantages in comparison with those applicable to others in the public sector workforce, unless those benefits or disadvantages are clearly justified by the requirements of the office of constable or the particular needs of policing.

The Police Association of Victoria made a number of submissions and spoke extensively with my investigators. Their reform proposal was for the establishment of an independent Registration Board that would deal with discipline in relation to serious matters.

There is little doubt that the adoption of a Registration Board will be of great assistance to the training, education and professionalism (properly understood) of Victoria Police. The proposed Police Registration Board, should it be adopted, should have its own power to determine matters of educational and training requirements in addition to registration status.

However, these should be separate from the internal performance management and discipline arrangements within Victoria Police, which should remain the province of the Chief Commissioner and Victoria Police managers. I do not consider that a Registration Board’s involvement in internal disciplinary matters affecting Victoria Police would overcome any of the difficulties associated with the current system, in particular those associated with formal processes, managing poor performance and delays.

The preferred approach is based on that adopted by the recent reviews in other jurisdictions.

**A Way Forward**

Reviews in other jurisdictions recommended that most, or all, of the following seven factors would be necessary to reform the antiquated punitive systems that had also characterised the police discipline systems in other jurisdictions.

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6 Bazley Report, p204
7 Morris Report, p52
1. Reducing, or eliminating the differences between the discipline arrangements for police and other employees.

2. Reducing the number of sanctions and increasing performance development with a focus on rehabilitation.

3. Increasing local decision making and responsibility for discipline matters.

4. Linking the discipline system with the performance management system.

5. Reducing complexity and speeding up processes.


7. Streamlining and simplifying review and appeal rights.

These factors have formed the principles upon which my recommendations for reform of the Victoria Police discipline system are based.

In determining the nature of the new discipline system, I have favoured the positions recommended by the recent reviews into Western Australian Policing Service and the Australian Federal Police, which emphasise remedial management of misconduct or poor performance and dispense with punitive sanctions except for those deserving dismissal.

As a result, the recommendations I have made are intended to achieve a system that will:

• remedy the conduct of officers who can be assisted; and

• remove from employment those who cannot.

A Remedial Focus

With the proposed process, remedial action will be taken for all conduct and disciplinary issues other than those that indicate dismissal is appropriate.

The remedial approach to discipline does not mean ‘going soft’ on problem employees and abrogating management responsibility. On the contrary, its advocates and practitioners point out that one of its key benefits is to reinforce the accountability of managers, who, under the traditional punitive system, often avoid using punitive processes to deal with discipline issues.

However, a remedial approach is not without risk, particularly if managers are not adequately trained or are unwilling to use management skills to resolve staffing difficulties.

It will be essential for Victoria Police to appropriately train and resource managers and to institute processes that ensure the remedial approach is appropriately implemented and managed. OPI will also need to be involved to ensure that the remedial process is effective and is not exploited or misused.
The Dismissal Process

In the proposed model, none of the currently available punitive sanctions other than dismissal will be available. The dismissal process will commence if the conduct of the police member indicates that the person can or should no longer remain part of Victoria Police. This will be because of the nature of particular conduct, for example if the conduct is dishonest, criminal or corrupt, or because remedial action has been tried but been proven ineffectual.

The dismissal process should be conducted promptly and fairly. The recommended process is a ‘show cause’ process on the papers, similar to the processes used in the Australian Federal Police and in Tasmania. This will allow serious disciplinary matters to be resolved within months, rather than the years that it sometimes takes currently.

The review considered the need for the current ‘no confidence’ process for the removal of officers. Provided a prompt, objective and just dismissal process, such as the new process recommended in the report, replaces the current discipline process, the ‘no confidence’ process will be redundant and should be removed from the legislation.

Reviews and Appeals

Outstanding amongst the significant defects with the current system are the numerous, inconsistent, excessively formal and slow review and appeal processes available. Their complexity and lethargy require replacement with simplicity and promptness. The proposed review and appeal processes mirror those available to others in the workforce and are modelled on those available to public servants.

It is recommended that a new appeal process for dismissed police be instituted. For technical reasons, Victorian police are currently denied the opportunity to seek relief on the basis of a ‘harsh, unjust or unreasonable’ dismissal. To redress this deficiency I recommend that the current jurisdiction provided to the Public Sector Standards Commissioner to review the dismissal of other public sector employees should be extended to include the Victoria Police members.

It is, however, recognised that it may not be in the public interest for the Victoria Police to reinstate a member whose employment has been terminated and in whom the Chief Commissioner has lost confidence. A mechanism is proposed for the Chief Commissioner to declare that a member who has been dismissed will not be eligible for reinstatement should he or she successfully challenge the dismissal. However, if a dismissed person succeeds in his or her claim that the dismissal was harsh, unjust or unreasonable, he or she will be entitled to financial compensation. This is considered to be preferable to the process in place for members of the Australian Federal Police which simply allows the Commissioner to make a declaration which deprives members of access to any relief on the basis of ‘harsh, unjust or unreasonable’ dismissal without any recompense.
Implementation Challenges

In addition to legislative reform, a number of significant changes will have to occur within Victoria Police as it moves from a rigid and punitive discipline system to a performance management approach. Substantial work will have to be done to ensure Victoria Police managers of all ranks are equipped to adopt an assertive approach to improving performance in those they supervise. The responsibility for driving change will be with the ranks of inspector and above. However, much of the responsibility for implementing change will be with sergeants and senior sergeants. They are responsible for directing and instructing operational police about what they should be doing and how they should be going about their duties. In some respects, the sergeant is the most important rank in Victoria Police; it is potentially one of the most influential. Those who hold the rank have not only significant operational experience, due to their organisational position as supervisors of those who are at the “coal face”, they can mould the style of policing and set the ethical and professional standards expected of new recruits and those at junior ranks.

The proposed disciplinary system focuses on performance management. This means that sergeants and senior sergeants must accept responsibility for their role as people managers. They will have to take an active role in the development of their staff, not only to ensure that achievers continue to improve and acquire skills and experience, but also to identify those who are underperforming or breaching acceptable standards. Sergeants will have to use a range of techniques to work with those whose conduct is not up to standard to ensure their performance improves. The sergeants’ and senior sergeants’ own supervisors, inspectors, superintendents and the like, will have to actively manage and monitor those who report to them, setting performance goals and expectations and monitoring them to ensure performance indicators such as complaint statistics are at a par with those in other police regions.

The Fisher report into the review of the Australian Federal Police noted that:

*what is really needed is appropriate motivational management. This leads, in relation to policing, to a renewed emphasis on personnel management and less interest in the alleged motivations stemming from military type discipline…The managerial model of professional standards uses relatively minor infractions by employees as an opportunity to improve that person’s performance and review the systems and processes that might have contributed to the behaviour in the first place. It involves creative solutions and the development of more imaginative and preventative responses to poor performance. It requires reflection not only on the actions of the employee but also on situational issues, such as the adequacy of the training provided and the level of management and supervision that were in place at the time.*

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8 Fisher Report, p59
I suspect many officers and sub-officers within Victoria Police will be ill-equipped to discharge some of their new responsibilities under the proposed reforms. To date suitability for promotion has, for many, been judged on an individual's operational skills and experience. Comparatively little attention has been given to the management skills required to supervise, motivate and develop staff. It is essential that this imbalance is addressed so that Victoria Police can shed the remaining influences of its militaristic, authoritarian and punitive past and move forward, equipped to meet the challenges of contemporary policing.
### THE AIM

#### Simplicity and Speed

A simple system leads to consistency, flexibility, easy understanding, and relatively speedy resolution of cases. The existing Victoria Police disciplinary systems are complex, convoluted, inconsistent, prescriptive and inflexible.

#### Minimum Formality

Formalised systems lead to the increase of legal technicalities and associated cost and delay. They are also likely to be adversarial, inhibiting speedy resolution, behavioural change and learning from mistakes.

#### Distinction between Remedial and Punitive Approach

An effective disciplinary system needs to be one which places greater emphasis or remedial measures by management methods and reserves punitive action for conduct or behaviour of the most serious kind, or behaviour which cannot be remedied.

#### Management Empowerment

An effective discipline system needs to adopt modern management techniques and needs to encourage and empower managers to manage. That includes expecting and requiring managers to identify potential problem issues with staff and to devise means to assist staff to overcome those issues before identified poor conduct becomes ingrained and leads to a disciplinary issue.
BACKGROUND

Context

Policing bodies have a number of devices to meet the challenge of providing high quality ethical and professional services, but predominant among them is a discipline system. It is essential, for the well-being of all police, as well as the communities that they serve, that a police discipline system works and works well.

As at June 2006, Victoria Police comprised over 11,000 police each of whom is responsible for providing “a safe, secure and orderly society by serving the community and the law”.

The powers that police hold and exercise, while designed and intended to assist police to discharge their responsibilities, can, if improperly used, reduce public confidence in police, decrease respect for the law, and increase fear amongst a community, thus destabilising it.

It is, therefore, important that police are not only trained to conduct themselves with the highest ethical and professional standards, but also managed in a way that continues to uphold those standards. To achieve these purposes, it is essential that an effective discipline system is in place. An effective discipline system fulfils the essential function of supporting and enforcing ethical and professional standards. A defective discipline system places both the integrity and the efficiency, not to mention the morale, of police at risk.

Origins of this Investigation

The police discipline system has undergone various modifications since policing commenced in Victoria in 1853, yet its effectiveness remains the subject of concern.

In late February 2007, I tabled my report Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct. That report revealed that a number of police, despite evidence of their unsuitability for the job, appeared to have escaped the discipline system and went on to have long and disreputable careers in Victoria Police.

I therefore determined to conduct an investigation into the Victoria Police discipline system on my own motion. I considered the investigation would provide an opportunity to identify relevant issues and consider them in a comprehensive way, rather than adopting a piecemeal approach.

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10 Office of Police Integrity, 2007 Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct
11 A copy of the Own Motion Determination and methodology adopted by the investigation is attached as Appendix One
The investigation has been well-timed, as a number of other jurisdictions both in Australia and overseas have recently reviewed their police discipline systems and, in some instances, have made significant alterations. My investigators examined the rationale for those reviews as well as the changes made or recommended, a number of which are capable of adoption or adaptation to benefit Victoria.

Without detracting from the importance of the discipline system, it is but one of the systems in Victoria Police aimed at ensuring the highest ethical and professional standards. Other systems, particularly the complaints and the performance management systems, interrelate with elements of the discipline system, but an extensive examination of systems that relate to the discipline system were beyond the scope of this investigation. They are only discussed in this report where they interrelate with the Victoria Police discipline system.

**Why do we have Discipline Systems?**

All organisations have discipline systems. Although not necessarily all called ‘discipline’ systems, all organisations have systems that:

- set out rules or principles about appropriate standards of conduct or behaviour expected of staff; and
- establish processes for dealing with non-compliance with those rules and what to do when they are breached.

There are good reasons for organisations to seek to ensure their employees act in accordance with established standards. First of those reasons in public bodies, particularly policing bodies, is the maintenance of public confidence in police as well as the application of the rule of law. Brennan J, as he then was, observed:

> Internal disciplinary authority over members of the police force is a means - the primary and usual means - of ensuring that individual police officers do not jeopardize public confidence by their conduct, nor neglect the performance of their police duty, nor abuse their powers. The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency.\(^{12}\)

There are also other reasons why staff need to comply with standards as failure to do so can have negative consequences concerning organisational performance, productivity and safety.

Discipline systems are usually formalised in some way. In public sector organisations, the discipline system can be formalised in whole or in part by legislation. Discipline systems can also be formalised in industrial instruments and organisational policies and procedures that form part of an employment contract (explicit or implied). The Victoria Police discipline system is formalised partly through legislation and partly through Victoria Police Manual (VPM) Instructions.\(^{13}\)

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\(^{12}\) Police Service Board v Russel John Morris and Robert Colin Martin (1985) 156 CLR 397

\(^{13}\) Police Regulation Act 1958 ss69 – 86; VPM Instructions 210 - 211
Prevention is Better than Cure

Disciplinary processes are properly regarded as a means of resolving a problem, but what is often forgotten is that the use of a disciplinary process is also an expression of failure. Not only failure of the individual concerned but, more importantly, failure by an employer to identify and correct poor performance or attitudes before a person’s conduct develops into an issue that warrants disciplinary action.

The most important way to ensure appropriate standards of behaviour in any organisation is not through a discipline process, but through the management skills of its supervisors. This is no less important for policing services than for any other employer.

An effective supervisor who can detect potential poor conduct or disciplinary issues and, through good leadership and formal and informal management techniques can ‘turn them around’ will provide a greater benefit to an organisation, the individual and the community than the most rigorous application of disciplinary processes.

However, no matter how good a supervisor may be in bringing out the best in his or her staff, most organisations need disciplinary processes to support performance improvement systems.

What is an Effective Disciplinary Process?

The object of a good disciplinary process, in broad terms, is to ensure compliance with behavioural standards by assessing and resolving allegations of poor performance or misconduct.

There are three elements of a good disciplinary process. The first two are self-evident:

- It must be fair to both the employee and the employer.
- It must operate promptly. A delayed outcome with lingering uncertainty is often stressful for the employee concerned and may well be worse than the penalty itself. It is also a potential cause of dysfunction within the workplace.

The third item is qualitatively different from the first two and concerns how a breach is dealt with or resolved.

In the most serious cases, resolution of a breach of standards will require the removal of the relevant person from the organisation. In less serious cases, resolution should involve measures intended to eliminate future breaches.
A discipline system intended to resolve less serious cases of misconduct will involve either a punitive or remedial process.

**Punitive Processes**

Punitive disciplinary processes usually involve formal and very prescriptive procedures that are intended to punish the employee and deter him or her (and possibly other employees) from engaging in similar behaviour in the future.

As the Full Federal Court has said, punishment for other reasons, such as denunciation or retribution, is not appropriate for a disciplinary system:

> the purpose of a disciplinary system within a professional organisation is: to protect the public, to maintain proper standards of conduct and to protect the reputation of the organisation. It is not to punish.\(^{14}\)

The nature of the organisation impacts on the disciplinary style adopted. In bodies such as police services, the management style has been one of ‘command and control’. Organisations which run on these principles tend to have highly prescriptive rules and processes, strongly hierarchical structures and relatively centralised decision-making authority.

It is therefore no surprise that traditional police discipline systems have been punitive and very formal and centralised. The laying of formal charges and the threat of punishment was seen as an important means of reinforcing authority.

Practical experience as well as academic studies have questioned whether this traditional approach produces an effective workplace or workforce and whether it does more to create an adversarial and difficult climate than one which is cooperative and responsible.\(^{15}\)

Other difficulties associated with punitive discipline systems include:

- **Abdication of responsibility**: managers see the processes as too difficult, disruptive and personally confronting and therefore avoid using them. Subject employees will, understandably, attempt to stave off possible punishment by lodging counter-claims, or by disputing the legitimacy and fairness of discipline procedures and decisions. In addition, where a discipline system is controlled centrally, managers will transfer the responsibility for their difficult staff to the central discipline management, thereby avoiding any opportunity of resolving the issues by the use of management techniques;

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\(^{14}\) Hardcastle v. Commissioner of Police [1984] 53 ALR 593, 597

• **Time and resource intensity**: the adversarial nature of the process requires formalised, time consuming processes; and

• **Poor workplace/industrial climate**: the competitive, ‘top down’ relationship leads to an adversarial climate in the workplace emphasising demarcations and disputes between managers and employees, leading to decreased employee satisfaction and effectiveness.

**Remedial Processes**

This alternative is very different to a punitive disciplinary process. A remedial disciplinary process is managerial and does not involve adversarial, court-like procedures. Rather than the imposition of progressively harsher punishments, progressively interventionist strategies are used to support employees to meet required standards. The focus on punishment is replaced with a focus on rehabilitation and encouragement to do better.

The remedial approach to discipline does not mean ‘going soft’ on problem employees and abrogating management responsibility. Remedial processes are seen to avoid some of the difficulties associated with punitive processes although they can carry with them their own dangers, particularly if managers are not adequately trained or are unwilling to use management skills to resolve staffing difficulties.

The remedial approach to discipline does not mean ‘going soft’ on problem employees and abrogating management responsibility. On the contrary, its advocates and practitioners point out that one of its key benefits is to reinforce the accountability of managers, who, under the traditional punitive system, often avoid using punitive processes to deal with discipline issues.

The remedial discipline model, however, is not a model that can be used exclusively to deal with all disciplinary difficulties. Every discipline system will always require elements of the punitive approach to, at least, provide a means to terminate the employment of an unsuitable employee.

Table 1 summarises and compares the punitive and remedial systems and demonstrates some of the weaknesses of a solely punitive system.
Table 1: Comparison of Punitive and Remedial Discipline Approaches

<table>
<thead>
<tr>
<th>“Non-punitive discipline requires an alteration to the entire corporate culture”</th>
<th>Punitive</th>
<th>Remedial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objective</td>
<td>Force compliance with employer’s rules and policies</td>
<td>Develop employee’s sense of responsibility and commitment</td>
</tr>
<tr>
<td>Desired outcome - Employee</td>
<td>Comply with rules to avoid trouble</td>
<td>Fulfil responsibilities</td>
</tr>
<tr>
<td>Desired outcome - Employer</td>
<td>Punish problem employee</td>
<td>Find solution to problem behaviour</td>
</tr>
<tr>
<td>Issue focus</td>
<td>Employer’s rules</td>
<td>Employee’s responsibilities</td>
</tr>
<tr>
<td></td>
<td>Problem employee</td>
<td>Employee’s problem</td>
</tr>
<tr>
<td></td>
<td>Past conduct (condemnatory)</td>
<td>Future conduct (affirmative)</td>
</tr>
<tr>
<td>Dynamic</td>
<td>Combative</td>
<td>Cooperative</td>
</tr>
<tr>
<td></td>
<td>Top-down (‘adult-child’)</td>
<td>Horizontal (‘adult-adult’)</td>
</tr>
<tr>
<td>Process response</td>
<td>Imposed</td>
<td>Agreed</td>
</tr>
<tr>
<td></td>
<td>Act on employee</td>
<td>Act with employee</td>
</tr>
<tr>
<td>Anticipated employee response</td>
<td>Injured sense of self worth</td>
<td>Feel respected</td>
</tr>
<tr>
<td></td>
<td>Hurt; angry; resentful</td>
<td>Concerned</td>
</tr>
<tr>
<td></td>
<td>Defensive</td>
<td>Open</td>
</tr>
</tbody>
</table>

The recent investigations and reforms to police discipline systems in other jurisdictions are examined in some depth in Appendix Five. But for the moment, it is worth noting that in each jurisdiction (New South Wales, Queensland, the Australian Federal Police and Western Australia, the UK and New Zealand) recommended reforms considerably expand remedial processes and reduce punitive elements.17

16 Based on Chapter 6 of Employee Discipline Policies and Practices, James R. Redeker, 1989
17 See Appendix Five.
THE SLOW, BROKEN, CONVOLUTED VICTORIA POLICE DISCIPLINE SYSTEM

Each of the submissions received from major stakeholders in the course of this review was critical of the existing Victoria Police discipline system and called for it to undergo a major overhaul.

The discipline system in Victoria Police is extremely complex and convoluted, if not tortuous. It has numerous elements, some of which overlap. Procedures and processes are detailed, formal, and slow, and provide multiple opportunities for appeal. Some of those processes are based on legislation, others are based on quite complex Chief Commissioner Instructions. As a result, the system is neither user-friendly nor easy for anyone outside Victoria Police to understand.

Disciplinary processes can be applied to police by way of a number of processes:

- assertive performance management of less serious misconduct through a process called the Management Intervention Model;
- formal disciplinary processes;
- the Chief Commissioner's lack of confidence process for the dismissal of police not suitable to remain members of Victoria Police;
- summary dismissal powers regarding Probationary Constables.

In addition the Governor in Council may dismiss the Chief Commissioner, Deputy Commissioners or Assistant Commissioners.18

Of those processes, the Management Intervention Model is the newest. Unlike the other processes, it seeks to provide remedial assistance rather than punitive sanctions for misconduct matters. Yet its application is limited; it is largely reactive rather than proactive, focusing on resolving complaints about service delivery, performance management or less serious misconduct matters, rather than performance improvement. The bulk of disciplinary matters go before one of the other processes, each of which is punitive, very formal, and although lawyers are generally not admitted, processes are overly legalistic and encourage an adversarial relationship between management and staff.

A detailed examination of the legal and policy framework applicable to Victoria Police disciplinary processes is attached to this report as Appendix Two. The simplified pictorial representation in Figure 1 will provide some appreciation of the system's labyrinthine nature. Some of the problems with the system are discussed in the following sections.

18 Police Regulation Act 1958 ss4(1) & (2)
Figure 1: Current Victoria Police Discipline System

Note: the Supreme Court or the Police Appeals Board may remit matters back to each other or to the Commissioner. In some circumstances members who have been dismissed may be reinstated.
Managers Not Managing

Effective managers through leadership, example and direction take assertive steps to address the weakness or poor performance of their staff before bad behaviour becomes entrenched. Early intervention enables a poorly performing employee to learn from his or her mistakes and undergo training if necessary to equip the person to do his or her job better.

Many Victoria Police managers themselves seem ill-equipped to effectively manage their staff. The following case study demonstrates multiple lost opportunities for intervention by an effective manager.

Case Study One

A Detective Sergeant was involved in the collation of the prosecution brief in relation to a serious sexual offence. Almost three years after the alleged incident, and following a number of flaws in the investigation, the brief was not proceeded with due to the substandard collation of evidence.

Following a complaint to OPI by the victim of the alleged sexual offence some four years after the original incident, OPI investigated the matter and recommended, amongst other things, that the Detective Sergeant be subject to disciplinary proceedings.

ESD accepted OPI’s recommendations and commenced a disciplinary investigation during which it appeared that the same Detective Sergeant was responsible for supervising and endorsing another two briefs of evidence. Due to inadequacies in the briefs and inordinate delays, the prosecutions were eventually withdrawn in each of the cases. In one case the withdrawal of the prosecution resulted in a five-figure sum of costs being awarded against Victoria Police. Prosecutors who withdrew the three briefs identified significant defects; the briefs “lacked fundamental points of proof”, investigations and compilation of evidence were deficient and “exceeded acceptable time frames”, and “contained defects indicative of a poor level of scrutiny by supervisors”.

The ESD investigation found that the Detective Sergeant was careless in the discharge of duty and engaged in conduct that was likely to diminish confidence in the Victoria Police. As a result the Detective Sergeant was issued with an Admonishment Notice.

The Detective Sergeant sought a review of the admonishment. The Reviewing Officer found that, aside from the inadequate investigation into the alleged sexual offence, the Detective Sergeant had no control over the other matters and that responsibility for overseeing the three briefs lay with the officer in charge at the time. The Reviewing Officer recommended that the Admonishment Notice be withdrawn, and that the matters be dealt with by way of the Management Intervention Model.19

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19 See para 3 ff Appendix Two
The admonishment was withdrawn six months after it was issued, and six years after the complainant’s allegation of sexual assault. The Detective Sergeant was placed on a performance improvement plan as part of the management intervention. OPI’s final review of ESD’s disciplinary investigation in late 2006 recommended consideration be given to re-issuing the Admonishment Notice in relation to the conduct of the investigation into the serious sexual assault allegation. At the time of writing, the matter is still under consideration by Victoria Police.

