

**SCRUTINY OF ACTS AND REGULATIONS COMMITTEE**

**Inquiry into Police Integrity Bill**

Melbourne — 4 June 2008

Members

Mr C. Brooks

Mr C. Carli

Mr K. Eideh

Mr K. Jasper

Mr T. Languiller

Mr E. O'Donohue

Mrs I. Peulich

Ms J. Pulford

Mr R. Smith

Chair: Mr C. Carli

Deputy Chair: Mr K. Jasper

Staff

Executive Officer: Mr A. Homer

Business Support Officer: Mr S. Dinsbergs

Witnesses

Mr J. Burnside, barrister (sworn), and

Ms G. King-Siem, barrister (affirmed), Liberty Victoria.

**The CHAIR** — Thank you for coming in on behalf of Liberty Victoria. The next witnesses will be Mr Julian Burnside and Ms Georgia King-Siem of the Victorian bar on behalf of Liberty Victoria. Thank you for attending these public hearings in regard to the Police Integrity Bill 2008. The committee is seeking written and oral evidence as to whether the provisions of the proposed law constitute an 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 Act 2006.

Mr Burnside and Ms King-Siem, 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 this perimeter is not so 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 report has not correctly recorded. However, there is not an opportunity to put anything additional or different to that which was actually said by you at these hearings. I would like to invite you now to make your statement to the committee on the relevant issue that you see may be involved in this proposed legislation. Following your opening statement members of the committee may have questions that they may wish to put to you. The committee has determined that it will take sworn evidence. I ask that you take either an oath or an affirmation. Can you then state the name of the organisation and your position in it?

**Mr BURNSIDE** — We both appear on behalf of Liberty Victoria, the Victorian Council for Civil Liberties.

**The CHAIR** — Terrific. Over to you.

**Mr BURNSIDE** — Thank you. You will have received a written submission and I should say at the outset that it was prepared by others and of course prepared jointly with the human rights workshop. Di Sisley, who runs that, is also in charge of the human rights workshop and I think she was primarily responsible for preparing the written submission, and so although it is nominally in my name I have to say that all credit for it goes to Di Sisley and Liz Curran. I was not proposing to repeat what is already there because you have got it and there is not much point in reading it out to you, but there are some other matters that I did want to discuss in advance. Before I begin can I correct one small thing that the previous witness said? It is the ACT not the Northern Territory that is the other jurisdiction with a human rights act, just to save you any fruitless searches through the Northern Territory legislation.

**The CHAIR** — Thank you.

**Mr BURNSIDE** — Incidentally the ACT act has been on foot since 2004 and so far there are I think only four or five reported cases arising under that act. It does not seem to have caused any trouble.

Can I start with this observation? The director under the bill has enormous powers, extraordinary powers, and we make no complaint about that because by definition the director has to deal with extraordinary circumstances and it is not surprising that that involves the conferral of great powers. Those extraordinary powers include of course the ability to compel attendance; to compel a person to give evidence, even evidence that may relate the person; to authorise people to carry guns and defensive weapons; to authorise the arrest of people who have not complied with requirements; and the power to search and seize without warrant.

The conferral of these powers, as I say, is understandable but needs to be viewed with great caution, and a great deal we think will depend on two things. The first is the character of the person who occupies a position of director, and the second is the way in which the director's powers are delegated to authorised officers and the nature of that delegation. It is very interesting to look at section 10 which deals with the required qualifications for the director. Subsection (2) sets out five requirements — some positive and some negative: you cannot be a former policeman in Victoria, and you cannot be a member of Parliament. All perfectly understandable. You have to have the ability to carry out the functions that is self-evident, but section 10(2)(a) sets out the core requirements and it lists that a person:

has been, or is qualified for appointment as, a judge of —

- (i) the High Court; or
- (ii) the Federal Court; or

(iii) the Supreme Court of a State or Territory; or

(iv) the County Court or —

an equivalent court in another state, which looks very distinguished because you think you are going to be getting a former Supreme Court judge as the director. But if you look carefully it is not just a person who has been one of those judges but a person who is qualified to be one of those judges. That means you have been a legal practitioner for five years. If the act says that the person who is eligible must have been a legal practitioner for five years, most people would probably think that that is not adequate. It is certainly not adequate as a repository of such great powers.

