

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

Inquiry into Police Integrity Bill

Melbourne — 4 June 2008

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Witness

Dr G. Hill, director, legal branch, Department of Premier and Cabinet (sworn).

The CHAIR — The next witness will be Dr Graham Hill, director of the legal branch, Department of Premier and Cabinet. Dr Hill, thank you for attending these public hearings. This is a hearing on the Police Integrity Bill. The committee is seeking written and oral evidence as to whether provisions in the proposed law constitute undue trespass to rights or freedoms and/or whether the provisions are incompatible with the rights set out in the Charter of Human Rights and Responsibilities. Dr Hill, anything you say or publish before the committee today is protected by parliamentary privilege; however, once you leave the hearing anything you say or publish outside the room is not protected. In the next day or two, you will be provided with a draft copy of the transcript of your evidence. You will have an opportunity to correct anything that the Hansard reporters may not have correctly reported, however this is not an opportunity to add anything additional or different to what you actually said at these hearings. I would like to invite you now to make a statement to the committee on the relevant issues that you see may be involved in the proposed legislation. Following your opening statement, members of the committee may ask questions. The committee has determined that it will take sworn evidence. Dr Hill, can you just give us your organisational position, please?

Dr HILL — I am the director of the legal branch at the Department of Premier and Cabinet.

The CHAIR — Thank you.

Dr HILL — The Office of Police Integrity was set up in 2004. The Police Regulation Act, which governs the Office of Police Integrity, and still does, required the special investigations monitor to report back to the Parliament within three years, and the report had to be on the provisions governing the OPI and how they were working. The SIM did report to the Parliament, I think, in October 2007, and one of the recommendations in the SIM's report was that the OPI be governed by a stand-alone act, hence the creation of this bill that you are scrutinising at the moment.

The bill provides for a stand-alone act for the Office of Police Integrity, and it implements 19 recommendations made by the special investigations monitor to amend the OPI legislation. It also re-enacts all of the OPI provisions that are currently in the Police Regulation Act. So it goes into the Police Regulation Act, lifts those provisions out of it and it will put them in this stand-alone act. That is an important point for the committee to consider because it is a re-enactment, and a lot of the provisions that have been the subject of comment this morning are ones that are simply being re-enacted and have been there since 2004. Obviously, that does not relieve the committee of the obligation of scrutinising them. The fact that they are being re-enacted is irrelevant in that sense, but where it is relevant is that it is important that nobody thinks that this is a new direction that Victoria is going in or that this is something new or a departure. A lot of these provisions are simply re-enactments of what is already there.

The bill also makes some improvements and enhancements to the OPI. For example, it provides for legal assistance to be given to witnesses who appear before the OPI and does other things. I appear before this committee as a public servant and so I am apolitical and impartial. I am not here to defend policy but I can explain policy and speak to the bill. In that context, in regard to some of the issues that have been raised this morning, I might just mention access to the court — that is, the immunity that the OPI has under its legislation — oversight by its watchdogs, and protection of OPI documents from subpoena. I might mention those issues because in all three cases I think that the bill represents a quantum advance on what the current law is. As a result of the special investigation monitor's recommendations and other decisions that have gone into creating the bill, and given that one of this committee's terms of reference today, as the chair read out, is to see whether there is undue trespass on rights and freedoms, it may not be amiss to look at these three matters.

Access to the courts — that is, the ability to seek judicial review of what the OPI does — is actually enhanced by this bill over the current law. At the moment you could take the OPI to court if the OPI is investigating a complaint and you say the OPI lacks jurisdiction. You could also take the OPI to court if they are acting in bad faith. Those provisions are retained in the bill, but the bill also introduces the idea of a critical incident. So if there is an injury that results from use of a motor vehicle, or someone being in the custody of the OPI, or use of force, that sort of thing, then there is also recourse to the courts in the normal way where a critical incident occurs.

On the second point — oversight of the OPI by its watchdogs — the role of the SIM is retained in the bill exactly as it exists at the moment, with one change, and that is that the time for complaining to the SIM has shifted from a 3 day time limit to 90 days. So, in fact, recourse to the SIM is increased. The bill also enhances the Ombudsman's role. Now that the Ombudsman and the director, police integrity, offices are held by separate people, the bill enhances the Ombudsman's role by clause 26, which clarifies that you can disclose information to the Ombudsman

without fear of breaching the confidentiality provisions. If you get a witness summons and a confidentiality notice, you can raise that with the Ombudsman. You can also complain to the Ombudsman, and the Ombudsman has been investigating complaints.