Comment: This case study shows persistent management failure in identifying and dealing with an ongoing problem. There was no evidence that the Detective Sergeant’s supervisors took any interest in whether the Detective Sergeant could competently meet the requirements of the job. There is no evidence that they provided feedback or training on how to rectify the problems with the Detective Sergeant’s supervision of investigations or management of the briefs. It is not until OPI drew attention to the defects in the first investigation that anything was done. The sanction applied was completely ineffectual, as, not only was it the subject of challenge, it occurred six years after the original allegation. Early corrective action through assertive management intervention may have been appropriate, but it was too late.

When it is operating effectively, performance appraisal can often resolve performance issues before they develop into disciplinary issues. The performance management processes of Victoria Police hinder this essential first-line preventative role. The formal performance assessment process in relation to senior sergeants and below, the Competency Assessment System, is not a continuous assessment system. Competency assessments are currently conducted biennially leaving staff unassessed in every second year. Victoria Police advise it is proposed to bring forward competency assessments so that they take place annually. They will be linked to progression payments. I am concerned that attaching a monetary incentive to this ‘one-off’ annual assessment process may cause minor infractions to be overlooked. In most other organisations, performance assessment is a continuous and cyclical process involving ongoing dialogue between staff members and supervisors so that weaknesses and successes are recognised when they arise and can be dealt with through training, direction or reward and recognition in a timely way.

Furthermore, unlike the performance assessment processes in other organisations, assessments under Victoria Police’s system must be ‘evidence-based’. This means that information that identifies an employee’s level of competence cannot include a supervisor’s “opinion” or subjective assessments.20

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20 Definition of “evidence” and Part 5 in VPM 305-1 “Performance Assessment”
Not surprisingly, the management of underperformance within Victoria Police is complex and formal.\textsuperscript{21} Supervisors have a central role, providing counselling at the local workplace and taking responsibility for developing a Performance Improvement Plan. Failure to improve under a plan requires a demonstration of proof as such failure can be used as a precursor to proceedings to terminate employment.\textsuperscript{22}

In cases where the evidence is more circumstantial than direct, the ability of the processes to provide solutions in relation to members is limited. Case Study Two is an example of where the systems in place did not allow the early identification and possible rehabilitation of a member with an excessive number of unsubstantiated complaints, but apparent violent predilections, who denied doing anything wrong.

**Case Study Two**

Four years after joining Victoria Police, a Constable began being the subject of complaints. During the following three years, there were ten complaints made about the Constable. Largely of a violent nature, complaints included allegations of assault such as kicking, striking, punching and striking with a baton, verbal abuse, unlawful arrest, property damage and racial abuse.

These complaints had a number of common features:

- many involved arrests for drunk and disorderly behaviour;
- all the alleged incidents took place either solely or primarily within police premises; and
- all the complaints were investigated and found to be either unsubstantiated or unable to be determined. Medical evidence was frequently inconclusive.

After a number of the complaints had been finalised, the Constable was counselled, but as none of the complaints had been substantiated, no disciplinary action was taken.

In the sixth year of the Constable’s service, after the lodgement of the eleventh complaint and in an attempt to address management concerns about the number of complaints received about the member, the Constable was transferred to non-operational duty for six months. However, before the expiration of the six-month period, the Constable applied and was approved for transfer to another police station, effectively circumventing the final three months of her non-operational placement and successfully undermining the only management action that had been taken in response to the Constable’s performance issues.

Over the next nine years, a further eleven complaints were received against the Constable including assault by punching, choking and kicking, verbal abuse, and threats. Many (but not all) complainants had prior criminal records and all complaints were found to be either not substantiated or unable to be determined.

The Constable’s complaint record regarding violent action was disproportional in relation to other police with similar duties. Yet there was no ongoing management or monitoring of what

\textsuperscript{21} VPM Instruction 305-2, “Management of Under Performance”

\textsuperscript{22} See Police Regulation Act 1958 s82 – discussed at para 39 ff Appendix Two
appears to be the Constable’s predilection for violence. Instead, the Constable was promoted to Senior Constable despite having been the subject of in excess of 30 complaints of assault relating to the use of violence against members of the public and around 20 complaints of verbal abuse including threats and intimidation. A further 20 or so allegations relate to general misuse of power or poor quality policing.

Comment: With one exception, this Constable’s supervisors persistently and consistently failed to recognise that even though none of the complaints had been substantiated, the complaints about the Constable when viewed together demonstrated an obvious pattern of behaviour that was inconsistent with inspiring public confidence in police. The Constable was able to thwart the one supervisor who took steps to modify the Constable’s behaviour by transferring to another Police Station. The performance management and disciplinary processes in this case substantially failed to recognise what appears to be a significant attitude problem or to put in place effective methods of assisting the Constable to cease that behaviour, or cease to be a member of Victoria Police.

Performance appraisal needs to operate continuously and not just on the basis of proven fact, but on the judgement and opinions of a skilled and observant supervisor who accepts responsibility for improving the performance and development of staff under his or her supervision.

The focus on proving facts about performance hinders the effectiveness of both assessments about competency and the management of underperformance. It adds an adversarial component to both processes and limits the opportunities for open dialogue about strengths and weaknesses that could encourage members to fully cooperate and engage with either process, and to both build on their strengths and learn from their mistakes to improve their performance.

To improve the benefit of the performance management process to both individual police as well as Victoria Police as a whole, I consider that Victoria Police should review the current systems for assessing competency and managing underperformance. Victoria Police may wish to seek the assistance of the State Services Authority in the conduct of the review. The review of the current systems for assessing competency and managing underperformance should be aimed at providing an effective system for regular opportunities to appraise the performance of individual police and one that allows:

- Identification of strengths to assist the individual’s skill and career development and advancement through the ranks; and
- The early identification of measures that address actual or potential performance or behavioural difficulties, and will assist the individual to overcome those difficulties.
should take into account performance assessment and management systems used by other organisations and modern performance improvement practices. The aim of the review should be to provide an effective system for regular opportunities to appraise the performance of individual police and one that allows:

- Identification of strengths, to assist the individual’s skill and career development and advancement through the ranks; and
- The early identification of measures that address actual or potential performance or behavioural difficulties and will assist the individual to overcome those difficulties.

Too Many Rules

The Victoria Police discipline system can be characterised by its formal complex trial like processes. The formal approach, in addition to being an ineffective means of improving policing, also brings with it a number of practical difficulties and weaknesses, including the bane of any discipline process: delay.

In its submission, the Police Federation of Australia put the issue succinctly:

Today, police operate under massive over-regulation. Volumes of instructions and policies, as well as thousands of pages of legislation and a range of government bodies, oversee them. This brings about a discipline procedure which places its greatest significance on blame – and, in turn, a low trust environment.

The Victoria Police submission also draws this connection:

Discipline has tended to be prescriptive, increasingly legalistic and reactive, responding to new circumstances by imposing further rules and restrictions on behaviour. A by-product is that it can contribute to a culture of risk aversion and avoidance behaviours.

Unnecessary, Punitive Sanctions

In addition to being far too complex, the primary difficulty with the Victoria Police discipline system is its clear and obvious punitive emphasis. The discipline system incorporates a considerable number of punitive sanctions. These include:

- Demotion
- Reduction in salary
- Admonishment
- Reprimand
- Fines
- Good behaviour bonds
- Ineligibility for promotion
- Transfer
- Dismissal.

23 Police Regulation Act 1958 s84
It is not at all clear what benefits flow from such an extensive range of sanctions. Punitive sanctions do more to polarise and distance the relationships between management and members than they can ever do to improve the performance of individuals or Victoria Police as a whole.

The effect of a demotion, for example, will be to stigmatise the member and deliver a significant and ongoing financial penalty impacting not just on salary but also superannuation benefits. While the demotion practice in Victoria is less extreme than it is in Britain where demotions from Superintendent or Inspector to Constable are not unknown, the stigma and financial consequences of demotion are more likely to create an embittered member whose value to Victoria Police and his or her colleagues can only be doubtful, if not destructive. Demotion is used when a person by their conduct has demonstrated he or she has been promoted beyond their capabilities or is no longer fit for the position. If appropriate selection and promotion systems are working with on going performance appraisal systems and mechanisms that permit dismissal for persistent underperformance, demotion as a sanction should be redundant.

Admonishments are also questionable. While an anomalous part of the remedial Management Intervention Model, many admonishments become the subject of adversarial disputes of which the majority (56%) are successful and result in the withdrawal of the admonishment notice. This might explain why internal appeals against admonishment notices are relatively high (39% over the two years to 30 June 2006). This indicates a low level of remedial result from their use, as well as possibly inappropriate application by management.

It is also not entirely clear why the discipline system requires two very similar sanctions, admonishments and reprimands. The only notable differences between the two are that admonishments, not reprimands, can be used as a management intervention and they both impact on eligibility for particular Police Honours, but in different ways.

Fines also do not have a useful place in a discipline system. This sanction is entirely appropriate for the criminal system as its intended effect is to deal with the symptom rather than the cause. It is a limited solution with the primary objectives of stopping citizens performing particular activities and deterring others, but it does not seek to improve their performance and behaviour so they are more effective citizens or employees. The ability to fine Victorian public servants as part of a disciplinary process was removed in 1998.

Good behaviour bonds also have their origins in the criminal process. A bond may be useful in the disciplinary context if associated with management monitoring and

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25 Sections 106(2)(c) and 99 of the Public Sector Management Act 1992 which were repealed when the Public Sector Management and Employment Act 1998 came into effect
support to avoid a repetition of the misconduct. By itself, it places the obligation for the offence on the member and tells the individual that, provided he or she does not get caught again within a particular period, the slate will be wiped clean. But it does little to encourage or assist the member to alter his or her long-term behaviour, so has little use in a disciplinary system which seeks to change behaviour not just punish offenders. The same criticism can be made of ineligibility for promotion for a fixed period.

Mixed Messages

It is difficult, if not impossible, for Victoria Police to properly administer any disciplinary system – much less the very complex one in place – if the objectives of the system are not clear or not properly understood. Similarly, it is difficult for police members to be subject to such a scheme if they, too, do not understand what it is intended to achieve.

There is no clear statement in the legislation, nor in the VPM Instructions, about the objectives of the disciplinary system. The result is that there is confusion about what the system is trying to achieve. This is the natural consequence or symptom of a piecemeal system which has been the subject of numerous attempts at reform, but no overall approach.

The next case study demonstrates the confusion within Victoria Police about the objectives of a disciplinary process.

Case Study Three

Police attended a house in search of an offender. Two men and a woman were arrested. The woman was transported back to the local police station.

As she was being removed from the van, a Senior Constable made a comment that the woman considered was discriminatory. This comment was raised, amongst others, in a formal complaint about the woman’s treatment.

OPI investigated the case. Relevant police and witnesses were interviewed and the evidence established that the comment had been made, substantiating this aspect of the complaint. OPI recommended that no formal disciplinary action be taken but that relevant anti-discrimination training be given to staff. The Senior Constable was also to be the subject of informal counselling through management intervention.

Victoria Police disagreed with the finding of ‘substantiated’ and sought a further review by OPI. Victoria Police contended that the comments had been ambiguous rather than intentionally discriminatory and that therefore the finding should have been unsubstantiated. The OPI carried out a further review and confirmed the original finding.
Comment: This case study shows how Victoria Police was prepared to engage in arguments over technicalities in the process, while ignoring the objective of a disciplinary process – that is to learn from honest mistakes and improve the conduct of police. The response in this case is indicative of an attitude that impedes performance improvement. Whether the comments were ambiguous rather than intentionally discriminatory is somewhat irrelevant. The comments had the propensity to be misunderstood and the recommended training should have assisted the Senior Constable in his future dealings with the public. This could have avoided his involvement in future complaints and their associated distraction from policing duties. His supervisor should have supported this approach, rather than continuing the diversion of resources associated with disputing a finding based on fact.

There is also lack of clarity about the performance management aspect of the Management Intervention Model and its relationship to formal disciplinary processes.

It is described as “an alternative dispute resolution process”. Its stated objectives refer to “the expedient resolution” of customer complaints, improving the servicing of public complaint issues, and promoting the integrity and reputation of Victoria Police.

There is no reference to using the process to manage or improve substandard conduct. This can (and has) led to confusion as to the primary purpose of the Management Intervention Model and therefore limits its potential to be a realistic and effective means of remedying poor behaviour.

While the use of the Management Intervention Model as an effective complaint resolution process appears to be improving, there is a risk that it can be used inappropriately to shield members from the consequences of their serious misconduct. This concern is exemplified in the following case study.

Case Study Four

A Senior Constable intercepted a vehicle for a routine check and the driver was charged with driving whilst his licence was suspended, to which he pleaded guilty.

Within six days of the interception, the Senior Constable made a statement for inclusion in the prosecution brief. The statement specifically acknowledged that the statement is true and that “a person making a false statement in the circumstances is liable to the penalties of perjury”.

In the statement, the Senior Constable attested that the driver claimed that he did not have his licence with him when his vehicle was intercepted.

26 Commissioner’s Instruction VPM 210-2

Perjury, on any construction, is not a minor matter and it is of great concern that members of Victoria Police do not take the matter extremely seriously. Dishonesty should not be tolerated within Victoria Police.
Although the driver pleaded guilty to the charge, he denied a number of the assertions in the Senior Constable's statement including the assertion that the driver did not have his licence with him. The driver claimed that he had his licence with him and that he gave it to the Police at the time. Phone recordings of the Senior Constable's contact with D24 confirm the driver's version, as the licence number was provided to D24.

The Office of Public Prosecutions considered that there was a prima facie case for a charge of perjury saying “it is clear from the evidence that (the Senior Constable) has told untruths“. However, the Office of Public Prosecutions did not recommend criminal charges, saying instead, “Given the availability of the disciplinary forum, the nature and complexity of such charges, together with the allegation, do not mitigate toward a County Court trial”. It also considered that “given the seriousness of the Senior Constable's having sworn a document, in which for the purposes of a prosecution, he was willing to perjure himself, the Director would be grateful if Victoria Police would advise this Office of the outcome of the matter”.

Despite these strong views that were shared by OPI, Victoria Police considered that the appropriate response to the conduct was counselling using the Management Intervention Model.

Comment: One of the fundamental requirements for being a member of police is integrity and honesty. The willingness of a member of police to perjure himself or herself to effect a prosecution is entirely inconsistent with that fundamental requirement. Perjury should be a matter of the greatest significance to Victoria Police, even where it cannot be established to the requisite criminal standard. Management Intervention Model is intended for relatively minor matters. Perjury, on any construction, is not a minor matter and it is of great concern that members of Victoria Police do not take the matter extremely seriously. Dishonesty should not be tolerated within Victoria Police.

Delay

A consequence of Victoria Police’s prescriptive formal discipline and appeal processes is that it takes an inordinate amount of time to commence, proceed and conclude disciplinary action. It is not unusual for disciplinary proceedings to take up to one or two years. In individual circumstances this timeframe may well blow out further if things become bogged down in technicalities, if there are concurrent criminal proceedings, or if the member takes sick leave or adopts deliberate delaying tactics.

Delay is a significant problem for both the members involved and Victoria Police generally. Those who are subject to a disciplinary process, particularly one with a punitive focus, are likely to experience anxiety and stress until the disciplinary
process is completed. Any unresolved disciplinary issue will also create uncertainty in the workplace until the process is completed.

In some disciplinary proceedings, a member will be suspended, often with pay for much of the time. Indeed, in ‘no confidence’ proceedings where the Chief Commissioner considers that the member is unsuitable to continue as a member, any suspension of the member must be with pay.27 This often provides incentives for the member to delay proceedings.

Even in the simplest discipline matters, the process cannot be expedited. Victoria Police advise that the rigidity of the legislated processes does not give the Commissioner the discretion to bring proceedings forward for speedier resolution, even where the subject officer agrees.

Delays also have the natural effect of making definitive determinations more difficult to achieve. The slowness of the process means that the quality of evidence deteriorates over time. Witnesses have greater difficulty in recalling relevant facts, there is greater scope for inappropriate corroboration of evidence, management may become increasingly reluctant to press for disciplinary action due to the passage of time, and resource constraints and spiralling costs will act to encourage action to be abandoned.

However, delays in finalising disciplinary proceedings are most problematic when a member is also subject to criminal proceedings. Generally, the charging of a person for a criminal offence in other public sector organisations will automatically result in dismissal. Victoria Police disciplinary processes that might lead to dismissal are put on hold pending the outcome of criminal proceedings. According to the Victoria Police submission:

*In cases where there is a combination of criminal and discipline charges, the length of time demanded by the discipline process leads to a situation where the discipline allegations cannot be dealt with for years due to the fact that the criminal justice process takes precedence. In these cases, Victoria Police cannot deal with members who have been charged with extremely serious offences because the criminal charges must be resolved first. This can take years, placing the organisation in a difficult position in not being able to fill positions, while there is ongoing uncertainty for the member and his or her colleagues. More importantly, the organisation’s reputation is at risk because the members, notwithstanding they may be suspended without pay, are still employed by Victoria Police.*

**Avoidance Behaviour**

As the objective of the formal disciplinary procedures is to apply punitive sanctions, subject officers are often uncooperative. It is in their interests in such an adversarial atmosphere to drag proceedings out and engage in other avoidance activities. Those members are also likely to know that the longer the process takes, the weaker the supporting evidence for it is likely to be. Sadly, these tactics are often successful,
reflecting poorly on the integrity of the system as much as the integrity of the member.

One way members avoid disciplinary proceedings is to leave work on workcover, or take sick or other leave. When this happens, it can be very difficult, if not impossible to tell whether the member is suffering a genuine stress-induced medical condition or is malingering to avoid the consequences of the hearing. In the past there has also been a reluctance on the part of Victoria Police to interview police on workcover or sick leave and this has contributed to the effectiveness of this form of avoidance behaviour.

In some cases, avoidance strategies can be highly inventive. I have had my attention drawn to one case where a member subject to disciplinary proceedings simply refused to accept any correspondence from Victoria Police and could not effectively be served with the necessary paperwork. Ultimately, the member was served, but such ingenuity highlights the fundamental weakness of the system.

Confusion about Standard of Proof

Highly technical rules and procedures give rise to technical problems or confusion in the way those rules may be applied or interpreted. This is particularly evident concerning the apparent confusion that exists over the requisite standard of proof in discipline matters. This problem is a common one and appears not to be isolated to Victoria Police and the Police Appeals Board.

The High Court case of Briginshaw v Briginshaw29 outlines how the standard of proof in civil and administrative cases (on the balance of probabilities) should be applied, having regard to the nature and consequence of the fact or facts to be proved.

This has led to the idea in many quarters, including the Police Appeals Board and Victoria Police, that there is a ‘sliding scale’, whereby the necessary standard of proof that the Chief Commissioner must satisfy is elevated if allegations are particularly serious, or where the consequences flowing from a finding may be particularly grave. The result of this approach is that, as the issue becomes more serious in nature or in its consequences, the standard of proof is believed to approach the criminal test of beyond reasonable doubt, creating a standard of proof for dismissal closer to beyond reasonable doubt rather than on the balance of probabilities.

I have been concerned as to the accuracy of this view and have obtained advice from the Victorian Government Solicitor on the matter. (See Appendix Three).

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28 In relation to the virtual cessation of discipline processes due to medical absences, Victoria Police points to a Supreme Court decision, which found that a hearing officer’s decision to refuse to adjourn a discipline matter and proceed ex parte, denied the subject member natural justice: Anthony v Sinclair; Tomlin v Sinclair, [1999] VSC 343 (14 September 1999)

29 Briginshaw v Briginshaw (1930) 60 CLR 336
This advice is that the practice adopted by Victoria Police and the Police Appeals Board of applying *Briginshaw* in the way that they have is incorrect. It is not the standard of proof that changes, but the strength or standard of evidence to which the standard of proof is applied.

The Victorian Government Solicitor advises, for a Tribunal to comply with *Briginshaw* considerations, it would need to “bear in mind”, where applicable, that:

- Certain allegations in question are serious.
- Certain occurrences are inherently unlikely (e.g. where a person is particularly well-esteemed).
- Personal consequences likely to flow from a particular finding are grave.

Where those issues are present, the standard of proof is not elevated to or close to the criminal standard, but the Tribunal should ensure that the standard of evidence is of sufficient probative value before finding against the individual. Where a serious allegation is made, reasonable satisfaction “should not be produced by inexact proofs, indefinite testimony, or indirect inferences”.

In other words, the decision maker must proceed cautiously where a serious allegation has been made or the facts are out of character.

As McHugh J commented in a statement made during argument:

> there are only two standards of proof: balance of probabilities and proof beyond reasonable doubt. I know Briginshaw is cited like it was some ritual incantation. It has never impressed me too much. I mean, it really means no more than, ‘Oh, we had better look at this a bit more closely than we might otherwise’, but it is still a balance of probabilities in the end.

**Balanced in Favour of Charged Police**

Since a higher, incorrect standard is applied, disciplinary proceedings are generally heavily weighted in favour of the charged member, as the following case study demonstrates.

**Case Study Five**

*A Senior Constable went to arrest a man for traffic offences. The accused and a number of other people in attendance at the man’s home refused to open the door. Although the police had no warrant, the Senior Constable kicked the door down and effected entry for the police. A fight ensued, and in the course of the fight, the Senior Constable allegedly punched the accused in the face several times. The accused required hospitalisation.*

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30 Relying on a number of High Court and other decisions, including *Neat Holdings Pty Ltd v. Karajan Holdings Pty Ltd* (1992) 110 ALR 449
31 See *Beaven-James v Walton* NSW Court of Appeal Quoted in the VGS opinion (Appendix Three), p4
The Senior Constable claimed that the accused repeatedly tried to attack him while he was being subdued. The accused complained about the Senior Constable alleging assault and illegal forced entry, amongst other things. The accused was charged and, seven months later, acquitted of all charges including traffic offences, assaulting police and escaping from custody.

An investigation into the Senior Constable’s conduct was undertaken and eleven months after the incident, the investigator found that:

- the entry to the property was unlawful, but the allegation about forced entry was unable to be determined. The investigator recommended further legal advice be obtained and dependent on that advice, a disciplinary offence of discreditable conduct be brought against the Senior Constable; and

- the allegation of assault was substantiated and recommended the Senior Constable face criminal charges.

Following legal advice one month later, the criminal charge was not proceeded with against the Senior Constable, instead a disciplinary charge was recommended and a notice of a disciplinary charge was served on the Senior Constable 18 months after the incident.

Ten months later, a disciplinary hearing was convened. The Senior Constable was charged with disgraceful conduct, in that he had used excessive force when arresting the accused.

At the disciplinary hearing, the hearing officer correctly stated that the standard to be applied was the balance of probabilities. But, after the one-hour hearing, the hearing officer then found that the charge had not been made out due to the inconsistencies between witness statements, incorrectly applying a ‘beyond reasonable doubt’ (criminal) standard of proof. The offence of discreditable conduct against the Senior Constable was dismissed.