It is difficult to know why the bill frames the qualification in this way, which we say gives a very misleading view of the qualities that the person might have. I am not for a minute suggesting that a person of inadequate competence would be appointed, but there must be a reason for identifying these officers as a guarantee of quality, and we would rather prefer that the appointee be a former judge of a superior court. There is some hesitation about the County Court, and I do not say that in any adverse reflection on present or former members of the County Court, but we think the seriousness of the powers warrants a person of clear, demonstrable, distinguished legal service.

Having said that, can I mention the power to authorise? The power to authorise is a matter of concern simply because the functions that can be performed by the director can, of course, be delegated to authorised officers. The authorisations will very likely be global authorisations — in other words, people will be authorised for the duration of their time as officers. And so what you have got is replicated throughout the organisation: people who for most purposes have all the powers of the director, and there are no qualifications for the people who are authorised officers. You will be conferring, albeit filtered through the discretion of the director, extraordinary powers on people who may not have the required ability and characteristics to exercise those powers in a way which preserves and safeguards the rights of the community, including the rights, of course, of the police.

Can I go to two instances of that on which we also wish to make independent points? The power of search and seizure is dealt with in clauses 87 and 88. Clause 87 defines an authorised officer. It is a member of staff who is authorised under subclause (2). Subclause (2) states:

The Director may authorise a member of staff ... to exercise the powers of an authorised officer under this Division.

As I say, there seems to be no restriction that the authorisation does not have to be for a particular purpose or for a particular function or for a particular investigation; it is just general. In the normal way of things you would expect it would be made as a matter of course and will operate indefinitely.

Clause 88 identifies the power to enter a public authority premises. It states:

An authorised officer may —

- (a) enter at any time premises occupied by a public authority at which the authorised officer reasonably believes there are documents or other things that are relevant to an investigation —

and then can search, inspect and seize such things. That is a power of search and seizure without warrant — and that in itself is an extraordinary power — and that is delegated to a person who is authorised generally by the director. That seems to us to be a rather alarming power to confer generally on people who happen to be members of the staff. There are some constraints in that power because subclause (2) requires the person to identify themselves and say what they are doing and so on, but even so it is a power of search and seizure without warrant and therefore without the usual safeguards that would accompany the issue of a search warrant.

There is another concern which is less significant, but a concern nonetheless. Clause 90 deals with circumstances where an authorised officer has seized a document, disk or tape or other thing that can be readily copied, or a storage device the information in which can be readily copied. In those circumstances on request the authorised officer must give a copy of the thing or the information to the person as soon as practicable after. Then the problem: subclause (2) states that the authorised officer may refuse a request under that section if:

- (a) the Director is satisfied that the work involved in copying the thing or information would substantially and unreasonably —
  - (i) divert the resources of the Office of Police Integrity from its other operations; or
  - (ii) interfere with the performance of the Director's functions; or

- (b) the Director is of the opinion that it is not in the public interest to give a copy of the thing or information to the person.

Now what we are talking about is the power to seize the database of a public authority. You would hope that in ordinary circumstances the database would be provided back to the authority, but the criteria for refusal are all one-sided. The director can refuse if doing so would substantially and unreasonably divert resources or interfere with the performance of his function. But there is no requirement to consider on the other hand the effect on the operation of a public authority whose database is taken away. It is potentially capable of crippling a public authority, and I am not sure that is what the Parliament intends.

**Mrs PEULICH** — Is there a definition of ‘public authority’, Mr Burnside?

**Mr BURNSIDE** — Yes, there is, in clause 3. Broadly speaking it is the sort of things you would expect. It means:

- (a) Victoria Police; or
- (b) a public service body within the meaning of the Public Administration Act 2004; or
- (c) any other body, whether or not incorporated, established by or under an Act for a public purpose ...