The third matter is protection of OPI documents from subpoena. The bill does not provide a blanket protection of OPI documents in the same way that New South Wales does where the Police Integrity Commission Act provides that you just cannot subpoena Police Integrity Commission documents to court in a criminal proceeding. This bill does something different. The court still retains its discretion. Clause 107(7) states that at the end of the day the court can decide that the documents must go out to the litigant who is trying to subpoena them because the circumstances exist. Similarly, the court retains discretion as to the procedure in deciding whether documents should go out, whether it would be a confidential hearing, a closed court, confidential affidavit or an ex parte hearing. Similarly, the bill makes procedures and tools available to the court that might not be available at common law. So, for example, the use of special counsel to test the evidence is provided for in the bill but might not be available at common law.

In terms of those three matters — access to courts, oversight of OPI and protection of OPI documents — the bill actually would take the law in the direction that the people who have made submissions here today are suggesting that it should go. The government's view is that the bill complies with the charter, and that is set out in a very detailed statement of compatibility that this committee commended the government on. The bill was crafted to meet the charter.

Two other points that I would like to make are that often when talking about OPI hearings people become confused, or it is dealt with in the same way as a criminal trial. OPI hearings are examinations in the course of someone's employment with Victoria Police. They are not criminal trials; they are completely different. The abrogation, for example, of the privilege against self-incrimination, that applies to OPI hearings, but evidence given that goes beyond that privilege is not admissible in subsequent court proceedings. It is important to keep in mind that we are talking about hearings in terms of an investigation or an examination rather than a criminal trial, and comparisons between OPI hearings and how the courts work in some ways are spurious.

The other point I would like to make is, in regard to firearms the general law applies to firearms. Somebody using a firearm or carrying a firearm is not immune from the normal law that applies. Chair, I have taken extensive notes on what other speakers have said. I do not propose in my opening statement to go through them, but I am able to discuss any matters of concern.

The CHAIR — Terrific, Dr Hill.

Mr JASPER — Through you, Chair, would you be able to give comment back, when you get the transcript, to the committee in writing; so a written response to those various issues?

Dr HILL — I appear here of course as a representative of the minister, so I would need to go back to the minister and ask him whether we could do that.

Mr JASPER — Subject to the minister's approval, would you be able to provide that information?

Dr HILL — We will raise that with him.

Mr BROOKS — Thank you, Dr Hill. Just one question — it is an issue that was raised by an earlier witness, Mr Davies from the Police Association, in relation to an incident. He gave an example of where a member of the OPI under this act might be in, say, a police station with a cup of coffee, drop the coffee and be called on to other matters; and a child entered the police station and was injured. The argument was put that that person would be protected under sections 109 and 110 of this bill and therefore would not be liable for any action. I wanted to ask you for your view on that particular point of view, particularly in light of the description of critical incident in this bill and the fact that in the example that was given it was suggested by Mr Davies that if that child was permanently impaired, would that qualify as a critical incident, and therefore would that person be afforded protection under this bill?

Dr HILL — It is extremely difficult to think of an example where a person would not have recourse against the OPI, because if the OPI is acting in bad faith, then the door is open to legal action. If it is a critical incident, the door is open to legal action, so it is hard to think up an example. Perhaps the example that was

proffered is itself an example of how difficult it is to think up circumstances, because that was a fairly extreme scenario. The first issue that would have to be examined is whether the OPI was acting in bad faith. That is a fairly wide avenue. You would also have to examine whether a critical incident had occurred — in other words, whether there was use of force, whether a person was in custody; those kinds of things, and they generally apply. I think in the example that was given, occupiers liability law might well kick in, and the person might have recourse against the occupier, which if it were a police station, would be the state of Victoria that has a duty of care to keep the floors clean.

Mrs PEULICH — Dr Hill, thank you very much for coming along at such relatively short notice and sitting through the other evidence, as you have. Just some small questions: you mentioned, and it has been a long time since I read the SIM report of October 2007, the adoption of 19 recommendations; do you recall the total number of recommendations?

Dr HILL — I believe there were 21.

Mr SMITH — I think 16 were adopted. I think that was what the evidence was earlier.

Mrs PEULICH — Okay. You also mentioned that provisions out of the police regulations have been lifted into the bill. You heard Julian Burnside's comment and concern about authorised officers obviously not having the same training; that indeed there are no qualifications specified in the act. Do you think that that would ameliorate any sorts of concerns that the public may have about the manner in which investigations would be conducted and in particular the use of weapons, given that authorised officers do not have qualifications specified as is the case in the police regulations?

Dr HILL — I am not at all certain that it is the case in the Police Regulation Act. I think that standards within Victoria Police are often done by its internal regulations and its policies and procedures rather than the statute, so I am not sure that is the case. In terms of this particular bill, it would seem cumbersome to regulate those sorts of details in an act. It is an operational question for the OPI as to what policies and procedures they have in place. In doing this bill, of course, a lot of inquiries have been made and careful consideration has been given to those issues, and there have been discussions with the OPI about it, but I think I should leave it to it to say what policies and procedures it would have.