Despite this finding, the accused sued the Senior Constable (and others) for civil damages and five and a half years after the incident, proved his case on the balance of probabilities and received judgment in excess of $1 million.

A discipline system for police needs to balance three interests: those of the individual, those of Victoria Police, and those of the community. In view of the important position policing has in our society and the powers and equipment given to police to perform their role, there is clear public interest, if any one of these three interests is to prevail, for it to be that of the community. This can only be achieved by a system where pre-eminence is given to the need to maintain the highest standards of integrity, honesty and ethical behaviour in the performance of policing.

Within the current disciplinary system, too often the interests of an individual police member are given precedence over the public interest in the maintenance by Victoria Police of the highest standards of honesty and integrity, as the following case study demonstrates.
Case Study Six

In his first year after probation, a Constable was involved in two car accidents. As a result of the first of those accidents, the Constable received penalty notices for having an unregistered and unroadworthy vehicle. The Constable left the scene of the second accident but was later fined $300 and had his licence suspended for two months. In the same year, the Constable was found with unregistered firearms and ammunition. As a result of the traffic offences, the Constable was found unsuitable for ‘in situ’ promotion to Senior Constable.

The Constable did not ever register his car, but his partner used the vehicle during the period his licence was suspended. When the period of licence suspension was completed, the Constable was caught driving the car again. Prior to the court hearing of the second set of charges relating to the unregistered vehicle, the Constable faced disciplinary charges arising from the two car accidents and was reprimanded and fined.

The charges concerning the unregistered driving were subsequently heard by a court and the Constable was convicted on one of those charges, three others were found proven without conviction and the Constable was fined. As these court findings constituted a breach of discipline, the Constable faced a second disciplinary hearing. The hearing officer found the charge proven and that dismissal was appropriate.

On appeal the Police Appeals Board overturned the dismissal and replaced it with a good behaviour bond and a 12-month period of ineligibility for promotion. In doing so the Police Appeals Board:

- Said that it is not bound by its previous decisions, thereby undermining any parity between sanctions applied to particular offending police; and

- Placed greater emphasis on the financial position of the Constable, his attempts to remedy this situation and his apparent good work performance than his established willingness to re-offend within a short period of being convicted.

Comment: This decision demonstrates an imbalance in the system. The interest of the community in having police with the highest ethical standards has been subverted by the interests of the individual member. It is of considerable concern that the Police Appeals Board gave no consideration to the effect of the decision, and decisions like it, on the integrity of Victoria Police. Decisions like this significantly threaten the ethical well-being of Victoria Police as a whole and undermine the reputation of the vast majority of police who conduct themselves honestly and with integrity.
Self-Imposed Complexities

The Victorian discipline system includes some ‘self-imposed complexities’ that have nothing to do with the legislative disciplinary framework. The length and detail in many of the VPM Instructions impose many unnecessary complexities. This is more so when the Instructions include elements which are *ultra vires* or beyond power. My analysis identified two such items concerning the power of hearing officers and procedure at disciplinary hearings, details of which are set out at Appendix Four.

Also self-imposed are the complexities of the Management Intervention Model process. Intended to divert less serious issues away from more formal complaint investigation processes, the Management Intervention Model includes elements that delay the completion of individual matters without any obvious offsetting benefit.

A sample audit of complaint files conducted by OPI found a significant problem with delays under the Management Intervention Model process, mainly ascribed to the number of persons involved. It took an average of 24 days for a complaint file classified as appropriate for management intervention to be received by a Resolution Officer. The average time taken to complete the review of reports of Resolution Officers was two months. The audit also found that most of these reviews could add no real value to the process, due to a lack of detailed information on the files.33

Another self-imposed complexity concerns the process for dealing with police who have been charged with an offence punishable by imprisonment and the offence has been found proven. Under the Act, the Chief Commissioner has discretion about what sanctions to impose, but is not required to conduct a formal hearing.34 Despite this, and for no obvious reason or benefit, the VPM Instruction requires a formal hearing to determine the applicable sanction.35 There is no reason why a simpler, prompter paper-based process, could not have been used.

Out of Step with Human Resources Processes

Both the discipline system and the human resources system seek to improve performance and professional development. Selection and promotion processes should operate in concert with the human resources system to achieve these objectives. However, within Victoria Police the systems seem to operate in separate silos. They are separately administered, with discipline the responsibility of ESD and performance management the responsibility of the Performance Management Unit, which sits within the Human Resource Department along with processes for selection and promotion. The communication and process links between these systems appear quite...

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33 Category 1 Audit: Region 2, July-September 2006
34 s80
35 VPM Instruction 211-3
underdeveloped with the result that much of the learning and concerns from one silo are not readily transferred or useable in the other, as the following case study demonstrates.

**Case Study Seven**

Early in his career, a particular Constable had a number of complaints made against him, including complaints about assault. In one instance, he negligently shot someone resulting in a five-figure payout by Victoria Police in costs and legal fees.

Nine months after the shooting incident, the Constable was the subject of a further complaint concerning an allegation the Constable had assaulted a person and planted drugs on that person. The person had been arrested for indecent language. The presiding Magistrate who heard the charges against the complainant dismissed all charges and found the charge of indecent language extraordinary and unacceptable.

An internal investigation found that the arrest had not been malicious but was ill-conceived. The local Inspector noted the Constable needed closer supervision.

Five months later, the Constable was again the subject of complaints, alleging he had slapped, abused and lashed out with his baton during a drug arrest. The Magistrate hearing the charges against the complainants dismissed the charges and found that the police had committed unprovoked assaults on the men and had lied under oath. A five-figure sum of costs was awarded against the police. The magistrate blamed the Constable in particular. By this time, the Constable had been the subject of nine complaints. In the following year, he was the subject of a further six, all of which were either found unsubstantiated or inconclusive. No disciplinary action had ever been taken against the Constable.

In that year, the Constable was due to be promoted to Senior Constable. Senior management recommended that, in light of the complaints history, promotion be deferred for one year. The Constable appealed to the Police Appeals Board and sought a discussion with the Chief Commissioner. The result was that, as no disciplinary action had ever been taken against the Constable despite the numerous complaints, the deferral could not be sustained. The promotion was confirmed, despite the fact that the civil action described earlier was still pending.

The following year yet another person facing criminal charges claimed to be the victim of assault by the same member who was now a Senior Constable. Again the charges were dismissed against the defendant and a three-figure sum of costs awarded against police.

As no complaint was lodged, no disciplinary action was taken. However, in that same month, the Senior Constable was transferred to administrative duties. In the remaining 14 years until he resigned from Victoria Police, the member was involved in a further eight complaints, the majority of which were ‘unsubstantiated’ by complaint investigators. By the time he left, the member had achieved the rank of Sergeant.
Comment: This is another example of a consistent failure to recognise a pattern of poor behaviour, despite adverse court findings, awards of costs against the police and an extensive complaints history. No disciplinary action was ever taken by Victoria Police against this member, notwithstanding that a magistrate had said that he and other police had lied under oath or had committed assaults. Even when a small number of internal investigators identified the problem, nothing was done about it and insufficient support was given by superiors to stamp out the aberrant behaviour. In fact, the member was able to continue to rise through the ranks. The only action taken, the member’s transfer, was not even in response to a complaint, but seems to have been in response to adverse publicity. The transfer simply moved the problem somewhere else and highlighted the system’s weaknesses in dealing appropriately with staff who were diminishing public confidence in police and harming the reputation of Victoria Police.

This case is somewhat historic; the member left Victoria Police in the late 1990s. However, the systemic problems it identifies, such as the lack of communication and common purpose between human resource management and discipline, still seem present at the time of writing. Significant work will need to be done to break down entrenched disparities between the approaches of the human resource management and discipline systems. There is a clear and obvious need for there to be a good fit, understanding and relationship between the two processes if Victoria Police is to adopt a better discipline system.

Poor Quality Data Management

There appear to be serious problems with the maintenance of accurate data regarding the management of Victoria Police complaint files and discipline processes. These have direct implications for the monitoring of related discipline processes and the quality assurance of their administration in the field. This problem poses risks to the effectiveness and accountability of the system, as well as to consistency in the treatment of members.

Although understated, the lynchpin of an effective disciplinary system is the ability to track, monitor and evaluate information relating to complaints about members and day-to-day performance management issues.

At a broader level, aggregated data can also identify trends that should prompt management to take proactive action to prevent the occurrence of serious problems. This data is an essential management tool that can support an organisation or an individual to improve performance, and match the information against performance indicators.

To serve these purposes, data needs to be comprehensively and accurately maintained, easily accessible to those who require it and able to be compiled into reports so that its usefulness is maximised from a more general management perspective.
An audit of complaint files conducted by the OPI last year identified a number of problems with the recording and reliability of data and information relating to those files, including:

- an all too common failure to reclassify files, after initial assessment, from the “general correspondence” category, to categories that identify the type of issue and process (for example, “Management Intervention Model”, “misconduct”, “serious misconduct”);

- the potential for an obvious misclassification of a matter to go unnoticed and unaddressed (for example, a complaint of serious assault and excessive force was not classified as a “serious misconduct” matter, but assigned a less serious file classification). This can (and did) lead to the inappropriate process being adopted;

- a consistent lack of adequate documentation on files to enable proper review through relevant approval processes; and

- twenty-five per cent of complaint files audited being found to contain allegations that were not addressed prior to the file being closed.

These data deficiencies lead to a number of self-evident problems, including:

- compromised ability to reliably identify and monitor discipline related matters;

- a greater risk of incompetence or mishandling of files due to inadvertent or deliberate misclassification;

- uninformed decisions being made due to poor record keeping; and

- a greater risk of challenge to the adequacy of the complaints system if all allegations are not thoroughly addressed. This, in turn, can lead to loss of confidence from the public.

There are also serious concerns regarding the database maintained by Victoria Police to provide information on complaints and discipline matters (the Register of Complaints, Serious Incidents and Discipline – “ROCSID”). Victoria Police had difficulty in providing data to this Review about what should be regarded as standard performance indicators. In summary, information was sought on:

- numbers of files per annum in each relevant file category;

- findings and actions taken; and

- average time between standard process milestones.

Difficulties in complying with the Review’s request for information appear to have arisen from a combination of the sheer number of data fields and option choices, combined with reliance on local area data input.
Any adopted changes to the existing discipline system must be carried out in tandem with custom built changes to data collection and monitoring systems to support those changes. Any reform to the discipline system which is not supported by the requisite data collection system is likely to fail.

Victoria Police should undertake a review of data collection systems to ensure the reformed discipline system is supported by a data collection system that enhances performance management tasks and is user-friendly. The Australian Federal Police have an impressive Complaints Recording and Monitoring System, which supports their revamped discipline system, that may be appropriately adapted.
HOW TO FIX IT?

Changes to the system are obviously required. Some improvements could be achieved by relatively minor adjustments to the scheme (such as a redrafting and streamlining of the Instructions and by providing increased and targeted training to improve the understanding of the scheme within Victoria Police), but this would be tinkering around the edges when fundamental change is necessary.

Having confirmed the unanimous views of the key stakeholders that the current Victorian discipline system is not viable and requires significant alteration, this Review examined a number of disciplinary systems in public bodies, some policing, some not, to see what practices have been used successfully elsewhere to gain some insight into the effectiveness of alternatives that might apply here.

How Unique are the Police?

One of the preliminary questions many of the reviews considered was whether the nature of police work is so unique and different from the requirements of other employees that a startlingly different discipline regime is required – providing substantially different rights and obligations than those under systems applicable to other types of employment.

There are three possible approaches to answering this question.

1. The traditional approach answers this question in the affirmative. There are notable differences between police and other public sector employees. Police are not employees as such, they are appointees. Moreover, each holds the office of constable which has independent functions, the most significant of which is the power of arrest.

   It is also claimed, with some truth, that there are other quite significant differences between the role of the police and that of other employees. This is particularly so for those who work ‘on the street’, an environment which often places them at risk of physical harm not to mention a far greater likelihood of being the subject of complaints from dissatisfied members of the public. The police uniform, it has been said, is a ‘complaint magnet’ (much more than similar occupations, such as customs officer and prison officers) and it has been argued that police need a discipline system which recognises the particular nature and risks of policing. This rationale is, at least, a part justification for the current completely inadequate and unworkable discipline system.

2. The second approach answers the question in the affirmative but for different reasons. It argues that the obligations placed on police should be greater than those applicable to others in the public sector workforce due to their obligations to the community and the extraordinary powers they hold. Advocates of this approach say the unique nature of policing means:

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• The community expects high standards of its police.

• A Police Commissioner is entitled to expect that members will perform to a high standard of integrity and competence and should be able to dismiss any person in whom he or she has lost confidence.

• The continued retention of those members who do not enjoy the Commissioner’s confidence is a canker within the Service, and a focus of disaffection and corruption.37

3. The third alternative also acknowledges that policing is a different, indeed a unique occupation, but considers that the uniqueness does not require that the system applicable to it should be markedly different from that applicable to others in the public sector workforce. This is the view favoured by the recent reviews of police discipline in the United Kingdom and in New Zealand. Those Reviews took the view that the respective police discipline systems should be brought within the “wider context of employment relationships”38 and that “employment law should be extended to police officers”.39 Alternatively, that the police discipline system be subject to separate but equivalent regulation with any divergence being that required “to meet the needs of the police service”.40

Of the three views, I prefer the third. Having compared discipline systems in non-policing systems and considered the apparent success of less regimented discipline systems in other recently reformed jurisdictions (discussed in the following sections and in Appendix Five), I consider disciplinary processes for police should be equivalent, as far as possible, with those applicable to others in the public sector workforce. Differences should only occur where the particular requirements of the office of constable, or policing generally, need to be taken into account.

Registration Board Approach

The Police Association has suggested in its submission that a Police Registration Board should be the sole custodian of all punitive disciplinary powers regarding police. A Police Registration Board is one of the reforms related to policing in Victoria, which the government has agreed to implement. It is proposed it will deal with issues including police training and education, the promotion of the profession, and the establishment of processes regarding the criteria relating to police officers exiting and re-entering Victoria Police. The Police Association strongly favours the Registration Board as it will help promote policing as a profession.

37 Wood Report Interim, (November 1996), p4
38 Bazley Report, p204
39 Morris Report, p52
40 Taylor Report, p17
I agree that advancing the professionalism of policing is a desirable end and one that needs pursuing. In doing so, of course, it needs to be appreciated that professionalism is not just a means of obtaining higher status and, possibly, higher income. It also brings obligations as Justice Sandra Day O’Connor of the US Supreme Court observed when she wrote that:

*Professionalism requires adherence to the highest ethical standards of conduct and willingness to subordinate narrow self interest in pursuit of the more fundamental goal of public service.*

It is understood that the Registration Board will have the function of the issuing and, where appropriate, withdrawing the equivalent of a nurse’s practising certificate, without which persons cannot be employed as members Victoria Police. One of its functions, therefore, can be seen as disciplinary in nature.

In its submission, the Association states:

*It is the view of the Association that the Ethical Standards Department of the Force (or any future equivalent), monitored by the OPI (or any future equivalent), should conduct investigations into complaints against members of the Force. Matters that are deemed to be of a local management nature would be resolved in that manner, via the use of the Management Intervention Model or a similar future system. More serious matters would be referred to a Professional Standards Tribunal or Board, for determination and possible sanction, with those sanctions including (but not restricted to) suspension or cancellation of registration to practice.*

There are two objections to this approach.

1. The primary concern is that it would place the Chief Commissioner in an invidious position, being an employer in the public sector deprived of disciplinary powers over those she is obliged to command. It is difficult to see how this could assist in the management of Victoria Police or improve its disciplinary outcomes.

2. The proposal will also do nothing, of itself, to remove the slow, adversarial and legalistic nature of the current regime; problems that the Association recognises and wishes removed. All it will do is to exchange one set of formal processes for another. A Registration body must involve formal processes. It is simply not possible for an external body to manage workplace difficulties or day-to-day performance issues. The result of the Association’s proposal is likely to be, therefore, that there will be no reduction in the emphasis on punitive discipline which is, as has been discussed elsewhere, simply ineffectual where the intention is to improve the performance and conduct of the employee.

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There is little doubt that the adoption of a Registration Board will be of great assistance to the training, education and professionalism (properly understood) of Victoria Police. The proposed Police Registration Board, should it be adopted, should have its own power to determine matters of educational and training requirements in addition to registration status. These should be separate from the internal performance management and discipline arrangements within Victoria Police, which should remain the province of the Chief Commissioner and Victoria Police managers. I do not consider that a Registration Board’s involvement in internal disciplinary matters affecting Victoria Police would overcome any of the difficulties associated with the current system, in particular those associated with formal processes, managing poor performance and delays.

Police Career Services Commission

In 2001, a Ministerial Administrative Review was commissioned (known as the Johnson Review). This review recommended the institution of a Police Career Services Commission. The proposed functions of the Police Career Services Commission were to:

- hear appeals against promotions and transfers;
- review discipline determinations;
- prevent and settle industrial disputes, approve and register industrial agreements;
- oversight disciplinary processes; and
- audit discipline and other processes.\(^{42}\)

In so far as it related to discipline, the Police Career Services Commission was to take over the Police Appeal Board functions and undertake a new role of oversight of the discipline process.

The Johnson Review did not, however, appear to have examined the matters considered in this report such as the common difficulties faced by a number of similar police jurisdictions in Australia and overseas, and the trends adopted to resolve those difficulties. As such, the recommendations in that report regarding the Police Career Services Commission do not seem relevant to the difficulties currently facing Victoria Police or challenges facing modern policing services.

Non-Policing Systems

Discipline systems for the following types of employees were examined:

- Corrections Officers (employed in the Department of Justice)
- Customs Officers

Two types of disciplinary systems emerged.

The first, applicable to teachers and firefighters, mirrors that of the current Victorian Police disciplinary system, being formal, prescriptive, elaborate and slow.\(^{43}\)

The second, applicable to Customs Officers and Corrections Officers, is the same as that applicable to other public servants. As Customs and Corrections Officers have similar roles to those of police in that they exercise coercive powers over citizens on behalf of the state, and Prison Officers are, at times, armed, it is of interest to note that they are not subject to a formal disciplinary regime similar to that for police. The schemes that they are subject to, like other public servants, are not noticeably different from those that apply to other employees in the workforce.\(^{44}\)

**Other Australian Policing Bodies**

Queensland Police (the Fitzgerald Royal Commission 1989), New South Wales Police (the Wood Royal Commission 1994), Western Australia Police (the Kennedy Royal Commission 2002) and the Australian Federal Police (the Fisher Review 2003) each have undergone significant reform processes following Royal Commissions or Inquiries. Each jurisdiction has adopted a slightly different model, but reforms have each led to the rejection of schemes like that applicable to police in Victoria and to the introduction of, or the considerably expanded use of, management solutions to deal with matters previously dealt with by the slow, formal, adversarial, militaristic discipline processes. Details of these reviews, their findings and recommendations are contained in Appendix Five.

**Overseas Policing Bodies**

Discipline systems in policing services in the United Kingdom (Morris 2004 and Taylor 2005) and New Zealand (Bazley 2007) have also been subject to review. These reviews also made findings and recommendations consistent with the earlier Australian reviews. New Zealand Police's discipline system with its long prescriptive list of approximately 50 disciplinary offences was considered so outmoded the review called for the Government to take immediate action saying:

_The current system is cumbersome, time consuming and outdated. It needs to be replaced with a modern approach to management misconduct and poor performance, based on a code of conduct, applying standard employment law and the best practice human resource management principles._\(^{45}\)

Details of these reviews, their findings and recommendations are also contained in Appendix Five.

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\(^{43}\) Part IVA and V Teaching Service Act 1981; sections 78A to 79 Metropolitan Fire Brigades Act 1958

\(^{44}\) Prison Officers are State Public servants and Customs Officers are Commonwealth public servants.

\(^{45}\) Bazley Report, p2
Conclusion

This analysis reveals similar problems exist for police discipline systems that share a common past. The majority of the reviews of police, conducted by Fitzgerald, Wood, Kennedy and Fisher in Australia, Morris and Taylor in the United Kingdom and Bazley in New Zealand have made remarkably similar recommendations to overcome those problems.

Seven factors were advocated by most or all of these reports for the reform of police disciplinary processes so that they can meet the needs of modern policing services.

These are:

1. Reducing, or eliminating the differences between the discipline arrangements for police and other employees.
2. Reducing the number of sanctions and increasing performance development with a focus on rehabilitation.
3. Increasing local decision-making and responsibility for discipline matters.
4. Linking the discipline system with the performance management system.
5. Reducing complexity and speeding up processes.
7. Streamlining and simplifying review and appeal rights.

In my view it makes sense that these factors should form the principles on which a new discipline system for Victoria Police should be built.
A WAY FORWARD

Reducing, or Eliminating the Differences between the Discipline Arrangements for Police and Other Employees

At present, there is a vast difference between the discipline regimes applicable to sworn members of Victoria Police and other public sector employees. These processes need to converge and become aligned. While some submissions argued for retention of a unique system just for sworn members, I was not persuaded by their arguments. Some other public sector employees have powers of arrest, carry fire arms and use coercive powers. In many areas, public sector employees are no more immune to corruptibility than sworn police. Some organisations have significant opportunities for corrupt activity. Within Victoria Police many Public Servants report to police. Performance management regimes should apply equally across the whole of the organisation.

Disciplinary processes applicable to police should be equivalent, as far as possible, with those applicable to other public sector employees, except where a benefit or disadvantage is clearly justified by the needs and requirements of the office of constable or the particular needs of policing.

Reducing the Number of Sanctions and Increasing Performance Development with a Focus on Rehabilitation

This principle is a key building block to a reformed system.

As with the existing system, the proposed system has two parts: the punitive part and the remedial part. It should also have the benefit of the simplicity and strength of the model presented by Commissioner Kennedy in Western Australia. Commissioner Kennedy distilled the key elements of a discipline system to two elements:

- a large remedial part dealing with all matters other than those justifying dismissal; and
- a small, but streamlined punitive part for use when the remedial part has failed or is inappropriate.

The remedial or rehabilitative part should relate to most disciplinary incidents and complaints, with the objective of enabling police to learn from honest but reasonable mistakes, remedying the conduct or behaviour, as well as serving as a means of resolving complaints, as the Management Intervention Model currently does. The difference with Management Intervention Model, however, concerns its scope. The Management Intervention Model is designed for minor issues. With the proposed process, management action should be taken for all disciplinary issues other than those which indicate that dismissal is appropriate.
In the proposed model, none of the currently available punitive sanctions other than dismissal will be available. Each of these sanctions, even the relatively minor ones such as an admonishment or a good behaviour bond, are not productive of a good workforce. They do not get rid of bad members and their objective of compelling good behaviour by either penalty or threat of bad consequences does nothing to encourage the member to accept personal responsibility for failing to conduct himself or herself to the requisite standard that the community is entitled to expect from police.