It is a very wide range of organisations. As anyone who depends on computers as much as I do would understand that losing your computer, in effect by having the hard drive taken, would bring you to an immediate stop. It seems to us that the obligation to provide a copy, or rather the ability to refuse to provide a copy, should be conditioned not only by reference to the practicality for the director but also to the practical consequences on the relevant organisation. As I say, you would think a director acting sensibly would not likely cripple a public authority, but in fact it would be desirable to see it in the bill. The next thing, if I may turn to it briefly — —

**Mr JASPER** — Do you think that subclause (3) provides some protection?

**Mr BURNSIDE** — Sorry?

**Mr JASPER** — Clause 90.

**Mr BURNSIDE** — You are saying clause 89?

**Mr JASPER** — And going onto subclause (3) and the other clauses there, which may provide some protection for the organisation?

**Mr BURNSIDE** — That is the power to seize.

**Mr BROOKS** — Clause 90, subclause (3).

**Mr BURNSIDE** — I am so sorry. It provides some protection. It does.

**Mr JASPER** — I would have thought so.

**Mr BURNSIDE** — Even so the discretion is not directly conditioned on such a thing, so you can imagine it would take you some while to get to the stage where you have an opportunity to make your submissions and get the result you want. It would be desirable, we think, and probably consistent with the intention of subclause (3), if the exercise of discretion itself were directly conditioned on a consideration of both sides of the ledger.

**Mr JASPER** — Thank you.

**Mr BURNSIDE** — I have lost my place because I was looking for clause 69(3), which was mentioned by the previous witness as giving rise to concerns.

**Mrs PEULICH** — Page 61?

**Mr BURNSIDE** — Yes. I should restrain the impulse to butt in on what someone else has said, but it is an occupational hazard. It seemed to us that the concern that was expressed may be overstated because in particular we cannot see that clause as giving rise to any risk of a judge saying, ‘Do you want a permanent stay because you

cannot get a fair hearing?'. What this is, is a fairly usual qualification that accompanies the abrogation of the privilege against self-incrimination.

Typically in legislation of this sort you see the privilege against self-incrimination is abrogated but the information which is compulsorily acquired cannot be used against you to prove commission of an offence, except for a limited range of what I call procedural offences — that is, telling lies during the investigation in which you are forced to give evidence, committing a contempt of the proceeding in which you are forced to give evidence and so on. The one exception to that I think would be clause 69(3)(b), so it could be used against the person in proceedings for a breach of discipline. That is atypical and it does mean that police are exposed to circumstances where they can be obliged to incriminate themselves for disciplinary matters. Whether that is a matter of concern for the committee is a separate thing, but it does not seem to us that you could find yourself in front of a Supreme Court judge on trial for a substantive offence and be unable to have a fair trial because of that section.

The next area of concern we have is the power to authorise the use of firearms, clause 103. In the same way but of less concern is clause 102, which relates to the use of defensive equipment. Again, the director is given power to authorise members of the staff to possess, carry and use firearms. This bypasses the usual police control on authority to use firearms. It is likely, in the ordinary way of things, that the authorisation will be given globally and without end. So you will simply have a whole range of people — who might or might not ever have served in services where carrying arms is part of the job and who certainly will not have been members of the Victorian police force, even if they have previously been a member of another police force — who will all be allowed to carry and use firearms.

It is difficult to understand why it is necessary or desirable that global authority to use firearms should be conferred on a small subset of people merely because they happen to work for the OPI. If the grant of permission were safeguarded by reference to qualification for appropriate training and the like, that would ameliorate the concern, and no doubt there will be occasions when it is appropriate for members of the staff to carry and use firearms. It is undesirable, however, that they should all be authorised, so that as a matter of course they can run around carrying guns in the same way that police, as a matter of course, can run around carrying guns. It is hard to see that their regular work would involve the requirement ordinarily to be armed. Obviously, I think, most citizens would be concerned at the idea that there is another subset of the community who can walk around the community armed. It needs safeguards, if it needs to be there at all.

I have been hesitant in the way I have framed this because in the ordinary way you might expect that the police could authorise members of the OPI staff to carry firearms, but, given the role of the OPI, it is also understandable that they might wish to bypass police authority. It follows that there has to be some other safeguard which is equivalent at least in effect to the requirement of police authority in other circumstances.