Mrs PEULICH — I note your staff have an internal manual, a draft guide, as to the application of the human rights charter and the legislative process, which one would expect. Were there concerns about this legislation that were generated by the consideration of that document?

Dr HILL — I am unable to talk about confidential communications between the public service and the minister, so I would not comment on that. But clearly this legislation is broad, extensive and engages a lot of human rights issues, and very careful consideration needed to be given to the charter of human rights.

Mrs PEULICH — Do you have concerns about the power of entry, search and seizure in the manner in which it is implemented here through this bill, being as broad as it is, and given that it can be applied to any public authority? I would also welcome your comment as to what you would see as fitting under that banner, under that umbrella.

Dr HILL — First of all, the bill distinguishes between public authorities and other premises — people's homes, for example, where a search warrant is required. It would give the director power to enter public premises, which I believe he currently has under the Police Regulation Act; so does the Ombudsman, and so does the Auditor-General. The idea is that there is the distinction between public and private, and if they are government offices or if it is a police station, which is more relevant to this particular example, then you would expect the person to have a right of entry rather than trying to secure an invitation — and a right of entry without a warrant. I think that there are appropriate balances, as Mr Jasper pointed out in his question to Mr Burnside.

Mr JASPER — Dr Hill, the main thing I think, firstly, is that we hope we can get some approval from the minister for you to respond to the issues raised by the Police Association and Liberty Victoria, which I think we would find useful. On the recommendations, you said that the legislation is virtually a mirror of what was contained in the previous legislation and now coming into a separate bill, the Police Integrity Bill. Of the 19 recommendations — there seems to be some confusion as to how many recommendations were adopted — was it new information put into the legislation or was it basically a re-run of the legislation, which was previously

adopted? The third issue is the compatibility one; I would be interested to get responses in relation to that because, in particular, Liberty Victoria and of course the Police Association mentioned concerns in relation to the charter of human rights, which seems to be the key issue of concern. It would be good to be able to get your responses in relation to the charter.

Dr HILL — There were three points there. The first one concerned the minister and whether he would —

Mrs PEULICH — Allow you to respond.

Dr HILL — Yes. We will take that one on board and find out. Your second point concerned — —

Mr JASPER — The recommendations.

Dr HILL — Of the special investigations monitor.

Mrs PEULICH — How many?

Dr HILL — I believe that 19 of the recommendations have been implemented, or would be implemented by the bill.

Mr SMITH — Out of how many?

Dr HILL — Out of 21, but with a report like the special investigations monitor has, there can always be issues about how you count them and what constitutes full or partial implementation. So, yes, the bill re-enacts the Police Regulation Act. It does the 19 things that the SIM recommended that it do. There are some other enhancements and improvements as well. It is a bit more than just a mirror re-enactment of the existing law.

Mr JASPER — Plus the recommendations and some other issues that you might have added in.

Dr HILL — Yes.

Mr JASPER — Thank you. Then the third issue is a compatibility one with the charter.

Dr HILL — It is the government's view that this bill is compatible with the charter in every respect, and the statement of compatibility sets out, clause by clause, how we think it is, and nothing that has been said at this hearing today would alter that.

Mr SMITH — Just on that, you would say that the evidence presented so far is pretty much baseless?

Dr HILL — No, I would not put it like that. My comments were far more narrow than that. That is, that in the issues raised in detail by each of the witnesses, nothing in that would demonstrate that the charter had not been complied with, with this bill. I am very happy to answer any specific issue that they raised today.

Mr SMITH — After the minister says that you can?

Dr HILL — No, in verbal questions right now.

Ms PULFORD — The question about the broad range of authority and the wide-ranging scope that could be applied, particularly in terms of the delegation of powers that Mr Burnside raised, could you comment on that, and also about the experience of the director prior to appointment?

Dr HILL — I think those are quite recent amendments to the Police Regulation Act. In fact, I think from memory, they came into operation from 1 May, because from 2004 George Brauer was the director, police integrity. I know he has a law degree, but I am sure he has practised law for five years, so I do not think he would have satisfied the current qualifications. They have come into operation relatively recently. The Parliament quite recently has put a qualification in — and that is, that the person should be a legal practitioner for five years or more. The delegation to use coercive powers can also only be to a person who satisfies that qualification, which is the same qualification necessary to be appointed as a Supreme Court judge.