Compelling good behaviour is only a superficial and short-term solution and will not adjust a member’s long-term behaviour, and that is what is required to ensure that each member is a valuable and effective member of Victoria Police.

Punitive action will only be taken if the conduct of the police member is such that the person should no longer remain in Victoria Police. This may be because the conduct is dishonest, criminal or corrupt, or because remedial action has been tried but been proven ineffectual.

Like Fisher and Kennedy, I do not consider that there is any room for an intermediate process in a police disciplinary system. Little benefit is seen to flow from intermediate penalties, such as fining or demotion, while they can potentially give rise to much damage to the workplace through disgruntled employees. They do little to remedy poor conduct in the long term. This ‘no middle ground’ position is a divergence from the standards of most other employment arrangements, including the Victorian Public Service arrangements, which provide a process for non-termination penalties for misconduct. However, this is one area where the different nature of policing requires a different approach:

Police employment is not like any other. It carries with it special obligations to the Government and the community, particularly in light of the powers that are exercised.... Normally, if there is evidence of misconduct that could support a reduction in rank, grade or seniority or a deferral in a salary increment there would at least be firm grounds for a consideration of employment suitability.

I note that, despite Commissioner Kennedy’s recommendation, Western Australia took a different view and has retained the formal disciplinary process for use when it is considered that the actions taken by an officer are insufficient to justify dismissal, but deserve punishment. An example used to justify the middle position concerns an officer who, despite repeated warnings, directions and remedial actions refuses to comply with relatively minor instructions, such as wearing his or her hat. The contrary, and I believe correct view, is that if remedial action has been tried with such

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46 Fisher Report, p70
47 See for example clause 17 of the Victorian Public Service Agreement 2006
48 Fisher Report, pp69-70
49 By retaining section 23 Police Act 1892 (WA)
an officer but has been ineffective and non-compliance with instructions continues, there is no place for the person within a policing organisation. Someone persistently unable or unwilling to take and obey instructions from senior officers or who will only comply with instructions that he or she believes appropriate should not be a police officer.

Linking the Discipline System with the Performance Management System

Conduct Improvement Process

Part of the proposed new scheme is to replace the Management Intervention Model with a new process, referred to for purposes of this report as ‘Conduct Improvement Process’. It is distinguished from the Management Intervention Model in the following ways:

- it would have a broader scope, incorporating all matters that do not justify dismissal; and
- it would require the inclusion of a Management Action Plan.

The current management response in Victoria Police, the Management Intervention Model, has a number of difficulties, outlined elsewhere in this report. It is too limited in scope, it is believed to be poorly understood by those administering it and police subject to the process, the approval process necessary before action is taken is far too slow, moreover, it adds little value to improving the performance of individuals or Victoria Police as a whole.

Management Action Plan

The Management Action Plan concept comes from the reformed Western Australian Police disciplinary model. A Management Action Plan is a specific and structured plan of remedial and developmental action designed to address behaviour, conduct and/or work performance deficiencies.

In each instance where there is a conduct issue, whether arising from a complaint or otherwise, a Management Action Plan is developed. The benefit of Management Action Plans is that the response to an issue about conduct can never be regarded simply as a sanction or penance, but rather as an issue which needs monitoring and recording as part of the member’s ongoing professional development.

The Management Action Plan is the vital element of the remedial part of the system. It entails both the acceptance and agreement by the member about the necessary changes to behaviour that are required, as well as ongoing monitoring and feedback by a superior named in the Management Action Plan.

This broadening of the scope of the present Management Intervention Model into a Conduct Improvement Process combined with the ongoing monitoring and feedback

Concentrating on correcting inadequate, incorrect or inappropriate conduct or behaviour will require ongoing commitment from both management and those with conduct issues.
requirements of Management Action Plans will require a significant cultural shift within Victoria Police. It will mean that a number of matters which are not currently handled by Management Intervention Model but by formal adversarial processes will be handled by remedial steps. Concentrating on correcting inadequate, incorrect or inappropriate conduct or behaviour will require ongoing commitment from management and from those with conduct issues. Managers and their staff will require significant training before and during implementation of the new system. There will also need to be significant monitoring of the system to ensure ongoing commitment to improving performance.

Part of the proposed model means that Management Action Plans arising from every conduct issue will be recorded on the member’s personnel file. This also involves a departure from current practice in Victoria. A number of jurisdictions examined as part of this Review do not necessarily maintain records of formal processes that lead to admonitions or warnings on the member’s file.

In Queensland for example, if the member cooperates in a successful managerial resolution strategy, then the record of the complaint that led to that strategy will not appear on the member’s personnel file, nor will the information be available for consideration in an integrity check for a promotion, transfer or review. In contrast, the Commonwealth, through its fully integrated Complaints Recording and Monitoring System, retains and records all details of complaints on members’ personnel files. These are then available for any promotion or other interview process.

The practice of either not recording outcomes of complaints on personnel files, or limiting that information’s availability, however, is inconsistent with the approaches taken in other forms of employment and is of dubious value.

In my view, it is important to record all complaints matters and the success or otherwise of Conduct Improvement Processes, whether punitive or remedial, on an employee’s personal file. Remedial action requires employees to take responsibility for their actions. It is inconsistent with that objective if the records of previous Conduct Improvement Processes are not maintained nor available to be reviewed by decision-makers in transfer or promotion applications.

The issue is not whether police make mistakes or make errors in judgment, but whether they learn from those mistakes and improve their conduct. This ability is very relevant to the person’s suitability for promotion. Greater responsibility demands greater scrutiny, and the complete personnel history, including complaints, of any internal applicant must be available to ensure that a fully informed decision is made.

50 HR Manual, 18.2, Complaint Resolution, section 3.1
Outcomes of Conduct Improvement Process

The outcomes of the Conduct Improvement Process should include, in addition to and in support of a Management Action Plan, a range of elements that are derived from the systems operating in the Commonwealth and Western Australia. They include:

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<td>Re-training and personal development</td>
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The employment options are generally negotiated by agreement, but can be imposed, in exceptional instances, where educational and behavioural options have been exhausted or have failed to address a member’s performance issues.

The Kennedy Report warned about relying on transfer as a conduct improvement strategy, saying it was a device that should be used sparingly. It said:

*Simply transferring a suspected or under-performing officer from one location to another is an inappropriate means of dealing with such problems. Not only does it fail to address the underlying behavioural issues, which is unfair to the officer, given that early intervention may “rescue” the officer from further suspect or under-performing behaviour, but it is also unfair on the receiving supervisor who inherits the problem. Transfers can however be useful measures to enable a “fresh start” when they are accompanied by appropriate re-training, counselling and supervision. To do less than this is a “dangerous and inadequate response.”*[51]

One of the proposed options included in the reformed Victoria Police model that is not used in other jurisdictions is ‘voluntary demotion’. Imposed demotion is clearly a punitive sanction. It entails a reduction in remuneration (with superannuation consequences) in addition to a reduction in status which is often regarded by many as carrying with it a certain stigma. As such, when imposed, it will almost inevitably result in a disgruntled and resentful employee, which in turn will impact negatively on the work environment.

When demotion is not imposed but is negotiated with an individual and accepted as an appropriate remedy, it can assist a poorly performing officer to be a productive and effective member at his or her level. This remedy is, again, one that should be used

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51 Kennedy Report, pp208-209
rarely, but it can have obvious benefits when an individual has been promoted above his or her skills, performs badly as a result, but is willing to acknowledge that fact.

**Remedial Action not Dependent on Substantiation**

The objective of a Conduct Improvement Process is to provide remedial results aimed at improving conduct or performance difficulties. It should not be appropriate or necessary to establish guilt or find that particular behaviour or conduct has occurred before action can be taken. Substantiation should only be a requirement if the process leads to punitive, not remedial outcomes. As Commissioner Kennedy said:

> The focus of matters referred for managerial resolution is to improve errant behaviour and prevent recurrence. It is not necessary, therefore, to establish to a legal certainty what had occurred and who was to blame. This is a clear departure from the previous adversarial model.\(^{52}\)

If the process was dependent on a ‘substantiated’ finding, that is establishing a particular version of events, the remedial benefit of the process would be hampered. In addition to delaying the resolution of the issue, if a Conduct Improvement Process was dependent on a matter being substantiated, it could not be instituted where there was a conflict in evidence and the matter was unable to be determined. As a result, no remedial action would be possible, even as a complaint reduction strategy.

This means, a member who has had an abnormal history of complaints of a particular type (as in Case Study Two) could be subject to a Conduct Improvement Process, even though there may be some doubt, or denial by the member, about a particular version of events. The Conduct Improvement Process should benefit the member, and Victoria Police, through a Management Action Plan, that is negotiated with the member about the particular support required and monitored by his or her supervisor, during the life of the plan to ensure the measures are working to improve the members conduct.

**Increasing Local Decision Making and Responsibility for Discipline Matters**

The first step in any disciplinary structure, is the initial assessment. In Victoria, at present, such assessments are made centrally, in ESD. In other jurisdictions they are made either regionally or locally. For an efficient remedial discipline to operate, the ownership of the staff difficulties should be localised, and not transferred away or elevated. The transfer of management issues from their origin undermines management accountability and provides an incentive to ‘pass the buck’. For that reason, I consider that ideally the assessment decision should be made locally, where the complaint is received or the incident arises.

However, there are two difficulties with this approach:

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\(^{52}\) Kennedy Report, p200
• the risk that if decision-making as to the assessment of the complaint or incident is localised, this may allow certain matters to be misclassified, deliberately or otherwise, leading to those matters not being properly investigated. Furthermore, as the recommended scheme does not require all serious misconduct matters to face punitive actions, the localised assessment is open to the potential for abuse; and

• the skills necessary to assess matters competently may not be presently available in many instances throughout Victoria Police and without those skills, this method of assessment will not be able to be properly attended to.

It is therefore necessary for three measures to be taken to overcome these difficulties:

• As an interim measure, to leave the assessment responsibility as a central responsibility, but to require training and instruction of police throughout the State to ensure the new arrangements and the assessment process are properly understood. Once the Chief Commissioner is satisfied that sufficient expertise has been gained by the relevant staff at the local level, the assessment function can be delegated to regional management. The objective would be for all police to have sufficient expertise to properly assess complaints and incidents.

• To require the management of each complaint and incident handled at regional or local level to be overseen by a regional Professional Development Committee subject to regular reporting to the relevant central body.\(^\text{53}\)

• For the relevant central police department and the OPI to engage in an ongoing oversight and regular audit of the assessment and the Professional Development Committee processes.

The last two of those measures are oversight processes. Oversight of the assessment process is essential to ensure its effectiveness, particularly when conducted at the local level. As Kennedy said in the WA Royal Commission, the “management of performance should never become a ‘soft option’ for addressing dishonesty or criminality”.\(^\text{54}\) This is the risk that assessment at the local level may face due to local issues and can only be avoided by both central and external oversight.

In other respects, it is considered that the administration of the Conduct Improvement Process will be similar to the administration of the Management Intervention Model, with the responsibility for individual cases being with a Resolution Officer.\(^\text{55}\)

Reducing Complexity and Speeding up Processes

In the proposed system, the question for the assessor will be simple - does the matter appear to justify the dismissal of the employee? If ‘yes’, the matter will be referred to commence the dismissal process. If ‘no’, the matter will be referred to local

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\(^{53}\) The current membership of the Professional Development Committee would continue (see Appendix Two)

\(^{54}\) Kennedy Report, p207

\(^{55}\) An officer appointed by the Co-ordination Officer (a Superintendent of Assistant Director of the relevant Division) who will be member of the Professional Development Council (PDC)
management as part of the Conduct Improvement Process discussed above. If ‘maybe yes, maybe no’, the matter will be referred for preliminary investigation.

Referral to the dismissal process will include alleged cases of “serious misconduct”, involving dishonest, criminal, or other corrupt conduct. However, not all instances of alleged “serious misconduct” will justify dismissal just as many today do not justify that result. Referral to the dismissal process will also involve police accused of misconduct or serious misconduct where remedial efforts have been used earlier in the career of the person but have not corrected his or her behaviour or performance.

**Dismissal Process**

The current dismissal processes require an adversarial hearing. Such hearings are complex, lengthy and are a source of delay and difficulty for Victoria Police in ridding itself of its worst members. Such hearings are rarely used in other forms of employment, private or public. Commissioner Kennedy in Western Australia considered that they are “the very antithesis of the system of modern management practices”. In his view:

> the public’s interest is best served by having procedures for dealing with police conduct and behaviour that [among others] avoid the full panoply of the procedures of the adversarial process, including the application of the rules of evidence.\(^{56}\)

Similar views were expressed by Commissioner Bazley in the New Zealand Inquiry into Police Conduct:

> It does not follow that an officer’s ability to continue as a police officer should remain unquestioned, just because his or her behaviour does not meet the standard of proof of “beyond reasonable doubt” applied in criminal courts or cannot be established by formal proof in an adversarial tribunal process. Under modern performance management process, incorporating standard employment law obligations and protections, inappropriate conduct should be capable of investigation using a range of possible methods and should be subject to the full range of possible sanctions, including dismissal.\(^{57}\)

The approach taken in most ‘reform jurisdictions’, as well as Tasmania, is for a streamlined and prompt process for the dismissal of officers. This is either by way of a ‘no confidence process’ (New South Wales, Western Australia) or by way of a streamlined disciplinary process (Commonwealth and Tasmania) based on investigation and ‘show cause’ process ‘on the papers’.

Some jurisdictions (Tasmania and Western Australia) have, like Victoria, two means of terminating the services of members - a ‘no confidence process’ and a disciplinary process. I am not satisfied that there is a need for both processes to achieve the one end. ‘No confidence’ seems to be a method of dismissal peculiar to Australian police but only in some jurisdictions.

\(^{56}\) Kennedy Report, p205  
\(^{57}\) Bazley Report, p208
A ‘no confidence’ process seems only required if the discipline process proves ineffective in removing inappropriate officers. Indeed, this seems to have been conceded by the then Minister’s second reading speech which first introduced the ‘no confidence’ process in 1999.58 ‘No confidence’ processes are essentially subjective in nature, and, as a result, could potentially be misused to remove unpopular but effective officers.

While the use of a ‘no confidence’ procedure has been supported by Commissioners Kennedy and Wood, I find it difficult to support the use of such processes if there is another more objective means available of promptly assessing and, where appropriate, terminating the services of members. At present, there is no streamlined alternative method available for Victoria Police.

If, however, a prompt, objective and just dismissal process (discussed below) replaces the current disciplinary dismissal processes, the ‘no confidence’ process will become redundant and should be removed from the legislation.

While I do not favour the continued use of ‘no confidence’ processes, I need to point out that I have seen no evidence indicating that the use of the no confidence power in Victoria has been misused on the few occasions on which it has been used.

The better approach for dismissing officers is by way of a streamlined discipline process which provides natural justice to the members concerned, but is done in a prompt manner. An appropriate methodology would be an investigation and “show cause” process “on the papers” as is done in the Australian Federal Police and in Tasmania. The details of the procedure could be established by legislation, as it is in relation to the Australian Federal Police, or the legislation could allow for more flexibility by allowing the details of the process to be fixed by either regulation or Commissioner Instructions. As this is a new process, which will require significant cultural change, it is suggested that a flexible approach should be adopted (as it has been in the ‘reform states’).

What Would Justify Dismissal?

Under the proposed scheme, the conduct that would justify termination of employment should include two elements:

- whether particular conduct has been engaged in; and
- whether that conduct indicates the member is no longer suitable to remain a member of Victoria Police.

58 See Parliamentary Debates, Victoria, Legislative Assembly, 22 April 1999, 587 (Mr W. D. McGrath, Minister for Police and Emergency Services)
The particular conduct necessitating dismissal would be a breach of discipline and which either:

- amounts to serious misconduct and which, due to the nature of the conduct, makes continuation in Victoria Police inappropriate; or
- is a repeat of similar conduct which has been the subject of the Conduct Improvement Process, and it is considered that:
  - further use of the Conduct Improvement Process is unlikely to rectify the particular conduct or improve his or her performance; and
  - due to that conduct, the individual is unsuitable to remain part of Victoria Police.

The legislative terminology for the second element of the test could adopt or adapt the wording used by the Royal Canadian Mounted Police for a similar test:

*Any officer may be recommended for discharge or demotion and any other member may be discharged or demoted on the ground, in this Part referred to as the “ground of unsuitability”, that the officer or member has repeatedly failed to perform the officer’s or member’s duties under this Act in a manner fitted to the requirements of the officer’s or member’s position, notwithstanding that the officer or member has been given reasonable assistance, guidance and supervision in an attempt to improve the performance of those duties.*

The legislation should also provide some criteria to assist the Chief Commissioner or her delegate in determining the inappropriate or unsuitability tests.

Those matters would include:

- the maintenance of public confidence in Victoria Police;
- the maintenance of the integrity, security and efficiency of police operations.

In view of the peculiar status of policing and the community obligations that role entails, the Chief Commissioner should give these factors primacy over individual factors, when determining whether the individual should be dismissed from Victoria Police.

**The Procedure**

Under the proposed reforms, the responsibility for initiating the dismissal process will lie with ESD. ESD should investigate the alleged conduct with a view to determining whether the alleged conduct took place and whether that conduct justifies dismissal.

If the ESD investigator considers that the alleged conduct did not occur, the matter should be resolved with a no action result, unless the investigator also considers that

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59 As currently defined in section 69 of the Act, see Appendix Five
60 As currently defined by section 86A of the Act see Appendix Six
61 Royal Canadian Mounted Police Act 1985 Section 48.18(1)
the findings indicate that some remedial action may need to be taken. If this happens, the matter should be referred back to the relevant Region as a Conduct Improvement Process. Similarly, if the investigator finds that the action did occur, but that it does not justify dismissal, the matter should also be referred back for resolution through a Conduct Improvement Process.

If, however, the investigator is satisfied that the alleged conduct did occur and that the conduct does justify dismissal, he or she must forward a report of the investigation, with recommendations, to the Chief Commissioner. The Chief Commissioner, or her delegate, should consider the report and form views as to whether the conduct occurred, whether it amounts to a breach of discipline, and what action should be taken. In forming conclusions, the standard of proof will be balance of probabilities (with Briginshaw correctly applied).

If he or she believes that dismissal may be appropriate, the member, subject to the process, must receive notification about the Chief Commissioner’s intention to dismiss the member unless the member can ‘show cause’ why this action should not be undertaken. The member will have a fixed period within which to respond.

On receipt of the response from the member and, if still satisfied on the balance of probabilities that the conduct has happened (being either a single instance of dishonest, serious misconduct, criminal or other corrupt conduct, OR repeated instances of failure to adhere to a Management Action Plan), the Chief Commissioner or delegate will have two options:

- to dismiss the member; OR
- where the Chief Commissioner is satisfied, in all the circumstances the member should be given a chance, or another chance, to rectify her or his conduct, the Chief Commissioner may refer the matter to the Conduct Improvement Process for the development of a Management Action Plan.

**Incorporation of Other Dismissal Processes**

The process outlined in the preceding section could also replace the other dismissal methods established by the Act:

- the streamlined dismissal process regarding probationary members;\(^{62}\)
- members who have been charged with an indictable offence (one punishable by imprisonment) and the offence is found proven.\(^{63}\)

It has been argued in some submissions that any member found guilty of an indictable offence should automatically be dismissed. That suggestion is regarded as too extreme as there may well be instances when the offence does not necessarily indicate that the person should not remain a member of police.

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\(^{62}\) Currently section 8(5) of the Act

\(^{63}\) Currently section 80 of the Act
While conviction for an indictable offence is clearly inappropriate for any police member, I do not consider it fair or just for such members to be given no opportunity to argue for their retention in Victoria Police. The streamlined method outlined in the preceding section should allow this to happen promptly and effectively.

The proposed process could also be used to examine whether someone should be dismissed as being unfit for duty. Although this process is not strictly part of the current discipline system, it demonstrates the nexus between performance management and disciplinary processes and their primary focus on the capacity of a person to conduct him or herself to the requisite ethical and professional standards that the community expects from police.

**Discipline Avoidance**

To address one of the chronic defects with the current system, specific measures need to be put in place for those that may want to delay or avoid participating in the disciplinary process. Service of material should be allowed at the last address provided by the member to Victoria Police.

In addition, where at any stage in the dismissal process the member claims to be too unfit to respond to a discipline inquiry, the legislation should permit the Chief Commissioner to direct a medical or psychiatric examination of the member by a Forensic Medical Officer. The result of that examination should be binding on both the member and the Chief Commissioner. If the FMO considers that the member is able to respond to the disciplinary inquiry, or if the member refuses to cooperate in the medical or physical examination, or refuses to attend the FMO, the legislation should allow the Chief Commissioner to conduct and determine the ‘show cause’ process without any input from the member.

**Streamlining and Simplifying Review and Appeal Rights.**

The review and appeal processes in Victoria are numerous, inconsistent, slow and despite the lack of legal representation, excessively formal. Their complexity and lethargy require replacement with simplicity and promptness. The reason for the current position derives from police history and culture, not from any identifiable need peculiar to police or the office of constable, much less good management practices or the needs of justice to individuals.

There is, therefore, no reason for the current processes under which the rights and disadvantages of members of police are significantly different from those of other public sector employees. I do not consider that they can be justified by the uniqueness of the policing role and I consider that the appeal and review rights applicable to

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64 Currently section 82 of the Act
police should give rise to no significant benefits or disadvantages to which others in the public sector workforce are not subject.

In considering the appropriate appeal types there are three types of appeals or reviews relevant to policing that need to be discussed separately. Judicial appeals, appeals concerning dismissal and other types of appeals or reviews.

Reviews and Conduct Improvement Process

The review and appeal regimes in other jurisdictions vary considerably. They vary as to whether they are:

- internal, or conducted by an external statutory body;
- based on the merits or just the process; or
- decisions or recommendations.

Even though the objective of the proposed scheme is remedial and should not lead to disputes, members should be able to have an internal review of the Conduct Improvement Process. Other public sector agencies are required to establish an internal review process for these sorts of matters. Victoria Police should develop internal review processes based on those requirements.

Also consistent with processes for Victorian public servants, Conduct Improvement Process matters should be subject to limited external review where a member considers management action is unfair or inconsistent with the legislative framework.

The review processes for public servants could be adapted to police. They are broad in scope, enabling process challenges of this type.65

If the Public Sector Standards Commissioner is not considered appropriate to discharge this function for police, these reviews could be a function of the Police Appeals Board. The Police Appeals Board has expertise in dealing with members’ appeals on a broader canvas. In that regard I note that the continuing existence of the Board is not affected by these reforms as its jurisdiction is much broader than dismissal and discipline appeals, the vast bulk of its work being concerned with promotion appeals.

Reviews and Appeals against a Dismissal

An internal review process is unnecessary in the dismissal process, given the nature of the review, the nature of the issue and the decision maker. Appeals to an external body are another matter and should be incorporated into legislation.