The next thing we wanted to mention arises under clauses 68 to 74, the compulsory evidence provisions. It has become common for investigating bodies to have power to take evidence compulsorily and it is probably too late in the day to complain about it, although traditionalists would complain about it. You will see that clause 70 has an exception in relation to legal professional privilege and that is desirable and, we would think, appropriate. But legal professional privilege appears to be the only substantial exception to the requirement to give evidence compulsorily; even Crown privilege is not an excuse for refusing to answer questions or produce documents.

We notice the significant absence of an exception for medical privilege. It is not unlikely that people being investigated are involved in whatever is suspected because of their involvement in drugs, and that may also mean that they themselves use drugs. That would mean that their medical records could be compulsorily acquired and used in the course of the investigation. It is a question of policy whether that is a desirable result. We do not know whether it has been considered and rejected, but medical privilege probably is right up there with legal professional privilege in terms of significance, and we have some difficulty seeing that it is justifiable that medical records could be compulsorily seized by the OPI, given the intrusive consequences that that would have.

The second exception that we think is worth considering — and it is purely a policy question of whether it is desirable — is what could colloquially be thought of as journalist privilege, although of course we accept that journalists do not have privilege in the orthodox sense. We mention it for this reason: it has often been the case, in this state and elsewhere, that stories about police corruption are broken first by the press and when a story gets into the press it then gets investigated by whatever bodies have power to investigate. It is easy to see circumstances where the OPI would immediately go to the journalist and force them to give evidence about their sources. It is

understandable, because it would be a natural short cut. Any responsible journalist will have all the details from sources; they generally do not make things up.

The question is: what is to happen to the journalist? The journalist, who in one sense has done a public service by revealing possible corruption, faces the possibility of either revealing their sources or going to jail. If they reveal their sources, then their career as a journalist is very likely finished, either because they will be whacked or because no-one will ever talk to them again. The question is whether that is really a cost that is worth paying in order to get the evidence, by forcing journalists to speak. We think that there is a shift in the mood in the last year or so, especially triggered by the Harvey and McManus contempt proceedings in the County Court, that suggests that maybe the policy decision ought to go the other way and journalists ought to be protected against compulsion to reveal their sources. We think on balance that there is a strong argument for adopting that position because the cost that it brings — a short cut not being available — is probably outweighed by the benefit it brings, which is the free revealing of information through the daily press.

Three small matters: first, clause 64.

**Mrs PEULICH** — Before you move away from this, would that apply to members of Parliament as well?

**Mr BURNSIDE** — The privilege?

**Mrs PEULICH** — Yes.

**Mr BURNSIDE** — Are they not dealt with separately? Parliamentarians are not privileged from compulsory evidence. Do they have benefits in the same way that journalists do, do they get evidence the same way? I am not sure about that; I do not know. You are well placed to answer that question. The idea that parliamentarians might be required to come and give evidence compulsorily to the OPI is slightly alarming. It is purely a policy question. I do not know how regularly occurrences like that would arise. If parliamentarians are regularly repositories of evidence about seriously bad behaviour, then I think there is probably a good argument that it is better to have politicians able to reveal these things in Parliament, with all the consequences that has.

**Mr JASPER** — And protections.

**Mr BURNSIDE** — And protections. Yes, but there is no protection. Parliamentary privilege would not help, because if you say in Parliament that you have information to show that — —

**Mrs PEULICH** — Derivative evidence.

**Mr BURNSIDE** — Well, you can be called in without, I think, breaching the parliamentary privileges. You could be called in and required then to say on oath the same thing that you said under privilege. The question is whether you are a compellable witness, not whether what was said in Parliament could ever be used against you for any purpose. If you are a compellable witness, then that may be a problem, in which case maybe parliamentarians ought to have the same privilege as journalists. I think it would be a very good double. It might lead to more accurate and friendly reporting of parliamentary proceedings, too.

**Mrs PEULICH** — I asked the question in view of your earlier comments.

**Mr BURNSIDE** — Clause 64 empowers a director to refuse specific legal representation to witnesses, but there are no guidelines for the criteria against which that refusal might be made. Generally speaking, people are entitled to retain the lawyer of their choice, and generally speaking, we hope, lawyers are reliable and understand their obligations. An open-ended ability to refuse to allow a witness to choose their own lawyer is at one level understandable, but at a different level also disturbing, and perhaps it ought to be conditioned on specific criteria.