To raise the threshold any higher to, for example, a Supreme Court judge, would limit the pool of candidates that a future government could choose from for a director, police integrity. In the director, police integrity, you are looking for a person who can lead an organisation of a hundred people; who knows something about people management, strategic leadership; who knows something about investigation technique and who also has legal skills to wield the powers that he has. I am not sure Supreme Court judges satisfy all of those qualifications, or that that very tight definition of who could be appointed as director would be beneficial.

Mrs PEULICH — You would anticipate that it would be unlikely to be a judge?

Dr HILL — The current director is a former judge, as is the current special investigations monitor. I cannot comment on how future governments might choose. In my answer I was simply explaining the policy which was publicly stated at the time — that is, that you want to have a fairly wide pool of candidates that you can choose from, not too narrow.

The CHAIR — I just want to ask a question about clause 69 on compulsory questioning. We heard from Liberty Victoria that essentially they are fairly orthodox, almost stock standard, in Victorian law except for one part, which is clause 69(3)(b) and the issue of that breach of discipline. Liberty Victoria had some concerns about that. I wonder if you could pick that up?

Dr HILL — Again, if we think of it conceptually in two parts; one is an investigation into somebody's employment with Victoria Police, the second part being exposure to a criminal trial prosecution to sanction. It is that first part, the course of their employment and disciplinary action that could be taken in the course of the employment, where information that is adduced using that coercive power would be available for use in disciplinary action. But it would not extend beyond that to criminal trial. The line is drawn between employment matters and matters of the criminal law.

Mrs PEULICH — In relation to the authority to possess, carry and use defensive equipment — just in reading through those provisions — in your earlier comments you said that much of the detail was just a lift out of the police regulations. Is it your view that this is just a lift out of the police regulations in terms of the manner in which weapons can be used?

Dr HILL — No. Defensive equipment and firearms — those two clauses are new, and are not currently found in the Police Regulation Act.

Mrs PEULICH — On a point of clarification, I think you implied that the delegation of power by the director, police integrity, could only be to a suitably qualified person. That was not my reading of the bill. Could you point to the provision where that is contained? I think in fact that the point being made by previous witnesses was that there were no qualifications specified for the authorised officers?

Dr HILL — No, there are. I am looking at clause 21 of the bill which talks about delegation by director. Subclause (2) says that the director, by instrument, may delegate to a senior relevant person a coercive power. A senior relevant person is defined further on in the clause, on the next page in my draft, and in paragraph (a) it replicates the qualifications that the director has — able to be appointed as a Supreme Court judge. Therefore if the director was not conducting an examination him or herself, the director could delegate to a person who has those qualifications to conduct the hearing. As we saw, Murray Wilcox, an ex-Federal Court judge, or Hartog Berkeley, I think, have conducted hearings in the past for the OPI.

Mrs PEULICH — But these qualifications do not necessarily infer, or require experienced use of firearms, do they?

Dr HILL — This is a delegation to use coercive powers. I think you might be talking about clause 103.

Mrs PEULICH — Yes, sorry, it was.

Dr HILL — Which authorises the director to — —

Mrs PEULICH — To authorise use.

Dr HILL — Yes. No, you are correct.

Mrs PEULICH — Okay. Right.

Dr HILL — There is nothing about experience there.

Mr SMITH — Dr Hill, can I just refer you to clause 49? The clauses before it basically set out how the director can request the chief commissioner to take some action or an investigation.

Dr HILL — Yes.

Mr SMITH — Paragraph (b) of that clause basically says that there is an option for the chief commissioner to tell the director that the investigation is not going to take place.

Dr HILL — Yes.

Mr SMITH — Where does that leave the request for the director?

Dr HILL — The director would then make an adverse report to Parliament to say that he had recommended something and that no action had been taken.

Mr SMITH — Thank you.

Mrs PEULICH — Given the preference of previous witnesses for some sort of parliamentary oversight, would you see that the main features of this bill were compatible with a parliamentary oversight mechanism — over and above the annual reporting?

Dr HILL — First of all I could not comment on the policy question of whether there should be — —

Mrs PEULICH — Just a functionality question.

Dr HILL — I am sure the bill would be compatible, or could be reworked to have that — —

Mr SMITH — Just to clarify my last question on clause 49, is there anything in the legislation which compels the director to make an adverse report to the Parliament?

Dr HILL — No.

Mr SMITH — Potentially it can just go away?

Dr HILL — Yes. You are talking about circumstances where the director has recommended that something should happen, has asked the chief commissioner to do that — —

Mr SMITH — To investigate.

Dr HILL — And she has exercised her operational independence to say, 'No, I am not going to do it'.

Mr SMITH — There is nothing to compel the director to tell the Parliament that has happened?

Dr HILL — No.

The CHAIR — Thank you very much, Dr Hill, for sharing your morning with us. That concludes the first part of our hearings today.

Witness withdrew.