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65 Public Administration (Review of Actions) Regulations 2005 enables internal review and external review by the Public Sector Standards Commissioner of decisions or processes that are unfair or inconsistent with the legislative framework.
Currently members of Victoria Police are not able to appeal to an industrial relations body if they think that their dismissal has been harsh, unjust or unreasonable. Victorian public servants, members of the Australian Federal Police and police in a number of other States have this right. While the law is well established that police are not employees as such, there is no reason why police should not have substantially the same benefits and employment arrangements as other persons in the public sector workforce. Both Victoria Police and the Police Association put this view in their submissions to this Review. I find their arguments on this issue persuasive and consider that it is consistent with the development of professional and effective policing in Victoria. The Morris review in the United Kingdom made a similar point specifically when it said:

3.25 It is clear that there is ample precedent to demonstrate that police officers can be made subject to legislation which applies to employees without compromising the office of constable.

3.26 In our opinion, therefore, there is no reason why employment law should not be extended to the office of constable in the same way as it is in respect of other issues, such as health and safety, equal pay and discrimination. This would necessarily include police officers acquiring a right of recourse to an Employment Tribunal to claim unfair dismissal, in addition to their current rights.

These views are equally applicable to Victoria.

To achieve this result, while retaining the office of constable, will require either an alteration of the referral of industrial relations powers to the Commonwealth, or the provision of a State regime.

The role of the Victorian State Services Authority has recently been expanded to:

enable certain public sector employees and Parliamentary officers whose employment is terminated to apply for relief in respect of that dismissal on the ground that it was harsh, unjust or unreasonable.

An application for review is made to the Public Sector Standards Commissioner who acts independently from the rest of the Authority. Currently, the public sector employees who are able to apply to the Commissioner are, essentially, those in bodies who have less than 100 employees. However, there appears to be no reason why this regime could not be extended to members of Victoria Police whose employment has been terminated.

An alternative is to provide such powers to some new body, designed to cater specifically for police. However, my preferred approach is that police should have access to a review of a dismissal decision on the grounds that the decision was harsh, unjust or unreasonable consistent with rights available to other public sector employees.

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67 Morris Report, p52
68 The power was referred under the Commonwealth Powers (Industrial Relations) Act 1996. The terms of the reference are found in sections 4, 4A and 5
69 Public Administration Act 2004 s70A
There is, however, one aspect of police employment that in the Australian Federal Police has justified a different treatment compared to employees in other public sector agencies.

The Federal Police Commissioner who has terminated the employment of either a sworn or an unsworn employee may issue a declaration, within 24 hours of that dismissal, declaring that the employee’s conduct:

- amounts to serious misconduct by the employee; and
- is having, or is likely to have, a damaging effect on:
  - the professional self-respect or morale of some or all of the AFP employees; or
  - the reputation of the Australian Federal Police with the public, or with any section of the public, or with an Australian or overseas government or law enforcement agency.\(^{70}\)

Where such a declaration is made, the Australian Industrial Relations Commission normal jurisdiction to review dismissals of employment claimed to be harsh, unjust or unreasonable, is excluded.\(^{71}\)

The Chief Commissioner has argued that a similar arrangement should be instituted in Victoria although, unlike the Federal model, being limited to sworn members.

The desire for a Victorian equivalent of the Australian Federal Police provision arises from the need for the Chief Commissioner to have full faith and confidence in the men and women in Victoria Police. To require the Chief Commissioner to have persons reinstated into Victoria Police whom she has dismissed for serious misconduct is inconsistent with that objective.

On the other hand, depriving police members of an entitlement held by other employees and by police in some other jurisdictions seems both unjustified and unfair.

A better and more appropriate solution would be to pay compensation to a member dismissed in harsh, unjust or unreasonable circumstances who is unsuitable for reinstatement. The Public Administration Act 2004 provides a precedent. Where a dismissal has been found to be “harsh, unjust or unreasonable” one of the remedies is:

> If the Public Sector Standards Commissioner thinks that the reinstatement of the employee is inappropriate, he or she may, if he or she considers it appropriate in all the circumstances of the case, make an order requiring the employer to pay the public sector employee an amount ordered by the Public Sector Standards Commissioner in lieu of reinstatement.\(^{72}\)

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\(^{70}\) *Australian Federal Police Act 1979*(Cth) s40K

\(^{71}\) *Australian Federal Police Act 1979* (Cth) s69B(1)

\(^{72}\) *Public Administration Act 2004* s70 M (6)
Using the Australian Federal Police model as a guide, the Chief Commissioner could, within 24 hours of dismissing a member, issue a declaration to the Public Sector Standards Commissioner to limit the remedies available to the member allowing compensation but preventing reinstatement, unless the Chief Commissioner withdraws the declaration.

The compensation able to be awarded by the Public Sector Standards Commissioner is capped. Broadly speaking, for police it would limit any amount payable to a maximum of six months pay at the award rate. This is less than the current cap able to be awarded by the Police Appeals Board when it believes that reinstatement of a dismissed police member is impracticable. That cap is an amount “not exceeding the amount of remuneration of the applicant during the period of 12 months immediately before being dismissed or terminated”. This seems a more reasonable amount, given this will be the only remedy available for dismissed members subject to a Commissioner’s declaration.

Judicial Appeals

Each Australian jurisdiction has a judicial or court process that allows appeals from disciplinary decisions based on administrative law grounds (such as a failure to provide natural justice).

A right of judicial appeal, on administrative law grounds, should continue for Victoria Police in the same way that it has in the past, and does for others in the public sector workforce.

It has been suggested that the Supreme Court’s jurisdiction should be specifically excluded in all dismissals for non-performance or misconduct etc. However I am not satisfied that this is appropriate when others employed in the public sector have this right. A right of judicial appeal on administrative law grounds should continue for Victoria Police in the same way that it has in the past, and does for others in the public sector workforce.

Other Disciplinary Issues

There are, in addition, other matters which need to be discussed regarding the police disciplinary system.

Disciplinary Matters which also Involve Criminal Prosecutions

At present, where an officer is charged with a criminal offence arising from the same circumstances as those that give rise to a disciplinary matter, the disciplinary matter is put on hold (often with the officer on leave with pay) for what can be many years until the criminal matter is completed. This is considered necessary to avoid prejudicing the criminal law matter. An acquittal, of course, does not release the officer from his other liability for disciplinary issues as the standard of proof in disciplinary matters

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73 The amount that can be ordered pursuant to section 70M(6) is capped by a fairly complicated formula set out in sub-sections (10) and (11). The effect of this cap is to mirror the thresholds in the Workplace Relations Act 1996 (Cth), prior to the enactment of the WorkChoices amendments.
74 Police Regulation Act 1958 s91G
75 Page 25, Victoria Police submission
is different from that for criminal offences. This extended period of delay is of no benefit to Victoria Police or to the officer concerned as he or she will often find this lengthy period of uncertainty extremely stressful.

With the proposed processes, this difficulty may well be able to be avoided. In this context we are largely concerned with ‘show cause’ dismissal matters, which are expected to be finalised within six months. Experience from other jurisdictions such as the Australian Federal Police indicates they are generally completed before criminal matters are begun, thus avoiding the stress that impacts on members during the seemingly endless period until their situation is resolved. Prompt resolution also benefits Victoria Police.

It will, of course, be necessary for there to be close communication between Victoria Police and the Office of Public Prosecutions regarding such matters to ensure that a ‘show cause’ dismissal matter, even if finalised prior to the commencement of a criminal matter, will not prejudice and therefore endanger the success of that prosecution.

Compulsory Questioning

Currently, the Act permits the Chief Commissioner or Director, Police Integrity to direct any member of Victoria Police to provide information, produce any document or answer any question for the purposes of any investigation of a complaint about a possible breach of discipline. Answers provided under the relevant provision can only be used in disciplinary hearings and cannot be used in subsequent criminal proceedings. However, failure to answer a question under a direction is itself a breach of discipline.

The Victorian provision was inserted in 1983 following a Commission of Inquiry into internal discipline in Victoria Police. The Commission considered that it was:

absolutely essential that police officers be required to account for their on-duty activities.
The idea that patrol officers on the grounds of self-incrimination known only to themselves might without penalty refuse to disclose where they had patrolled, whom they had checked or spoken to and similar matters has only to be stated to recognise its inherent absurdity.

The provision is currently limited to complaint investigations, but police misconduct can be identified in other ways, not just through a complaint. There is no reason why the investigation of any misconduct should be limited by any unnecessary restriction.

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76 Police Regulation Act 1958 s86Q
77 Committee of Inquiry – Victoria Police, A Review of Internal Discipline in the Victoria Police Force, Special Report No. 1 – September 1983, para 63.15, p139
The proposed reform to the Victoria Police disciplinary system is partially modelled on the Australian Federal Police disciplinary system. That system retains a similar power to direct answers to questions in any disciplinary matter. Accordingly, I am of the view that the Victorian provision should be retained, but be modified so that the current requirement for a “complaint” as a necessary precondition for its use is removed.

**The Power to Refuse Resignations**

In most jurisdictions in Australia, including Victoria, there exist limitations on the ability of officers to resign. These limitations commonly involve:

- requiring a fixed period of notice to be given or obtaining Commissioner’s approval for a different period;¹⁷⁹
- offences for failing to comply with resignation requirements, such as notice;⁸⁰ and
- a requirement for specific written authorisation from the Commissioner to resign.⁸¹

In Victoria, a member of police cannot resign without either specific written authorisation from the Commissioner or three months’ notice in writing. A penalty attaches for failure to comply with this provision.⁸²

Although not stated explicitly, many of these provisions imply a police Commissioner may refuse a resignation. I note that equivalent provisions do not exist in other public sector legislation. Notice regarding resignation for public servants is usually dealt with in industrial arrangements or in employment contracts.

*Unless a strong rationale can be presented, I can see no justification for the Commissioner being able to refuse a resignation, either explicitly or implicitly.*

In the context of a disciplinary system in which police can be charged with corrupt or other serious misconduct, it may be that resignation is used as a means of avoiding a disciplinary outcome. Accordingly, a refusal to accept a resignation of such an officer would allow disciplinary proceedings to continue. I fail to see what end this might achieve, other than a waste of resources. In any event, if dismissal were the likely outcome of that process, voluntary resignation results in a solution to the problem sooner rather than later.

*Unless a strong rationale can be presented, I can see no justification for the Commissioner being able to refuse a resignation, either explicitly or implicitly.*

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⁷⁸ Section 40VE of the *Australian Federal Police Act 1979*
⁷⁹ For example, section 8.1 of the *Police Service Administration Act 1990 (Qld)* and Regulation 5.1 of the *Police Service Administration Regulation 1990 (Qld)*
⁸⁰ For example, section 27 of the *Police Service Act 2003 (Tas)* and section 29 of the *Police Act 1998 (SA)*
⁸¹ For example, section 20 of the *Police Administration Act (NT)*
⁸² *Police Regulation Act 1958 s14*
Protection of Disclosures in the Conduct Improvement Process

One issue which has arisen in the context of any move towards a stronger focus on remedial measures in a disciplinary system is the status of potentially incriminating disclosures which might be made by an officer as part of discussions during the Conduct Improvement Process. It is said that officers will be less inclined to take an effective part in the process if they consider that any disclosures made during the proceedings can be used against them in disciplinary or criminal proceedings.

In Queensland, the Police Human Resources manual, which details the processes for that State’s disciplinary processes, provides for the confidentiality of the details of its management resolution process and states that:

An Alternative Dispute Resolution mediation is conducted in private and the content of the mediation is confidential and privileged.\(^{83}\)

The Queensland legislation does not provide any legislative backing for that proposition or provide any other protection for statements made during the process other than expectations of confidentiality. The Queensland process involves, like the current Management Intervention Model and the proposed Conduct Improvement Process, processes other than Alternative Dispute Resolution during which disclosures may be made.

New South Wales makes specific provision for the protection of statements made during an Alternative Dispute Resolution process, but, like Queensland, no further protection is made for other types of disclosure during that State’s remedial process.\(^{84}\)

Other Australian jurisdictions have no protection for statements made by officers during a disciplinary process, other than in provisions which allow compulsion for answers to questions in disciplinary investigations.

The other Australian jurisdictions have not seen the need to provide any blanket protection for statements made during a remedial process and it is difficult for me to see otherwise. Nonetheless, I note that Victoria Police favours this sort of protection, as a mechanism to achieve cultural change in Victoria Police, and to persuade police that they must be open and frank in the new Conduct Improvement Process. As this report has indicated, there is long history of adversarial tension between management and officers in Victoria Police with particular reference to the discipline process. It will take some time to overcome that tension. The success of any remedial process requires the trust and acceptance of all police.

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\(^{83}\) Queensland Police HR Manual, 18.2, Complaint Resolution Procedures, para 3.9
\(^{84}\) Police Act 1990 (NSW), section 211D(3)
evidence in any criminal or civil proceedings. Of course, this proposed provision would not preclude the use of documentation, such as Management Action Plans, in any dismissal proceedings where Conduct Improvement Processes had failed.

As I remain unconvinced about the long term benefit of this protection, which does not apply in other employment settings, I recommend that protection provision be subject to a sunset of five years. During that period, the need for the protection can be reviewed.

**Implementation**

*Legislation*

For transparency reasons if no other, it is preferable for all elements of the discipline system to be legislatively based and the Act should be amended to include the basis for the remedial and management part of the disciplinary system.

The amendments, however, should not follow the current approach of providing, in laborious detail, the procedural requirements for the scheme and providing further detail in supporting documentation. Instead, as in Queensland and New South Wales, the role of the legislation should be to establish the essential elements or parameters of both the remedial and punitive elements of a new scheme, leaving the necessary processes to be defined by way of subordinate legislation or VPM Instructions. This is similar to the approach taken under the *Public Administration Act 2004* in relation to public sector body heads and the procedures for discipline and grievance matters.

While the details of the particular processes should be a matter for the Chief Commissioner, the essentials of the scheme should be established by requirements in the Act. Simplicity of design is considered one of the benefits of any successful scheme. This is the approach favoured in this report.

*Administration*

One of the advantages of the proposed Conduct Improvement Process is to link the Discipline and Performance Management Systems. This is highly desirable as the aim of both systems is identical – to ensure high standards of ethical and professional conduct and to correct inadequate, incorrect or inappropriate conduct, so improving policing services to the community, ensuring confidence in Victoria Police and benefitting individual police members. This linkage could be advanced one step further if the administration of both the performance management system and the remedial aspect of the disciplinary system were administered by the same part of Victoria Police. At present, the discipline system is the responsibility of ESD, while the performance management system is the responsibility of the Performance Management Unit which forms part of the Human Resources department. One of the problems of the current arrangements is that the communication between the discipline and the performance management systems is poor, despite their parallel paths and common objectives.
New Zealand has overcome a similar difficulty by integrating the discipline and human resources functions (which include performance management) into a single management structure.\(^85\) The Chief Commissioner should consider the advantages of the New Zealand model in overcoming the difficulties arising from the administrative separation of the performance management and discipline processes in Victoria Police.

**Human Rights Issues**

The *Charter of Human Rights and Responsibilities Act 2006* (the Charter) now imposes an obligation on Government to ensure that any legislation is consistent with the rights described in the Charter. When new legislation is proposed, the Government must provide to Parliament a statement of compatibility with the Charter,\(^86\) or alternatively, must make a statement that the legislation specifically overrides the Charter.\(^87\)

Although a detailed analysis of any potential amendments to the Act will be required, I can foresee only one provision which might be affected by my suggested amendments. This issue is discussed in detail in Appendix Eight.

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85 A measure praised by Commissioner Bazley. Bazley Recommendation R36 Vol 1 223
86 *Charter of Human Rights and Responsibilities Act 2006*, s28
87 *Charter of Human Rights and Responsibilities Act 2006*, s31
FLOW CHART OF RECOMMENDED DISCIPLINE SYSTEM FOR VICTORIA POLICE

Incident/Complaint

Oversight by ESD and OPI

Assessment
By either ESD or Region or workplace under delegation from ESD

All other

Conduct Improvement Process
Result – remedial/training measures only in context of Management Action Plan

Internal review

Process review

Breach of Discipline which may justify termination

Termination Process
- Process: investigation and show cause or other process determined by Commissioner that provides natural justice
- Sanction/Result:
  - Termination or
  - Remedial/training

Terminations only

APPEAL
Public Sector Standards Commissioner
Grounds - harsh, unjust or unreasonable termination

*Note: Existing Administrative Law grounds of appeal to the Supreme Court remain
CONCLUSION AND RECOMMENDATIONS

The intention of the proposed changes is to fundamentally alter the discipline system to one which is more in line with employment practices in other forms of employment and in a growing number of other policing services.

More importantly, it will change the focus of the system from the impossible and absurd objective of forcing individuals to be better, to one which assists police who can be assisted and, at the same time, provides an effective and fair means of promptly dismissing those who should not remain members of Victoria Police.

The report has made a number of significant recommendations for the simplification and improvement of the Victoria Police discipline system. Victoria Police were shown a draft of these recommendations and their comments have been incorporated. In general, they are supportive of them.

Recommended Outcomes to be Achieved by Legislative Amendment

1. Effect to be given to the following principles on which a new discipline system should be built:

   a) Reducing, or eliminating the differences between the discipline arrangements for police and other employees. Disciplinary processes applicable to police should be equivalent, as far as possible, with those applicable to other public sector employees, except where a benefit or disadvantage is clearly justified by the needs and requirements of the office of constable or the particular needs of policing.

   b) Reducing the number of sanctions and increasing performance development with a focus on rehabilitation.

   c) Increasing local decision-making and responsibility for discipline matters.

   d) Linking the discipline system with the performance management system.

   e) Reducing complexity and speeding up processes.

   f) Streamlining dismissal processes.

   g) Streamlining and simplifying review and appeal rights.

2. Establishment of a disciplinary process for Victoria Police that has two parts:

   a) Remedial processes for use for all police misconduct and poor performance issues other than where the police conduct justifies termination; and

   b) Dismissal processes where the police conduct justifies termination.
3. Establishment of a framework for the remedial and management part of the disciplinary system that sets basic parameters within which the Chief Commissioner can determine procedures to give effect to the new scheme.

4. Establishment of a limited right of review where a member believes management remedial action is unfair or inconsistent with the legislative framework.

5. Introduction of a streamlined dismissal process where a member is obliged to 'show cause' why dismissal should not occur regarding a breach of discipline which either:
   a) amounts to serious misconduct and which, due to the nature of the conduct, makes continuation in Victoria Police inappropriate; or
   b) is a repeat of similar conduct which has previously been the subject of the remedial part of the disciplinary process and it is considered that further use of the remedial process is unlikely to be successful in assisting the officer and, due to that conduct, the officer is unsuitable to remain part of Victoria Police; and which applies to:
      i) misconduct by probationary officers; and
      ii) members who have been charged with an offence punishable by imprisonment and that case is found proven; and
      iii) possibly, members terminated for being unfit for duty.

6. Removal of the current “no confidence” process from the legislation, provided a prompt, objective and just dismissal process, such as the new discipline process recommended in the report, replaces the current discipline process.

7. Provision for the Chief Commissioner to direct that the member undergo a medical or psychiatric examination by a Forensic Medical Officer where the member claims to be unfit to respond to a discipline inquiry in dismissal proceedings and for the Forensic Medical Officer’s opinion to be binding.

8. Consistent with the rights available to public servants under the Public Administration Act 2004, provision to members of Victoria Police of access to an external review of any decision dismissing the person, on the basis that the decision was harsh, unjust or unreasonable.

9. Provision for the Chief Commissioner to issue a declaration that if successful in any claim for harsh, unjust or unreasonable dismissal, an individual should not be entitled to reinstatement but could receive an award of compensation.

10. Amendment of section 86Q of the Act to allow its use even though no complaint has been lodged concerning the member’s conduct.

11. Removal of the legislative requirement that the Commissioner specifically approve resignations.

88 As currently defined in section 69 of Police Regulation Act 1958
89 As currently defined in section 86A
12. Exclusion of any statement made as part of any remedial management action from dismissal, criminal or civil proceedings, without precluding the use of documentation, such as Management Action Plans, in any management related proceedings including dismissal proceedings where remedial management action has failed. Provide a five year sunset during which period the need for the protection can be reviewed so it can be extended if considered necessary.

13. Ensure the proposed Police Registration Board, should it be adopted, have power to determine matters of registration status, separate from the internal discipline arrangements within Victoria Police, which remain the sole province of the Chief Commissioner.

**Recommended Administrative Action to be Undertaken by Victoria Police**

1. Review the current systems for assessing competency and managing underperformance. The aim of the review should be to provide an effective system for regular opportunities to appraise the performance of individual police and one that allows:

   a) Identification of strengths to assist the individual’s skill and career development and advancement through the ranks; and

   b) The early identification of measures that address actual or potential performance or behavioural difficulties, and will assist the individual to overcome those difficulties.

2. Undertake a review of data collection systems to ensure the reformed discipline system is supported by a data collection system that enhances performance management tasks and is user-friendly.

3. Arrange in the short term for the assessment of complaints and incidents to remain a central function, but ensure it is delegated to the regional or local level once the local area is sufficiently skilled to undertake the process and ensure:

   i) that the assessment process is overseen by a regional Professional Development Committee that reports centrally on a regular basis; and

   ii) that the assessment process is subject to oversight by Victoria Police centrally and by OPI.

4. Establish management methods to rectify and resolve substandard behaviour, conduct issues or performance issues, instead of formal hearing processes (called for the purposes of this report Conduct Improvement Process). For these purposes it should ensure that:

   a) There are clear objectives as to its purpose (consistent with the principles outlined above).
b) There is a Management Action Plan in each instance where any action is
determined to be necessary.

c) There is a process for internal review if a member considers management
remedial action is unfair or inconsistent with the legislative framework.

5. Establish processes that finalise disciplinary matters promptly, but where criminal
matters are likely to be involved, consult with the Office of Public Prosecutions to
ensure that the disciplinary matter will not prejudice the criminal matter.

6. Consider the New Zealand model for the integration of the human resources and
discipline functions within Victoria Police to determine whether it would provide
a clearer and more consistent focus on both functions.
APPENDICES

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APPENDIX ONE - OWN MOTION DETERMINATION AND METHODOLOGY

Own Motion Determination

In that I, George Eugene Brouwer, Director, Police Integrity, consider that the matters to be investigated specified below are relevant to the achievement of my objects under section 102BA of the Police Regulation Act 1958, those objects being -

(a) to ensure that the highest ethical and professional standards are maintained in the force; and

(b) to ensure that police corruption and serious misconduct is detected, investigated and prevented; and

(c) to ensure that members of the force have regard to the human rights set out in the Charter of Human Rights and Responsibilities -

pursuant to section 86NA(1) of the Police Regulation Act 1958, I determine that I will conduct an investigation into those matters on my own motion. The matters to be investigated are:

The formal and informal policies, practices and procedures in place in Victoria Police concerning the administration of discipline; and, in particular -

(a) Whether those policies, practices and procedures provide an effective, just and timely discipline regime within Victoria Police.

(b) Whether those policies, practices and procedures are consistent with the attainment or maintenance of the highest ethical and professional standards in the force.

(c) Whether those policies practices and procedures are consistently applied.

(d) How those policies, practices and procedures compare to the effective policies, practices and procedures in existence in other jurisdictions and other types of workplaces.