The next is clause 51. It was only a minor point but clause 51 provides exemption from the Freedom of Information Act, which is indefinite. It ought to have a terminal point, we think. It is a matter for policy how long the terminal point should be in the future, but it should not be forever.

Finally, clause 58. Of course in the modern fashion when a witness is summonsed to give evidence they go into a cone of silence from which they can almost never emerge. They are not allowed to reveal to anyone what they have been asked to give evidence about, or I think even the fact that they have been required to give evidence. That includes, it would seem, that they cannot tell members of their family. That is a concern, especially it is a concern if

the person, by virtue of having to give evidence over a number of days, is absent from their work or perhaps from their commitments at home in circumstances where they are simply not allowed, as a matter of law, to give any explanation for their absence. That is a matter which deserves some amelioration, we think, to allow for the ordinary circumstances of family life and work life. I have said you cannot tell family members; I think it is true also that you cannot tell your employer or others who have a legitimate interest in knowing why you are absent or why you are going to be absent.

**Ms KING-SIEM** — I think the only exception to that is a legal representative, so you can obviously for the purposes — —

**Mr BURNSIDE** — That completes the things that I wanted to address directly, but Georgia may want to add — —

**Ms KING-SIEM** — The only thing I would probably add would be the oversight of the SIM, and that was, again, probably, as the previous speaker pointed out, that it appears that complaints can only be made by witnesses — that would seem to limit the role of the SIM — and that its complaints should be receivable by perhaps anybody and everybody who wished to lodge them with it. What the SIM does with that is another matter, but at least to have that avenue open.

**The CHAIR** — All right, thank you for that. We will just open up for questions.

**Mr BROOKS** — I have got a fairly general question, Julian. Thank you for your time today. That is about the things you have spoken about today. How would you tie those in to the terms of reference of this committee, particularly the role we have in terms of reporting on how bills sit within the charter of human rights? How would you tie those issues you have spoken about into, for example, the charter of human rights?

**Mr BURNSIDE** — There are various ways, which we have addressed in the written submission and which were addressed by the previous witness and no doubt by others, in which the rights in the charter are affected by the powers given in the act. The most direct tie-in is the nature of the person who is given the power. There are very many wide discretions. If the right person exercises those powers, then what you may get is an unreasonable entrenchment on the rights that the charter is concerned with. There are infringements in theory and there are infringements in practice, and I think we need to be concerned with what happens in practice. If the powers which are given are used sensibly, then we think an appropriate balance is struck between the rights that need protection and the interests which are being protected by this legislation. The context of this is that we all know that corruption can happen in organisations. We know that there are concerns about corruption in the police force as well as elsewhere. How then do you police the police? It is a problem that has been recognised for a very long time. You do it by conferring extraordinary powers. The extraordinary powers have the potential to affect the human rights of the community in some parts and of individual police members in other respects. Whether they do or not depends on how the powers are exercised, and that comes back directly to the first point we made.

**Mrs PEULICH** — I have two questions, if I may. Thank you for your submission. Having being born in a communist regime I am not much interested in the centralisation of power, dare I say. You were asking how do you police the police — a legitimate question that we are obviously all trying to come to terms with. How do we police a regime which breaks new ground or adopts new practices of investigation as well as legal proceedings? Are you in favour of a model of parliamentary oversight over and above just the annual reporting? Do you have a view on that?

**Mr BURNSIDE** — I think parliamentary oversight is a good idea, and I was inclined to agree with the comments of the previous witness, who was concerned that there is only a discretionary ability to report to Parliament, and even then it might only be an anodyne report.

**Mrs PEULICH** — Financial reports.

**Mr BURNSIDE** — Because until democracy completely fails, Parliament is where the buck stops, and on issues like this it seems desirable that Parliament should have an oversight. I rather thought, though, that Parliament might have oversight automatically by virtue of the director being an officer of the Parliament. How that works you would know better than I, but one way or another parliamentary oversight I think is a good idea.