(e) Whether those policies, practices and procedures hamper or assist management of the force.

(f) Whether those policies, practices and procedures are unfair or unjust to the members of the force.

(g) Whether those policies, practices and procedures include elements that unnecessarily delay the resolution of disciplinary matters.

(h) What measures can be adopted to improve or replace those policies, practices and procedures so as to improve the ethical and professional standards and the level of discipline within the force while providing a just and fair process.
Methodology

Own Motion Determination—Issued 27 February 2007.

Advertisement – seeking submissions by 5 April 2007 was made on 9 March 2007 – in the Herald-Sun and The Age.

Submissions were received from:

• Victoria Police
• The Police Association of Victoria
• Former Chief Commissioner S I Miller
• Mr J P Tuttle
• R L Andrews
• The Police Federation of Australia
• Fitzroy Legal Service
• Victoria Legal Aid
• Federation of Community Legal Centres (Vic.) Inc

The Police Association also provided two subsequent additional submissions.

Discussions were held with:

• Former Commissioner K Glare
• Former Commissioner N Comrie
• Former Deputy Commissioner Bill Kelly
• Assistant Commissioner L Cornelius
• Police Officers from:
  - Conduct and Professional Standards Division
  - Airlie Leadership Development Centre
  - Risk Management Division
• Mr P Mullett, Secretary, Police Association of Victoria
• Mr G Davies, Discipline/Legal Manager, Police Association of Victoria
• Mr Bruce McKenzie, Assistant Secretary, Police Association of Victoria
• Representatives of other policing jurisdictions in Australia:
  - Mr S Hollands, Queensland Police Service
  - Ms B Etter, WA Police
  - Mr M Green, WA Police
  - Mr A Scott, AFP
  - Mr S Mewburn, AFP
  - Mr R Kelland, AFP
  - Mr P Wild, Tas Police
  - Ms C Burn, NSW Police
- CS Trueman, SA Police
- CI Zander, SA Police
- Ms J Russ, AFP

- Ms B Masterson, Chairperson, Police Appeals Board
- Mr R Beazley, Police Appeals Board
- Representatives of:
  - The Department of Justice
  - The Melbourne Fire Brigades Board
  - The Customs Service
- Mr G Vines, the Public Sector Standards Commissioner
- Mr I Lanyon, Australian Professional Standards Council
- Ms K Ettershank, Australian Professional Standards Council

Also considered were the following reports from other jurisdictions:

  - *Interim Report* (February 1996)
  - *Interim Report* (November 1996)
- *Royal Commission into whether there has been Corrupt or Criminal Conduct by any Western Australian Police Officer, Final Report Vol II* (January 2004) (The Kennedy Report)
APPENDIX TWO - VICTORIA POLICE DISCIPLINE PROCESSES

Background

1. Victoria Police was established in 1853. Based on a military command and control style model, the legislative framework for regulating police has been generally consistent since then, although provisions concerning discipline have seen most change. Arrangements have ranged from virtually unfettered powers of the Chief Commissioner, to a non-binding review mechanism (the former Police Review Commission) then to the formal quasi court-martial discipline and appeal hearings in the form of Police Discipline and Police Service Boards.

2. Today disciplinary sanctions can arise from a number of different processes. The ‘militaristic rigidity’ survives and combines with a multiplicity of procedures and processes. These operate in addition to the ‘pre-disciplinary’ processes in the hands of supervisors. In addition to the powers of the Governor in Council to dismiss the Chief Commissioner, Deputy Commissioner or Assistant Commissioners, disciplinary sanctions can arise in five separate processes:

   • a management or administrative process, called the Management Intervention Model;
   • formal disciplinary processes;
   • the Commissioner’s lack of confidence process; and
   • powers concerning Probationary Constables.
   • There is also a Fitness for Duty Inquiry which, while not strictly discipline, also needs discussion in this context.

The Management Intervention Model

3. The Management Intervention Model is a relatively new process with a broader scope than the provision of disciplinary outcomes. It is designed to provide for the expedient and flexible resolution of complaints, incidents and issues arising from the conduct of either sworn or unsworn Victoria Police employees with a view to ensuring the provision of a highly professional service to the community.

4. The Management Intervention Model is intended to empower local managers and hold them accountable for resolving customer service issues and minor complaints using alternate discipline resolution processes.

90 Police Regulation Act 1958 s4(1) &[2] the Act
91 Police Regulation Act 1958 s82
5. It is not legislatively based, but has been used since January 2006. It was not formally issued as an instruction in the Victoria Police Manual until 6 November 2006. The five stated objectives of the Management Intervention Model are:

- to facilitate the expedient resolution of complaints incidents and issues, thereby ensuring the provision of a highly professional service to the community of Victoria;
- to improve the service, options and outcomes to the public in the handling of complaints and issues;
- to promote the integrity and reputation of employees and the Victoria Police;
- to maintain and enhance professional standards of conduct and the ethical health of the organisation;
- to promote and encourage a flexible approach to resolve complaints, incidents and issues.\(^{92}\)

6. The matters intended to be resolved by the Management Intervention Model are at a relatively minor level, defined as a complaint, incident or issue classified as a ‘Category 1 Matter’. Category 1 matters consist of:

- misconduct;
- minor breaches of police rules or procedures;
- workplace harassment pursuant to EEO (sic) legislation;
- correspondence related issues;
- complaints/allegations, where an employee’s performance has failed to achieve appropriate service or behavioural standards and could be most efficiently resolved using Management Intervention Model or the Management of Under Performance policy; or
- other matters assessed as suitable by a “specialist area”.\(^{93}\)

7. “Misconduct”, is not defined in either the Act or the Instructions. It would seem to amount to misconduct that does not fall within the scope of “serious misconduct”, a term defined by section 86A or in VPM 210-1 as:

“serious misconduct”, in relation to a member of the force, means—conduct which constitutes an offence punishable by imprisonment; or conduct which is likely to bring the force into disrepute or diminish public confidence in it; or disgraceful or improper conduct (whether in the member’s official capacity or otherwise)”.  

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\(^{92}\) VPM Instruction 210-2.

\(^{93}\) “Specialist areas” is defined as: Areas within Victoria Police that perform or have responsibility for particular specialised functions or responsibilities of legislation or policy. Specialist areas include but are not limited to, Equity and Conflict Resolution Unit, Workplace Relation Unit, ESD Performance Management Unit and Occupational Health and Safety.
8. ESD is responsible for assessing whether the matter is appropriate for resolution under the Management Intervention Model and should be classified as a Category 1 matter. If a Category 1 matter is unresolved within 40 days (or any extension to that period which is granted) the matter should be returned to ESD and then dealt with in accordance with the formal disciplinary process discussed below.

9. The rules, as set out in the Instruction, regarding the management of a Management Intervention Model matter are quite detailed. There are a number of persons who can or must be involved in the process including:

   • The “Coordination Officer” who must be a Superintendent or Assistant Director of the Division from which the matter emanated. The coordination office allocates Category 1 matters in consultation with the Professional Development Committee. The Coordination Officer monitors the progress of all files they have allocated and is also the liaison officer between the Professional Development Committee and the Resolution Officer.

   • The Professional Development Committee should comprise as a core:
     - Regional Superintendent or equivalent;
     - Inspector - Continuous Improvement; and
     - HR representative.

   The Professional Development Committee has a number of roles, but in the context of the Management Intervention Model, its role is to identify the facets of the complaint, incident or issue that require resolution and/or addressing. It can also recommend the appointment of a Professional Council.

   • The Professional Council comprises at least 12 members with specified roles; members include the Regional Assistant Commissioner, the relevant union representative, the Coordination Officer and a community representative. A Professional Council can only be appointed with the approval of the regional Assistant Commissioner/Department Manager. The role of the Professional Council includes the provision of specialist advice to the Professional Development Council.

   • The Resolution Officer who is appointed to resolve the matter within 40 days of the creation of the file (although a 21-day extension can be provided by the Professional Development Committee). The Resolution Officer is appointed by the Coordination Officer and, in relation to a sworn officer, should be, at the minimum, an Inspector from the relevant District, Division or region or department as the case may require.

10. The Resolution Officer is the key to the process as he or she has responsibility for the resolution of the matter. The primary considerations of the Resolution Officer are:
• the expedient resolution of allocated files;
• a welfare and development employee focus;
• keeping all parties fully informed throughout the process;
• the application of outcomes in the resolution of matters that benefit the employee, the organisation and person/group raising the issue; and
• the application of natural justice principles to all phases of the process.

11. The key principles underlying the Management Intervention Model process are:
• to resolve less serious misconduct matters locally; and
• to do so by way of consultative processes.

12. The Management Intervention Model aims to resolve performance issues by way of remedial techniques, rather than adversarial punitive methods. The Instruction encourages “developmental and welfare driven action rather than punitive sanctions”.

13. Three disciplinary or punitive sanctions are able to be implemented, but only “after all development/welfare issues have been exhausted”. They are:

• admonishment;
• transfer; and
• change of duties by direction.

14. “Admonishment” is a “non-statutory mechanism available to support the discipline process”. Although the term itself is not defined, in practice it is a warning or rebuke that is a slightly lesser sanction that the minimum disciplinary sanction recognised by the Act: the “reprimand”. To “reprimand” is defined as “to officially or sharply rebuke”.

15. To effect an admonishment, an “Admonishment Notice” must be issued by a line supervisor. The decision to issue the Notice “must be based on credible evidence that it is more probable than not that the employee committed a minor breach of discipline”. Principles of natural justice must be applied prior to issuing an Admonishment Notice.

16. The Management Intervention Model is apparently well-regarded amongst members and by the Police Association. According to advice from Victoria Police, the number of “minor” matters that were traditionally investigated by ESD staff has reduced, allowing ESD staff to redirect their resources to more significant matters.

94 VPM Instruction 210-2 para.11.1
95 Under Regulation 21(2)(a) of the Police Regulations 2003 the Chief Commissioner may fill a vacant position by way of transfer.
96 VPM Instruction 211-2
97 The order of seriousness of the sanctions is reversed, according to the Compact Oxford, which states: a reprimand is a formal expression of disapproval, while to admonish is to “reprimand firmly”.
98 VPM Instruction 211-2
When the Management Intervention Model was introduced, it was expected that it would allow 15 per cent of complaints to be resolved by mediation, but it now appears that the rate will be over 30 per cent of complaints received.\(^9\)

**Formal Disciplinary Processes**

17. Under the Act, disciplinary sanctions are based on either:

- the establishment of a “breach of discipline”; or

- a member being found to have committed an offence punishable by imprisonment.\(^{10}\)

**Breach of Discipline**

18. A member of the force commits a breach of discipline if he or she—

(a) contravenes a provision of this Act or the regulations; or

(ab) fails to comply with a direction under section 55 or 90 of the *Whistleblowers Protection Act* 2001; or

(b) fails to comply with a standing order or instruction of the Chief Commissioner; or

(c) engages in conduct that is likely to bring the force into disrepute or diminish public confidence in it; or

(d) fails to comply with a lawful instruction given by the Chief Commissioner, a member of or above the rank of senior sergeant or a person having the authority to give the instruction; or

(e) is guilty of disgraceful or improper conduct (whether in his or her official capacity or otherwise); or

(f) is negligent or careless in the discharge of his or her duty; or

(g) without the approval of the Chief Commissioner -

(i) applies for or holds a licence or permit to conduct any trade, business or profession; or

(ii) conducts any trade, business or profession; or

(iii) accepts any other employment; or

(h) acts in a manner prejudicial to the good order or discipline of the force; or

(i) has been charged with an offence (whether under a Victorian law or under a law of another place) and the offence has been found proven.\(^{101}\)

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9 Submission Victoria Police
10 Police Regulation Act 1958 s80
101 Police Regulation Act 1958 s69(1)
19. To establish a “breach of discipline” the Act requires a very formal charge and inquiry process to be undertaken. The process is summarised below.

Investigation

20. Prior to charging a member of Victoria Police with breach of discipline, the Chief Commissioner may conduct a preliminary investigation, the length of time for which varies, depending on the circumstances of the case.

21. ESD determines which area will conduct the investigation, ESD or the relevant Region. Investigations should be completed within three months, although there is facility for the relevant investigator to seek extensions.\(^{102}\)

22. For the purpose of an investigation, the Chief Commissioner has the power to direct any member to furnish any relevant information, produce any relevant document or answer any relevant question. Answers can be used in discipline proceedings, but not in court unless exceptional circumstances apply, for example perjury proceedings.\(^{103}\)

23. At any stage in the investigation, the Chief Commissioner may:
   - transfer the member;
   - direct the member to take leave; or
   - suspend the member with pay.\(^{104}\)

24. If the members have not been charged within three months (or such longer period as is allowed by the Police Appeal Board), the transfer, direction or suspension must be withdrawn.\(^{105}\)

Charge

25. If it is believed that a member has committed a breach of discipline, he or she is then charged with that breach.\(^{106}\) Where it is believed that the person has also committed an offence referred to in the First Schedule to the Act, the Director of Public Prosecutions must be consulted before a discipline charge is laid.\(^{107}\)

26. Any charge must:
   - be in writing; and
   - contain particulars of the alleged breach of discipline; and
   - specify when and where an inquiry into the charge is to be conducted; and

\(^{102}\) VPM Instruction 210-4 paras 6.4.1 and 6.4.2
\(^{103}\) Police Regulation Act s86Q Answers given can be used in court in relation to proceedings for perjury, for a breach of discipline, failure to comply with a direction or a review under Division 1 of Part IV
\(^{104}\) s70(2)
\(^{105}\) s70(3)
\(^{106}\) s71(1)
\(^{107}\) s71(2)
• specify that the member must state in writing whether or not he or she admits or denies the truth of the charge; and

• specify the time within which the member must make that statement.\textsuperscript{108}

27. A member, once charged, can be transferred, directed to take leave or be suspended with or without pay, and any such action remains in force until the charge has been finally determined.\textsuperscript{109}

Inquiry

28. Legislatively the procedure of any inquiry is at the discretion of the person conducting it, with hearings to be conducted with as little formality and technicality as is possible.\textsuperscript{110} Rules of evidence do not apply, but the rules of natural justice do.\textsuperscript{111} Victoria Police policies require that:

• all discipline hearings will be tape recorded;

• a subject sworn employee will not be required to appear at a discipline hearing if they do not wish to;

• where an employee is required as a witness, the Hearing Officer will instruct the employee to attend the hearing and/or produce documents but a summons will not be issued; and

• sworn employees are entitled to be represented by any person other than a legal practitioner.\textsuperscript{112}

29. If a charge is found proven, the person conducting the hearing may make one or more of the following determinations:\textsuperscript{113}

• reprimand the member; or

• adjourn the hearing of the inquiry into the charge on the condition that the member be of good behaviour for a period not exceeding 12 months or on any other condition specified in the determination; or

• impose a fine not exceeding 40 penalty units; or

• impose a period, not exceeding two years, during which the member will not be eligible for promotion or transfer to other duties; or

• reduce rank or seniority of the member; or

• reduce the remuneration of the member; or

\textsuperscript{108} s72
\textsuperscript{109} ss71(3) and (4)
\textsuperscript{110} ss73 – 78 and VPM Instruction 211-3
\textsuperscript{111} ss75(3)(c)&(d)
\textsuperscript{112} VPM Instruction 211-3 para 7.2
\textsuperscript{113} For classification 1 matters, the hearing officer will be either a Superintendent or a Commander who can impose any of the sanctions other than dismissal or reduction of rank. Classification 2 matters the Hearing officer will be an Assistant or Deputy Commissioner who can impose any of the sanctions – see paragraph 7.1
• transfer the member to other duties; or
• dismiss the member.\textsuperscript{114}

30. Purportedly to avoid prejudicing criminal proceedings, if the member is charged with a criminal offence arising from the same facts as the disciplinary matter, the disciplinary matter is put on hold until, either the Office of Public Prosecutions has advised that the prospects of conviction are ‘poor’, or until the criminal matter is finalised.\textsuperscript{115} This can take some years. During this often lengthy period, the relevant officer is generally put on leave with pay.

Criminal Charge found Proven

31. If a member has been charged with an offence punishable by imprisonment, and the offence has been found proven, the Chief Commissioner can do one or more of the following:

• reprimand the member;
• reduce rank or seniority of the member;
• reduce the remuneration of the member; or
• require the member to be of good behaviour for a period not exceeding 12 months or on any other condition specified in the determination; or
• impose a fine not exceeding 40 penalty units; or
• impose a period, not exceeding two years, during which the member will not be eligible for promotion or transfer to other duties; or
• transfer the member to other duties; or
• dismiss the member.\textsuperscript{116}

32. Although there is no legislative requirement for a formal hearing to be held in relation to such matters, Victoria Police policies require a formal hearing to be conducted.\textsuperscript{117} Such a hearing involves the appointment of a hearing officer, the ability of the member to appear before the hearing, the calling of witnesses, and representation of the member by any person other than a legal practitioner.

Commissioner’s No Confidence Power

33. Since 1999, in addition to the ability to dismiss members arising from the formal disciplinary process, the Chief Commissioner has a non-delegable power\textsuperscript{118} to dismiss a sworn member, other than a Deputy or Assistant Commissioner, if the Chief Commissioner is satisfied that the member is unsuitable to continue as a member of the force, having regard to-

\textsuperscript{114} s76
\textsuperscript{115} VPM Instruction 211-3 para 7.5
\textsuperscript{116} s 80
\textsuperscript{117} VPM Instruction 211-3
\textsuperscript{118} s6A (1)
• the member’s integrity; and
• the potential loss of community confidence in the force;

were the member to continue as a member of the force.\textsuperscript{119}

34. The Act sets out the process which the Chief Commissioner must follow before reaching a no confidence decision, including the obligation to give the member concerned:

• notice setting out the grounds on which the Chief Commissioner considers that the member is unsuitable to continue to as a member of the force; and
• 21 days in which to make written submissions. The Chief Commissioner must take those submissions into account in forming her decision whether or not a no confidence order is to be made.\textsuperscript{120}

35. The Order issued by the Chief Commissioner must set out the reasons why the Chief Commissioner is satisfied that the member is unsuitable to continue.

\textbf{Probationary Officers}

36. The Chief Commissioner may terminate the appointment or disallow a promotion of probationary constables at any time during the period of probation.\textsuperscript{121}

37. No hearing is required for such terminations, although Victoria Police policy sets out a process to be followed by the Assistant Commissioner, Education Department. Where a decision is made to terminate the appointment, the Assistant Commissioner must in negotiating a period of notice with the employee have regard to principles of natural justice and must:

• indicate their decision and the reason/s on the file;
• advise the employee personally of the decision and reasons for the decision;
• provide the employee with a letter confirming termination of appointment and the reason/s; and
• advise the employee in writing of his/her right to request a review of the decision by the Police Appeals Board.

\textbf{Fitness for Duty}

38. Where there is a reasonable belief that a member is incapable of performing his or her duties or is inefficient in performing duties and that incapacity or inefficiency is not caused by any infirmity of mind or body, the Chief Commissioner may inquire into a member’s fitness for duty.\textsuperscript{122,123} Such an inquiry will normally follow

\textsuperscript{119} s68
\textsuperscript{120} s68(2)
\textsuperscript{121} s8(5)
\textsuperscript{122} s82(1)
\textsuperscript{123} Section 16B gives the Chief Commissioner the power to retire officers who are incapacitated by infirmity of mind or body.
a Management of Under Performance process where a member has an established record of failure to meet competencies.

39. The inquiry can compel the production of evidence and any person, other than a legal practitioner, can represent the individual concerned at the inquiry.

40. The person conducting the inquiry, if satisfied that the member is unfit for duty, can:

- transfer the member to other duties;
- reduce the member in rank; or
- dismiss the member.

Appeal/Reviews

Police Appeal Board Reviews

41. The Police Appeals Board was established in 1999 to replace the Police Review Commission which had been introduced in 1993. Unlike its predecessor, the Police Appeal Board can make binding decisions.

42. The Police Appeals Board comprises a chairperson and two or more deputy chairpersons appointed by the Governor in Council. Amongst other things the Board:

- conducts reviews of Commissioner’s confidence decisions; and
- conducts reviews of certain decisions by the Chief Commissioner, including decisions to:
  - terminate a member’s appointment;
  - compulsorily transfer a member;
  - make a determination in relation to a disciplinary offence to:
    - impose period, not exceeding two years during which the member will not be eligible for transfer or promotion
    - reduce the rank of the member;
    - reduce the seniority of the member;
    - transfer the member to other duties; or
    - dismiss the member.\textsuperscript{124}

\textsuperscript{124} ss88(b) and (c) and s91F(1)
Disciplinary Process Reviews

43. When reviewing a decision arising out of disciplinary proceedings, the Police Appeals Board may simply hear submissions and review the material put before the original disciplinary hearing officer, or it may conduct a review *de novo*, which allows a fresh examination of all relevant material including new evidence.¹²⁵ ¹²⁶

44. At the completion of a review the Police Appeals Board may:

- affirm the original decision;
- set aside the original decision and substitute a new decision; or
- set aside the original decision and refer the matter back to the Chief Commissioner for the matter to be resolved in accordance with the directions of the Police Appeals Board.¹²⁷

Where the decision being reviewed is to terminate the member’s appointment or to dismiss a member, the Police Appeals Board may:

- order the Chief Commissioner to reinstate the member; or
- if reinstatement is regarded as impracticable, order the Chief Commissioner to pay compensation not exceeding the amount of remuneration earned by the applicant during the previous 12 months.¹²⁸

These options are not available to a review of decision to dismiss a member following a conviction, which implies that such decisions may not be subject to review.¹²⁹

In conducting the review hearings the Police Appeals Board is required to operate “with as little formality and technicality, and as much speed as the requirements of the Act and the proper consideration of the subject-matter permit.”¹³⁰

With some exceptions Police Appeals Board hearings must be conducted held in public. The Board is not bound by the rules of evidence, but must adhere to the principles of natural justice. It can issue summonses for the attendance of witnesses and any person, other than a legal practitioner, may represent the member concerned.¹³¹

No Confidence Reviews

In conducting reviews of no confidence decisions, the Police Appeals Board’s role is somewhat different. The ground of the review is that “the decision was not sound, defensible or well-founded”.¹³² The burden of proof lies with the relevant member of police.¹³³

¹²⁵ Scott v. Sinclair and Anor v. The Police Appeals Board [2001] VSC 481 (per Ashley J)
¹²⁶ Stewart v. Shuey & Ors [1999] VSC 114 (per Ashley J) and Anthony v. Sinclair & Ors [1999] VSC 343 (per Vincent J)
¹²⁷ s91G(1)
¹²⁸ s91G(2)
¹²⁹ s91G(3)
¹³⁰ s91L(1)
¹³¹ ss91MA, 91N, 91J, 91O and 91P
¹³² s68B
¹³³ s68C(3)
There are restrictions on the introduction of new evidence, although the Police Appeals Board must give leave for new evidence to be adduced if:

- the Chief Commissioner has acted on wrong information;
- there is cogent evidence to suggest that the information before the Chief Commissioner was unreliable; or
- the evidence to be adduced might materially have affected the Chief Commissioner’s decision.\(^{134}\)

Similarly, there are restrictions on calling police witnesses, although the Board can grant leave if it considers that “extraordinary grounds exist that warrant leave being given”.\(^{135}\)

In considering discipline reviews, Police Appeals Board must have regard to both the public interest and the interests of the applicant for review. However, for the purposes of the section, ‘public interest’ includes, in the case of a review under Division 1 of Part IV (dismissal of unsuitable members), the fact that the Chief Commissioner made an order under section 68(1) (dismissing an unsuitable member).\(^{136}\) This somewhat unusual provision appears to demonstrate the legislature’s view that it is the public interest to give weight to the Chief Commissioner’s authority in these matters.

**Other Reviews**

The Police Appeals Board cannot review reprimands, fines less than five penalty units, requirements that members be of good behaviour for a period of 12 months or other conditions or admonishments made pursuant to the Management Intervention Model process. However, there are two separate administrative processes for such reviews.

**Internal Reviews of Lesser Disciplinary Sanctions**

There is no internal review of such decisions if the Hearing Officer was a Deputy Commissioner or above but where the Hearing Officer was ranked below Deputy Commissioner internal review processes exist for:

- reprimands;
- fines less than five penalty units; or
- requirements that members be of good behaviour for a period of 12 months or other condition.\(^{137}\)

A Reviewing Officer appointed by a Deputy Commissioner conducts the internal review. The appointee is senior in rank to the relevant sworn employee and the Hearing Officer who made the original decision. The review is generally conducted as a papers review with no requirement for a formal hearing unless the Reviewing

\(^{134}\) s68 E
\(^{135}\) s68F(2)
\(^{136}\) s91K(2)(b)
\(^{137}\) See VPM Instruction 211-3
Officer considers it to be necessary. The test for the Reviewing Officer is “could a reasonable person have made the decision the decision-maker made”.\textsuperscript{138}

The Reviewing Officer has no determinative powers but may make recommendations to Assistant Commissioner ESD who may accept or vary such recommendations.\textsuperscript{139}

**Internal Reviews of Admonishments**

The internal review process described above does not cater for admonishments issued under the Management Intervention Model.

The rationale for a separate review process for admonishments is not clear, although admonishments appear to be of a slightly lesser significance than reprimands, they are subject to a more extensive review process.\textsuperscript{140}

The Reviewing Officer is appointed by the Divisional/Department Manager or Assistant Commissioner ESD and must be from a different Division/Department to the one where the Admonishment Notice was issued. The Reviewing Officer must be of equivalent or higher rank to member who originally issued the Admonishment Notice.

The Reviewing Officer conducts a merits review and must take into account whether:

- the decision to issue the notice was supported by evidence;
- the principles of natural justice were followed;
- any additional evidence has been provided by the employee;
- the decision-maker had authority to make the decision;
- the decision to issue the notice was appropriate to the circumstances; and
- the reviewing officer may scrutinise/test any additional evidence provided by the employee.

The Reviewing Officer must also provide written reasons if requested.

Unlike the internal reviews of reprimands, the admonishment reviews since 2003 have been determinative. The Reviewing Officer has the power to affirm or withdraw the Admonishment Notice. Where the Notice is withdrawn, the Review Officer “must do one of the following”:

- recommend no further action;
- direct the subject employee to be counselled;
- direct the subject employee to complete a Performance Improvement Plan;

\textsuperscript{138} VPM 211-3 para 10.1.3; Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 at 230;
\textsuperscript{139} Paragraph 10.1.3 VPM 211-3
\textsuperscript{140} VPM Instruction 211-2 para 5
• recommend management intervention considered appropriate to the circumstances (following advice from the Performance Enhancement Program and the Discipline Advisory Unit); and

• recommend that the subject employee be charged with a breach of discipline.

In another contrast to internal review processes for lesser disciplinary sanctions, which are not subject to timelines, an Admonishment Reviewing Officer must report both to the subject employee and to the Assistant Commissioner ESD about the progress of the review, providing reasons why the review has not been completed within 21 days of the application.

**Ultimate Appeal Process**

A final appeal avenue for members subject to disciplinary processes is the Supreme Court for those who have administrative law rights arising from the original or appeal decisions.

Unlike other employees and police in some other jurisdictions, as Victoria Police members are not ‘employees’ at common law, they have no right of appeal to the Australian Industrial Relations Commission or any other any industrial relations tribunal on the basis that a decision to terminate employment has been harsh, unjust or unreasonable.¹⁴¹ ¹⁴² ¹⁴³

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¹⁴¹ Appeals to an industrial tribunal can be taken by police in the C’th, NSW and WA jurisdictions. See Appendix Five.

¹⁴² Victoria has referred its industrial relations powers to the Commonwealth and, aside from a narrow jurisdiction, which does not apply to police, exercised by the Public Sector Standards Commissioner, there is no State industrial relations jurisdiction.

¹⁴³ *Konrad v. Victoria Police* [1999] FCA 988
APPENDIX THREE – ADVICE ABOUT STANDARD OF PROOF FROM VICTORIAN GOVERNMENT SOLICITOR

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27 June 2007

Mr Ian Kelley, PSM
General Counsel
Office of Police Integrity
DX 210174
Melbourne

Dear Mr Kelley,

Review of Victoria Police disciplinary system

1. We refer to your request for advice dated 29 May 2007.

Purpose

2. To advise on the modern applicability of the doctrine derived from the High Court decision of Brigden v Brigden (Brigden). It outlines the standard of proof applicable within Police disciplinary proceedings, and comments on Brigden’s role indicating the nature of the evidence required.

Background

3. In the cited High Court case of Brigden, Dixon J famously commented:

Excepts upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences...

It is often said that such an issue as fraud must be proved “clearly”, “unequivocally”, “strictly” or “with certainty”. This does not mean that some standard of persuasion is fixed intermediate between the

1. [High Court of Australia, Brigden]
2. [Brigden v Brigden, (1903) 10 ATR 276]
satisfaction beyond reasonable doubt required upon a criminal matter, and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained.

4. These comments have been consistently upheld by the High Court as valid evidentiary considerations, in circumstances where there is an inherent likelihood of an occurrence of a given description, or where the consequences flowing from a particular finding may be particularly grave. These 'Briggslaw' considerations have nevertheless been problematic in application: many decision makers and tribunals mistakenly considering the 'Briggslaw doctrine' or 'Briggslaw test' alters the necessary standard of proof in civil cases.

5. You pointed out that Victoria Police and the Police Appeals Board consider the 'Briggslaw doctrine' to mean that there is a sliding scale in the necessary standard of proof in disciplinary matters, whereby the necessary standard of proof is elevated if allegations are particularly serious, or if grave consequences to a Member of Police may result from a given finding. Indeed, you note that this is a relatively common view amongst Police, pointing to comments made by Commissioner Kennedy of the Western Australian Police Royal Commission, that as a result of Briggslaw:

"[When a situation in the upper range, such as a dismissal, is being contemplated, the standards of proof required may approach that of a criminal standard."

6. This advice explains that applying Briggslaw in such a manner is incorrect, emphasizing that the applicable standard of proof in disciplinary matters is always the balance of probabilities. It attempts to explain Briggslaw's evidential role, by drawing on the distinction between:

6.1 The necessary standard of proof (the balance of probabilities), and
6.2 The requisite strength (or standard) of evidence (which Briggslaw has some effect on).

The applicable standard of proof

7. The High Court has consistently made it clear that there are only two standards of proof applicable within Australian courts and tribunals, namely:

7.1 Beyond reasonable doubt in criminal matters; and
7.2 On the balance of probabilities in civil cases.

8. As McHugh J comments in *Williams v Holloway* indicate, any argument that the Briggslaw test elevates the civil standard of proof above the balance of probabilities, is wrong in law. There are only two standards of proof: balance of probabilities and proof beyond reasonable doubt. It would be wrong to hold, as you do, that the balance of probabilities is some mixed concept. It has never impressed me too much. I mean, it really means no
more than, 'On, we had better look at this a bit more closely than we might otherwise', but it is still a balance of probabilities in the civil.

9. In the recent Victorian Supreme Court case of Safari 4 x 4 Engineering Pty Ltd v Commonwealth Motor Taxation Pty Ltd, Gilbard emphasized that the relevant standard in civil proceedings is the balance of probabilities; noting, however, that the giver of the nature of the allegations made against an individual, Brougham requires a closer look at the standard of the evidence involved.\*1

Because the claim involves the commission of a criminal offence by Mr Keen, the standard, although on the balance of probabilities, carries a heavier burden than that which normally rests on a plaintiff in a civil proceeding. In Brougham v Brougham, Dixon J considered the question of burden of proof and the standard of proof in civil and criminal cases. After observing that whilst there was not any standard of persuasion fixed between the criminal standard and the civil standard, he stated that nevertheless, the nature of an issue necessarily affected the process by which reasonable satisfaction is obtained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues ... (authorities referred to) ... But consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.\*2

10. This elegant expression of the effect of Brougham is consistent with High Court comments made in the 1992 case of Needham v Karavan Holdings Pty Ltd. In that case, Mason, Brennan, Deane and Gaudron JJ supported the Brougham test, clarifying its application in commenting.\*3

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what is sought to be proved. Thus, authoritative statements have often been made in the civil law that clear (footnote omitted) or cogent (footnote omitted) or strict (footnote omitted) or strict (footnote omitted) proof is necessary.

Statements to that effect should not, however, be understood as directed to the standard of proof.

Rather they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in frauduous or criminal conduct (footnote omitted) and the judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

11. In light of the authority and clarity of those judicial statements, it is abundantly clear that there is no third standard of proof, or 'sliding scale' standard in civil cases.

\*1 Page 71 of 121
\*2 Page 172 of 176
\*3 Page 171 of 176

150520
Briginshaw's practical implications: influencing the standard of evidence

12. In our view, a useful explanation of the evidential implications of Briginshaw is made by academic Loretta De Freitas, in a lengthy Melbourne University Law Review article reviewing the Briginshaw test.1 Briginshaw directs a court to proceed cautiously in a civil case where a serious allegation has been made or the facts are imponderable. If the finding is likely to produce grave consequences, the evidence should be of high probative value. The Briginshaw test focuses attention on the standard of the evidence required to prove the case in the ordinary civil standard; it is not a change in the standard of proof. There is no third standard of proof in the common law.

13. In our opinion, for a Tribunal to comply with Dixon 2's Briginshaw considerations, it would need to bear in mind (and would wisely acknowledge in any written decision, where applicable, that):

- Certain allegations in question are serious;
- Certain occurrences are inherently unlikely (e.g. where a person is particularly well known; and that
- Personal consequences likely to flow from a particular finding are grave.

14. Concerns of this nature were briefly acknowledged by Hall J of the NSW Supreme Court in The Council of the New South Wales Bar Association v Association's Barristers, where he commented:2

In proceedings where the issue is whether or not a person has practised as a barrister without having the holder of a current practising certificate, the civil standard of proof applies. However, the nature and consequences of the proceedings and the gravity of the Bar Council's allegations have to be taken into account.

15. As an aside, in situations where a serious allegation has been made or certain facts are improbable, Briginshaw requires a Tribunal or decision maker to be mindful of the standard of the evidence before it. The NSW Court of Appeal briefly turned its mind to this issue in Brown v James v Watson and Ors, where it approved Briginshaw's reminder to be mindful that where a serious allegation is made, reasonable satisfaction "should not be produced by inexact proofs, indefinite testimony, or indirect inferences".

16. The Victorian Court of Appeal advocated this "bear in mind" approach in British American Tobacco Australia Services Ltd v Cowell, the Court commenting that:3

The standard of proof is the civil rather than the criminal standard; bearing in mind also the seriousness of the allegation as required by Dixon 4 in Briginshaw v Briginshaw (as modified or explained in Nattris v Nattris Holdings Pty Ltd).4

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3. [2006] VSCA 5 at 43.
5. [2001] VSCA 19 at [172], emphasis added.
17. Neat, in our view, means a Tribunal or decision maker that certain conduct is serious, and out of the ordinary, and that as a result, they should 'not lightly make a finding that, on the balance of probabilities, a party is civil litigation has been guilty of [fraudulent or criminal] conduct'.

18. Providing a decision maker takes into account the factors mentioned by Dixon J in Brightshow, a failure to refer to Brightshow in detail would not necessarily invalidate a decision made. This was demonstrated in the decision of the Victorian Supreme Court, in McKenna v Victoria, where Smith J held that although the Anti-Discrimination Tribunal did not expressly mention Brightshow when considering each allegation directed at a respondent, this did not mean the relevant considerations had been overlooked.

19. In McKenna, a former Victorian police officer had brought a claim against her colleagues and Victoria Police, in relation to sexual harassment she claimed to have suffered at the hands of her colleagues. His Honour held that it was sufficient that the Tribunal had carefully followed Dixon J's analysis, paraphrasing and applying most of the principles of Brightshow to all the allegations.

20. In our view, it is nevertheless arguable that a Tribunal expressly comment that in considering evidence, it has been mindful of Brightshow considerations. Such an acknowledgment would not need to be overly formal, but given the High Court commented in Minister for Immigration and Ethnic Affairs v Wu Siu Lam, \(^1\)

> the reasons of an administrative decision-maker are meant to be informed and not to be scrutinised upon over-zealous judicial review by seeking to determine whether any inadequacy may be pleaded from the way in which the reasons are expressed...

21. In concluding, we note that the compatibility of Neat's explanation of the Brightshow test, with the English position, is outlined by in a joint judgment within the Nany Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading.\(^2\)

\(^1\) [1998] F2C 92-02

Should you require any further assistance in relation to this matter, please do not hesitate to contact John Carr on 8684 0490.

Yours faithfully,

[Signature]

[Name]
Vicrtorion Government Solicitor
APPENDIX FOUR - VPM INSTRUCTIONS THAT ARE ULTRA VIRES

Two items that currently form part of VPM Instructions but identified as *ultra vires* or beyond power concern the power of hearing officers and procedure at disciplinary hearings.

*Power of hearing officers* – The VPM Instruction states the hearing officer will be appointed by a Deputy Commissioner who will also determine whether the level of inquiry will be classified as classification 1 or 2. According to the Instruction, this distinction will determine the rank of the hearing officer and the sanctions that can be applied.144

Where a matter is determined to be a Class 1 type of matter, the Instructions state the hearing officer cannot dismiss or reduce in rank any person subject to a hearing. This restriction, however, is inconsistent with section 76(1) of the Act which empowers the person conducting an inquiry and who has found the charge proven to “make one or more of the following determinations”, which include dismissal and reduction in rank. The legislation does not allow the hearing officer to be subject to any instruction or restriction when exercising that discretion.

The Victorian Government Solicitor has confirmed that the purported limitation on the penalties applicable for Class 1 matters to be *ultra vires* (see Attachment to this Appendix)

*Procedure at disciplinary hearings* – A similar conclusion applies to the procedural restrictions imposed by the Instruction.

According to section 75(3)(a) of the Act the procedure of a discipline inquiry is at the discretion of the person conducting it. Paragraph 7.2 of VPM 211-3, however establishes a number of procedural requirements which purport to bind the person conducting the hearing, such as:

- all discipline hearings will be tape-recorded;
- a subject sworn employee will not be required to appear at a discipline hearing if they do not wish to;
- where an employee is required as a witness, the hearing officer will instruct the employee to attend the hearing and/or produce documents. A summons will not be issued; and
- sworn employees are entitled to be represented by any person other than a legal practitioner.

While not commenting on the merit or otherwise of these instructions, they cannot be read consistently with the clear discretion that the section 75(3)(a) of the Act has given to the person conducting the hearing to determine the procedure for the hearing. Their validity is, therefore, questionable.

144 Paragraph 7.1 VPM 211-3
27 June 2007

Mr Ian Killey, PSM
General Counsel
Office of Police Integrity
DX 210174
Melbourne

Dear Mr Killey,

Review of Victoria Police disciplinary regime

1. We refer to your request for advice dated 29 May 2007.

Purpose

2. To advise on the validity of VPM Instruction 211-3 on Disciplinary Action, in light of powers set out in ss 73 and 76(c) of the Police Regulation Act 1958.

Discussion

3. Section 73 of the Police Regulation Act 1958 (the Act) empowers the Chief Commissioner of Police to appoint an officer to make an inquiry into a charge:

73 Inquiry into a charge

The Chief Commissioner or an officer authorised by the Chief Commissioner must inquire into and determine a charge.

4. Section 76(1) the Act, meanwhile, empowers a person conducting an inquiry to make the following determinations:

76 Determination of the inquiry

(1) If, after considering all the submissions made at an inquiry the person conducting the inquiry finds that the charge has been proved, the person conducting the inquiry may make one or more of the following determinations:

(a) to expel, suspend or reduce the number of the member;

(b) to adjourn the hearing of the inquiry into the charge on the condition that the member be of good behaviour for a period not exceeding 12 months or on any other condition specified in the determination;

(c) to impose a fine not exceeding 40 penalty units, or
(a) to impose a period, not exceeding 2 years, during which the member will not be eligible for promotion or transfer to other duties;
(b) to reduce rank or seniority of the member;
(c) to reduce the remuneration of the member;
(d) to transfer the member to other duties;
(e) to dismiss the member.

5. We are advised that the Chief Commissioner’s VPM Instruction 211-3 (Disciplinary duties) empowers the Deputy Commissioner to appoint hearing officers, who are responsible for determining whether the matter falls within Class 1 or Class 2. The instruction goes on to provide that dismissal, or reduction of rank, cannot be imposed for matters of a Class 1 variety.

6. We concur with your view, that VPM Instruction 211-3 limits the powers of a person conducting an inquiry under s 76 of the Act, without statutory basis. We consider VPM Instruction 211-3’s purported limitation on the penalties applicable for Class 1 matters to be ultra vires.

7. Our interpretation of the powers of hearing officers under s 76 of the Act, is that they are empowered to make one or more of any of the determinations listed in subsection (1), regardless of internal classifications of the charges in question.

If you require any further assistance in relation to this matter, please do not hesitate to contact John Cain on 8664-8401.

Yours faithfully,

John Cain
Victorian Government Solicitor
APPENDIX FIVE - HOW OTHERS DO IT

Other Australian Policing Bodies

Queensland

In his report into police corruption in Queensland in the late 1980s, Commissioner Fitzgerald noted that:

disciplinary matters should be dealt with by commissioned officers in a simple, streamlined way…The unnecessary complex hearing mechanism used to date in reliance on the Police Rules should be abolished…There is no reason why police should have the luxury of having every disciplinary complaint against them determined with the full panoply of an adversarial process including examination of witnesses upon oath, and the accused not having to make any statement or provide any explanation.145

Fitzgerald laid the groundwork and set the building blocks for the features of a modern, professional police service which would be resistant to corruption.

The simple, streamlined managerial approach discussed by Fitzgerald is evident in aspects of the Queensland system today. The Queensland Police Human Resources Manual deals specifically with management resolution of complaints.146 The manual makes two essential points as to the nature of clear managerial resolution strategies. First, that the objective of the procedure be remedial, not punitive:

The focus of the managerial resolution process is on improving the conduct of subject members and preventing recurrence of similar complaints.147

Second, that managerial resolution strategies need not be based on findings of guilt:

Members of the Service responsible for managerial resolution of complaints are not required to establish detailed information about what happened or attribute culpability.148

The objective is not to impose sanctions, but to develop means to assist police members to overcome performance difficulties and to resolve complaints brought against officers. Managers and supervisors are “encouraged to be flexible in customising a strategy to effectively address particular behaviour/conduct, to prevent it recurring and satisfy the complainant’s concerns in a timely manner.149

Serious matters, which cannot be dealt with managerially, go through a different process generally requiring a formal hearing process including the possibility of legal representation, and written and oral submissions.150

145 Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (GE Fitzgerald QC, Chair) Report p294
146 Queensland Police, HR Manual (2005), Sections 18.1.6 and 18.2.3
147 HR Manual Section 18.2.3
148 Ibid
149 HR Manual Section 18.2.3.4
150 HR Manual Section 18.3.4.3.1
Following the hearing, a decision is reached as to sanction. The range of sanctions includes reprimands, fines, demotion, reduction in salary and ultimately, termination.\textsuperscript{151}

\textit{New South Wales}

The Fitzgerald findings regarding disciplinary reform were similar to those adopted by subsequent major corruption inquiries. In 1996 Commissioner Wood, who chaired a Royal Commission into New South Wales Police, was concerned that the complaints and discipline structure at the time was “complex and convoluted” involving “inconsistencies, ambiguities and other problems”.\textsuperscript{152} In his first interim report, he identified a number of significant weaknesses in the then current system. He considered that among its weaknesses, the system was:

- complex, inconsistent and inflexible;
- counterproductive, because of its adversarial nature and its concentration on punitive, rather than remedial action;
- directed towards command and control, rather than management of its members;
- characterised by substantial delay;
- typified by an instinctive reaction to defend any charge, no matter how indefensible, and to appeal against any decision made;
- conducive to fear and want of openness in dealings between members and the organisation; and
- productive of anxiety and uncertainty during the long waiting period, sometimes leading to genuine stress-related illness.\textsuperscript{153}

Each of these concerns is equally applicable to the current Victorian system.

Wood, like Fitzgerald, emphasised the need for the change and said that:

\textit{the Service should endeavour to move from the formal adversarial model to a more managerial or remedial model that places the responsibility on commanders at patrol or equivalent level to deal with complaints and matters of discipline.}\textsuperscript{154}

He also emphasised, like Fitzgerald, that the managerial process does not require findings of culpability or guilt:

\textit{The management process is a method of dealing with misconduct and inept performance falling short of criminal conduct that warrants dismissal. As such, it should not involve the formulation of a specific charge or invocation of a formal disciplinary proceeding, dependent on technical rules of evidence and procedure.}\textsuperscript{155}

\textsuperscript{151} Police Service (Discipline) Regulations 1990 (Qld) regulation 10
\textsuperscript{152} Wood Report, Interim, February 1996, para 1.92
\textsuperscript{153} Wood Final Report, para 4.1
\textsuperscript{154} Wood Final Report, para 4.12
\textsuperscript{155} Wood Final Report, para 4.39
Wood also considered that the process that should be adopted for termination of employment should be “a managerial and not disciplinary procedure”\(^{156}\).

Absolutely integral to proper management is the existence of a power in the Police Commissioner to remove from the Service those officers in whom he has lost confidence.

This is to the advantage of the community and those members of the Service who are performing properly. The power should be as broad and as discretionary as the title suggests.\(^{157}\)

Wood considered that such dismissals would be subject to administrative law review only and that “there would be no appeal to appeals tribunals, the Police Tribunal or the Industrial relations Commission”\(^{158}\).

The changes subsequently made in New South Wales flowed directly from Wood’s recommendations and the adoption of the managerial model. In keeping with the recommendations, the New South Wales system distinguishes between misconduct, and unsatisfactory performance.\(^{159}\) The Commissioner is empowered to take two types of action, namely reviewable action (for example, demotion\(^{160}\)) in relation to police who have engaged in misconduct, or unreviewable action, which is action of a management nature such as counselling, training, coaching or warning.\(^{161}\)

The process adopted for reviewable action is much less formal than the previous hearing process, and is, in effect, a ‘show cause’ process on the written material including the submissions made by the member concerned. New South Wales also has an internal process designed to ensure consistency.\(^{162}\)

The reviewable action process does not lead to termination of employment. Consistent with Commissioner Wood’s recommendations, the sole means of dismissal for New South Wales Police is the Commissioner’s power to terminate employment if the “Commissioner does not have confidence in the police officer’s suitability to continue as a police officer, having regard to the police officer’s competence, integrity, performance or conduct.”\(^{163}\) The process followed for this procedure is also a ‘show cause’ process on the papers.

The appeals or reviews available in relation to reviewable action and no confidence dismissal are limited, although not as limited as Wood recommended. Both can be appealed to the New South Wales Industrial Relations Commission on the basis that the action is “harsh unreasonable or unjust”.\(^{164}\) In addition “unreviewable action”,

\(^{156}\) Wood Interim Report, November 1996, para 4.3
\(^{157}\) Wood Interim Report, November 1996, para 4.1 and 4.2
\(^{158}\) Wood Interim Report, November 1996, para 4.2
\(^{159}\) Police Act 1990 (NSW) s173
\(^{160}\) Police Act 1990 (NSW) s173(2)(a)
\(^{161}\) The full list is in Schedule 1 to the Police Act 1990 (NSW)
\(^{162}\) NSW Police Complaint Management Manual, Module 5, Actions and Outcomes (2005) p6
\(^{163}\) Police Act 1990 (NSW) s181D
\(^{164}\) Police Act 1990 (NSW) s174 and 181E
is not quite “unreviewable” as there is a limited internal review to the next line of command available to officers who do not agree with such actions.\textsuperscript{165}

\textbf{Western Australia}

The Kennedy Royal Commission, which reported in 2004.\textsuperscript{166} was predominantly concerned with issues of corruption, but also examined disciplinary processes.

The Commission found that the major impediment to the Western Australia police achieving a system of discipline, which incorporated remedial elements, was a legislative provision that enables the Commissioner to charge any officer with a breach of discipline and provides for punishments ranging from a reprimand to dismissal.\textsuperscript{167}

Commissioner Kennedy considered that the provision perpetuated:

\begin{quote}
\textit{a formal, inefficient and punitive disciplinary process of a type which is condemned by almost all recent reviews. That section… should be repealed and replaced with a contemporary management-based system.}\textsuperscript{168}
\end{quote}

The Commissioner went on to strongly support a more managerial approach to discipline, and stated:

\begin{quote}
The overriding principle in considering disciplinary matters and the loss of confidence provision must be the enforcement of high standards of honesty, integrity and ethical behaviour in, and in connection with, the performance of policing duties. …It is of paramount importance that WAPS has a disciplinary system that is timely and effective. It is evident that for this to occur the current adversarial system will need to be extensively remodelled to adopt a more managerial approach.\textsuperscript{169}
\end{quote}

To achieve this, it would be necessary to minimise the use of highly formal procedures, recognise standards applicable to police are higher than for the general employee and ensure the requisite level of flexibility for employer and employee.

The provision was not, however, repealed, although the Western Australian Police Commissioner has directed that “resort to disciplinary charges” be “restricted” and the primary focus will “remain on the managerial approach”.\textsuperscript{170} Advice provided from Western Australia Police is that the provision is used rarely and only for exceptional cases when the offence does not justify dismissal, but is considered too serious to for the managerial approach.

The Western Australian Managerial Discipline Model is outlined in Guidelines that describe in detail the processes and policy basis for dealing with managerial issues around conduct. The model draws on the Kennedy Recommendations and states that its intent is:

\begin{flushright}
166 Kennedy Report, The Royal Commissioner was the Hon G A Kennedy AO QC
167 Police Act 1892 (WA) s23
168 Kennedy Report Vol I, Executive Summary 2
169 Kennedy Report Vol II, p205-206
170 WA Police, \textit{Management Discipline Model Guidelines}, 3; HR-31 MDM Policy, in Police Gazette 30 January 2007, 47
\end{flushright}
a remedial/developmental approach that recognises that people will make honest mistakes and which provides a ‘fair go’ to change behaviour, conduct and/or performance leading to improvement in both organisational and individual performance.\textsuperscript{171}

An integral part of the model is the use of Managerial Action Plans to deal with conduct which warrants management intervention. Managerial Action Plans provide an essential and explicit link between the discipline system and the performance management system.

The accountability for developing and monitoring a Managerial Action Plan resides with a senior officer, whilst its day to day administration sits with the immediate supervisor of the member subject to the plan.\textsuperscript{172}

The importance of a Managerial Action Plan process cannot be underestimated. It serves a number of key functions in an integrated and modern discipline system. In particular, a Managerial Action Plan:

- serves as a filter to ensure that a conduct complaint goes to the right ‘place’. Minor matters are dealt with locally, with a full formalised hearing reserved for serious matters, thereby saving cost and delay;
- reduces the risk that particular behaviour may result in a sanction which is ill-matched to its gravity;
- provides an opportunity for aberrant conduct to be acknowledged, corrected and learned from;
- gives the relevant local supervisor greater accountability for those being supervised, thereby enhancing management skills; and
- gives senior management a management tool which can be used to monitor complaints more effectively.

Where the conduct is such that the Commissioner does not have confidence in the officer’s suitability to continue as, having regard to the police officer’s competence, integrity, honesty, performance or conduct, the Commissioner can terminate the employment of a non-commissioned officer.\textsuperscript{173} For commissioned officers this power rests with the Governor.\textsuperscript{174}

Police who have been removed have an appeal right to the Western Australian Industrial Relations Commission on the ground that the decision to remove the officer was harsh, oppressive or unfair.\textsuperscript{175}

If the Commission decides such an appeal in the member’s favour, it may order that the termination order is of no effect, or, if it considers that it is impracticable for such
an order to be made, it may order the Commissioner to pay compensation for loss of injury suffered, the amount of which will not exceed 12 months remuneration.176

**Australian Federal Police**

The Western Australian reforms were strongly influenced by the 2002 review of professional standards in the Australian Federal Police (AFP), (the Fisher Review).177

Fisher was of the view that:

> the real challenge for modern police administration is to change the internal culture of the organisation and to promote an integrity regime. Modern policing calls for a more sophisticated approach than has been applied in the past. Today, serving police are well trained and educated, intellectually mobile and are responsive to quite different demands of a contemporary society. It follows that modern managerial techniques, which have been explored extensively in industry and government, need to be adapted and employed in aid of present police administration.178

Fisher recommended particular types of behaviour should be categorised, with actions tailored to the degree of seriousness.

Fisher, like Kennedy, questioned a punitive approach to discipline and recommended:

> a professional standards system whereby, the managerial approach is taken to performance issues, with termination of services being reserved for those instances where conduct, in the light of public interest remains below an acceptable standard. Put simply, if the management of poor performance does not deliver the desired results, the officer’s continuation in the police service is called into question.179

These recommendations were broadly accepted. The AFP disciplinary system now categorises conduct and incorporates the employee management principles suggested by Fisher.

Conduct is classified into four categories.180 The two minor categories, One and Two are treated differently from Category Three and the fourth category, corruption.

Categories One and Two are classed as ‘managerial’ issues and are dealt with locally.181 Category One and Two conduct includes:

- minor management or customer service matters;
- minor misconduct or other inappropriate conduct revealing unsatisfactory performance; or
- repeated conduct of a minor nature.182

176 Police Act 1892 (WA) s32U (2)(3) & (6).
177 Conducted by the Hon W K Fisher AO QC
178 Fisher Report 37
179 Kennedy Report Vol II 203-204; also see Fisher 68-70
180 Australian Federal Police Act 1979 Part V sections 40RB, 40RN, 40RO, 40RP
181 Australian Federal Police Act 1979 s40RB, 40TC and 40TD
182 Australian Federal Police Act 1979 s40RN & 40RO. Further examples of Category 1 and 2 conduct are found in the Australian Federal Police Categories of Conduct Determination 2006.
Upon receipt of an allegation of Category One or Two conduct, the Commissioner allocates the matter to the relevant manager, in accordance with any orders issued by the Commissioner for dealing with conduct issues. If satisfied that the conduct has occurred, the manager may, for Category One matters, require the member to undergo training or development such as:

- coaching;
- mentoring; or
- other training and development activities.

Remedial action is taken to remedy unsatisfactory performance and may include for example:

- changes to employment such as restricting duties or transfer;
- recording of adverse findings; or
- counselling, reprimanding or warning.

Category Three and corrupt conduct are subject to a more formalised process. The Commonwealth Ombudsman must be notified, and the professional standards unit will investigate the matter. The investigator must ensure that the officer has the opportunity to be heard. If, following the investigation, the investigator is satisfied that the conduct has occurred, he or she can recommend to the Commissioner that the member undergo remedial training or development be terminated from employment or any other action.

There is a limited internal review available against any disciplinary finding stated in the Act. Claimants can pursue appeals seeking administrative law remedies in the courts in the normal way.

Police whose employment has been terminated also have available the “harsh, unjust or unreasonable termination” remedies available under the Workplace Relations Act 1996 unless the Commissioner has declared that the employee’s conduct or behaviour constitutes serious misconduct, or might damage Australian Federal Police self respect, morale or reputation.

Of all the ‘reformed’ police jurisdictions in Australia, the Australian Federal Police model has come the furthest in terms of attempting to achieve a fully integrated workforce. The Australian Federal Police model applies the same disciplinary process to all Australian Federal Police employees, regardless of whether they are sworn or unsworn.

The AFP model has come the furthest in terms of attempting to achieve a fully integrated workforce. The AFP model applies the same disciplinary process to all AFP employees, regardless of whether they are sworn or unsworn.

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183 Australian Federal Police Act 1979 s40TH and 40TA
184 Australian Federal Police Act 1979 s40TC
185 Australian Federal Police Act 1979 s40TD
186 Australian Federal Police Act 1979 s40TN and 40TM
187 Australian Federal Police Act 1979 s40TR
188 Australian Federal Police Act 1979 s28
189 Australian Federal Police Act 1979 s40K & 69B Commissioner’s declaration powers limits operations of Workplace Relations Act 1996
employees, regardless of whether they are sworn or unsworn. All Australian Federal Police employees are employed under the same act.

Tasmania and South Australia

In the other Australian States, there has been but little reform. The South Australian system is similar to that of Victoria, but not as complex. In Tasmania, the system is relatively unsophisticated but, so far as officers are concerned, would be considered to be quite harsh by Victorian standards.

The Commissioner has a wide discretion to take a number of actions, including fines, demotion and termination of employment. The process used to determine these matters does not require a formal hearing, but is a show cause process on the papers. The Tasmanian Commissioner also has the ability to terminate officers on a ‘no confidence’ basis. This is, as it is in Victoria, in addition to the formal discipline process which can also lead to termination. This no confidence process is rarely used.

There is a formal appeals process to the Police Review Board, but the jurisdiction of that body is limited to reviewing certain types of decisions.

Comparison

As can be seen each jurisdiction has structured their discipline process somewhat differently. The following table identifies the differences between them.

Table 2: Overall Comparison

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(Non-dismissal) / / / / / Used as an exception

190 Australian Federal Police Act 1979 s43(3)(i). The termination of commissioned officers requires the Minister to accept a recommendation from the Commissioner.

191 Police Service Act 2003 (Tas), Sections 60-68
Overseas Policing Bodies

United Kingdom

Two significant inquiries were carried out in 2004 and 2005 into aspects of specified United Kingdom policing services.192

The inquiry held in 2004 looked into a wide range of issues affecting the Metropolitan Police Service, the police responsible for policing most of the Greater London area and the first organised police service in London.193 It was established in response to a number of high profile cases involving allegations of racism, dishonesty and more broadly, the operation of the internal complaints system.194

The complaints and discipline system is centrally regulated and had complex, highly prescriptive process for taking disciplinary proceedings.195 Essentially, the basic militaristic approach to discipline had not changed in 80 years. The Inquiry described it as “more like a complex board game than a management process”196.

Not surprisingly, the existing system had been pilloried by a wide range of stakeholders on a number of fronts. In particular, criticisms received in evidence by the Inquiry included that the system was:

• archaic, antiquated and a product of the court martial system;197

• cumbersome, unduly complex, difficult to understand, slow and bureaucratic;198

• legalistic and resource intensive;199 and

• costly, and did not focus on performance, nor allow any lessons to be learnt.200

The Inquiry accepted that the existing system had some major problems and that the essence of a good disciplinary regime is simplicity.201 It went on to recommend that:

more flexible disciplinary processes are needed; processes that allow managers discretion in the way investigations and misconduct hearings are conducted, whilst at the same time preserving the rights of the officer under investigation.202

The Inquiry also considered the rationale for the police having a very different discipline system than that applicable to normal employees. It concluded that, while the office of constable should remain:

We can see no reason why the disciplinary procedures which apply to most employees should not be adapted to apply to police officers. Outside the police service, disciplinary

192 Of the four counties that make up the United Kingdom, only one, Northern Ireland has a single police service covering the entirety of its territory. In England, there are 39 separate police services.
193 Headed by Sir William Morris, (the Morris Inquiry)
194 BBC report, 21/1/04
195 See Police (Misconduct) Regulations 2004 which also contain the Code of Conduct
196 Morris Report, p58 and 59, para 3.60 and Figure 1
197 Morris Report, para 3.57, p57
198 Morris Report, para 3.57, p57
199 Morris Report, para 3.57, p57
200 Morris Report, para 3.58, p58
201 Morris Report, para 3.67, p60
202 Morris Report, para 3.73, p62
procedures must be applied in a manner that is fair to the employee. There is no reason why the same proposition should not apply to police officers.\textsuperscript{203}

Following on from the Inquiry, the Home Secretary requested a fundamental review of the police disciplinary system across Britain in order to comment on some of its recommendations.\textsuperscript{204}

The Review examined a number of other jurisdictions, including Australia. It was cognisant of the fact that, overall in the public sector, there had been a move away from overly bureaucratic processes.\textsuperscript{205}

The Review made a number of recommendations including recommendations about key areas which should be the foundation for police disciplinary arrangements.\textsuperscript{206} Of the other recommendations, many are relevant to Victoria and are reminiscent of the findings of the Fitzgerald, Wood, Kennedy and Fisher reports:

- The language and environment for handling police discipline should be open and transparent. It should be much less quasi-judicial. Investigations need not be centred on the crime model; the style of the hearing should be less adversarial and similarities with a ‘military court marshal model’ avoided.\textsuperscript{207}

- The intention is to encourage a culture of learning and development for individuals and/or organisations. Sanction has a part when circumstances require this but improvement will always be an integral dimension of any outcome.\textsuperscript{208}

- Conduct issues should be separated into two distinct groups, namely ‘misconduct’ and ‘gross misconduct’ to promote proportionate handling, clarify the available outcomes and provide a better public understanding of the policing environment. Conduct matters should be dealt with at the lowest possible line management level.\textsuperscript{209}

- Investigations and (where appropriate) hearings should be less formal and managed in a manner proportionate to the context and nature of the issue(s) at stake and in accordance with the Arbitration and Conciliation Advisory service code.\textsuperscript{210}

- The police service must manage the disciplinary arrangements dynamically and demonstrate this by actively engaging with all groups internally (including staff/staff support associations) to drive through the change to the internal culture of the organisation and promote the acceptance of responsibility at all levels of management.\textsuperscript{211}

\textsuperscript{203} Morris Report, para 3.74, p62  
\textsuperscript{204} Headed by the former Chief Inspector for Scotland, William Taylor, \textit{(the Taylor Review)}  
\textsuperscript{205} Taylor Report, p13  
\textsuperscript{206} Taylor Recommendation 2, p15  
\textsuperscript{207} Taylor Recommendation 2(iv)  
\textsuperscript{208} Taylor Recommendation 2(iii)  
\textsuperscript{209} Taylor Recommendations 2(vi) & (vii)  
\textsuperscript{210} Taylor Recommendation 2(viii)  
\textsuperscript{211} Taylor Recommendation 2(x)
**New Zealand**

New Zealand has also completed its own review this year.\(^{212}\)

The New Zealand Police Regulations contain a long prescriptive list of around 50 disciplinary offences for sworn members, including matters such as insubordination,\(^{213}\) drinking on duty,\(^{214}\) sleeping on duty\(^ {215}\) and feigning sickness to avoid duty (malingering).\(^ {216}\) There are also general instructions issued by the Commissioner.\(^ {217}\)

The discipline system has two elements: lower level sanctions which are imposed administratively and the more serious which must be brought before a Tribunal.

The Review found that the adversarial punitive system had performed so badly that it *‘has no place in a modern police human resources strategy.’*\(^ {218}\) It commented that:

*The current system is cumbersome, time consuming and outdated. It needs to be replaced with a modern approach to management misconduct and poor performance, based on a code of conduct, applying standard employment law and the best practice human resource management principles.*

The Review found the situation so poor that it:

*urged the Government to consider immediate action to revoke the current regulations dealing with discipline in order to enable a more sensible and efficient system to come into force as soon as possible.*\(^ {219}\)

**Canada**

Interestingly, the Royal Canadian Mounted Police discipline system has legislatively articulated two discipline paths, “informal actions” and “formal disciplinary actions”.\(^ {220}\)

Informal actions are taken where the superior member or officer:

*is of the opinion that, having regard to the gravity of the contravention and to the surrounding circumstances, the action is sufficient.*

Informal action can happen without a formal hearing process and can range from counselling to forfeiture of time off.\(^ {221}\) The aim is to minimise the formality of the process, but not to provide remedial assistance.

Where the relevant officer believes that informal disciplinary action would not be sufficient, a hearing before a board can be arranged.\(^ {222}\) The hearing is a formalised process which can result in dismissal for a sufficiently serious breach.

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\(^{212}\) Headed up by Dame Margaret Bazley DNZM (the Bazley Report)

\(^{213}\) Police Regulations 1992 (NZ) Regulation 9(3)

\(^{214}\) Police Regulations 1992 (NZ) Regulation 9(7)

\(^{215}\) Police Regulations 1992 (NZ) Regulation 9(16)

\(^{216}\) Police Regulations 1992 (NZ) Regulation 9(20)

\(^{217}\) Commissioner’s Instructions (IA 100 – IA 133)

\(^{218}\) Bazley Report, p219

\(^{219}\) Bazley Report, p2

\(^{220}\) Royal Canadian Mounted Police Act 1985

\(^{221}\) Royal Canadian Mounted Police Act 1985 s41

\(^{222}\) Royal Canadian Mounted Police Act 1985 s43(2)
There is also another dismissal process, which has some similarities to the ‘no confidence’ powers in some Australian jurisdictions. It requires ‘grounds of unsuitability’. It can be used where the member has repeatedly failed to perform duties in a fit manner, notwithstanding any reasonable assistance or guidance that may have been given. If the member asks for it, he or she is entitled to a hearing before a demotion board consisting of three officers appointed for that purpose. There is also an appeal right to the commissioner, whose decision is “final” although subject to a limited form of judicial review.

223 Royal Canadian Mounted Police Act 1985 s45.18
224 Royal Canadian Mounted Police Act 1985 s45.26(6)
Division 2—Discipline

69 Breaches of discipline

(1) A member of the force commits a breach of discipline if he or she—

(a) contravenes a provision of this Act or the regulations; or

(ab) fails to comply with a direction under section 55 or 90 of the Whistleblowers Protection Act 2001; or

(b) fails to comply with a standing order or instruction of the Chief Commissioner; or

(c) engages in conduct that is likely to bring the force into disrepute or diminish public confidence in it; or
Police Regulation Act 1938
No. 63 of 1938
Part IV—Employment, Disciplinary and Other Matters

1.69

(d) fails to comply with a lawful instruction given by the Chief Commissioner, a member of or above the rank of senior sergeant or a person having the authority to give the instruction; or

(e) is guilty of disgraceful or improper conduct (whether in his or her official capacity or otherwise); or

(f) is negligent or careless in the discharge of his or her duty; or

(g) without the approval of the Chief Commissioner—

(i) applies for or holds a licence or permit to conduct any trade, business or profession; or

(ii) conducts any trade, business or profession; or

(iii) accepts any other employment; or

(h) acts in a manner prejudicial to the good order or discipline of the force; or

(i) has been charged with an offence (whether under a Victorian law or under a law of another place) and the offence has been found proven.

(2) A member of the force who aids, abets, counsels or procures, or who, by any act or omission, is directly or indirectly knowingly concerned in or a party to the commission of a breach of discipline, also commits a breach of discipline.

(3) A member of the force may commit a breach of discipline under subsection (1) in respect of conduct engaged in while seconded to the Office of Police Integrity.
PART IVA—COMPLAINTS AND INVESTIGATIONS*

Division 1—Preliminary

36A Definitions

In this Part—

* * * * * *

conduct, in relation to a member of the force, means—

(a) an act or decision or the failure or refusal by the member to act or make a decision in the exercise, performance or discharge, or purported exercise, performance or discharge, whether within or outside Victoria, of a power, function or duty which the member has as or, by virtue of being, a member of the force; or

(b) conduct which constitutes an offence punishable by imprisonment, or

(c) conduct which is likely to bring the force into disrepute or diminish public confidence in it; or
Police Regulation Act 1958
No. 638 of 1958
Part IVA—Complaints and Investigations

36B

(d) disgraceful or improper conduct
(whether in the member's official capacity or otherwise);

* * * * *

serious misconduct, in relation to a member of the force, means—

(a) conduct which constitutes an offence punishable by imprisonment; or

(b) conduct which is likely to bring the force into disrepute or diminish public confidence in it; or

(c) disgraceful or improper conduct
(whether in the member's official capacity or otherwise).

36B Provisions of this Act prevail

A provision of this Act that is inconsistent with a provision of the Omnibus Act 1973 prevails,

to the extent of the inconsistency, over the provision of that Act.

* * * * *
APPENDIX EIGHT – COMPLIANCE WITH THE HUMAN RIGHTS CHARTER

Section 26 of the Charter states that a person must not be tried or punished more than once for an offence in respect of which he or she has already been convicted or acquitted in accordance with law.

It is possible to mount an argument that any discipline process which results in dismissal of an officer’s employment as a result of that officer being convicted of a criminal offence constitutes a second punishment and therefore infringes the Charter. Section 80 of the Act as it currently stands could be the subject of this argument.

The better view is that there is a distinction between internal processes operating in the context of the employer-employee relationship, and the criminal law. It is a standard canon of statutory interpretation to read the meaning of a word from the meanings of the other words in context. Section 26 of the Charter refers to “conviction”, “acquittal”, “offence” and “tried”. All of these terms presuppose a criminal process, not a private disciplinary one.

Accordingly, my view is that dismissal following conviction of a criminal offence does not constitute punishment a second time in terms of section 26, and that section 80, or any amendment to the Act to incorporate it elsewhere, is unlikely to infringe the Charter. The Department of Justice has been consulted in forming this view.

225 Also known as noscitur a sociis
A Fair and Effective Victoria Police Discipline System