**Mrs PEULICH** — My second question relates to your comments in relation to use of firearms and your view that training is required, although the bill is silent on that. Even though those officers may be subjected to a training program similar to that of the police force, they do not have the same regulations in terms of how those firearms are used, so do you feel that would adequately meet your concerns?

**Mr BURNSIDE** — I think they ought to be subject to the same prudential regime as police officers who are given permission to carry firearms.

**Mrs PEULICH** — Because here of course they can use them offensively, not just defensively, under this particular bill.

**Mr BURNSIDE** — Yes, that is right. I suppose it depends on what that means. I had understood that as being equivalent to the ability of police to use weapons offensively, in the sense that it has to be on occasions that justify the use of weapons. But all the safeguards that are supposed to control police use of offensive weapons ought to be implanted in this. As I say, we understand why going to the police for authority may not be possible or sensible in some circumstances, but you still need the same sort of prudential regime.

**Mrs PEULICH** — If I may, one last question, just coming back to the definition of the public authority. Now, where is that?

**Mr BURNSIDE** — Section 3, on page 7.

**Mrs PEULICH** — Do you feel that that is teased out sufficiently? Are there public authorities that we cannot envisage?

**Mr BURNSIDE** — No. I think it reaches public authorities that I cannot envisage. I did not have time to explore it to find out what sorts of bodies might be reached by it, but it is very wide, and that is probably enough to make the point.

**Mr JASPER** — Mr Burnside, I have noted the comments and the criticism or the suggestions on various clauses. But overall, does Liberty Victoria support the legislation? And what are your comments in relation to the use of the charter of human rights now that we are having to deal with legislation and regulations?

**Mr BURNSIDE** — I think, overall, we are not opposed to the bill. We think, subject to the comments we have made, that the balance between human rights and the objectives which are desirable has been appropriately struck. Does that deal with your question? I am not sure whether I got the second half.

**Mr JASPER** — No, just an overall comment I was looking for.

**Mrs PEULICH** — So it has been appropriately struck, notwithstanding your comments about how it could — —

**Mr BURNSIDE** — Subject to our comments.

**Mrs PEULICH** — Right.

**Mr BURNSIDE** — Because a great deal is going to turn on exactly how the powers are used. That is why we are concerned about the qualifications of the director — they are too broad — and why we are concerned about the way in which the director's authority can be delegated to any number of people for an indefinite time. Then I think what you are doing is giving exceptional powers to people who may not have the wisdom to use them in appropriate ways. That is where the rights in the charter may lose out unreasonably.

**Mrs PEULICH** — So five years of legal experience does not quite make it?

**Mr BURNSIDE** — No; absolutely not. I am sorry.

**Mr SMITH** — I am just after your opinion on how the courts would test the powers used by the OPI, like those set out in clause 69 or 107. How would they test that those powers are being used for a proper purpose?

**Mr BURNSIDE** — Let me go to it specifically; 69. This is a pretty standard provision. You can be compelled to answer questions. Courts do not have a look-in about whether that compulsory power is being

appropriately used; it is simply a power which is given. Were you concerned about the exceptions to the power — in other words, the way in which the evidence could be used?

**Mr SMITH** — Yes, that is right.

**Mr BURNSIDE** — Paragraphs (a), (c), (d) and (e) all seem to be fairly orthodox exceptions. They are orthodox exceptions because they go to the process in which the person has refused to give evidence. Obviously if you have got compulsory powers to take evidence and a person perjures himself in that process, it seems reasonable that you can use the answer they gave to demonstrate that they perjured themselves. Likewise, contempt; if they misbehave themselves or if they refuse to answer questions and the like, then the transcript has to be available to demonstrate that that is what happened. Those four subparagraphs are all directed at protecting the process that we are concerned with — namely, the compulsory taking of evidence. It is paragraph (b) that is the real exception: that means the evidence that you are required to give can be used against you for breach of discipline. Given that it is the OPI, given that the OPI is supposed to oversee the conduct of the police force, there is an interesting policy question of whether they should be able to force people to reveal their own breaches of discipline. I am assuming a breach of discipline is a much lower order thing than a criminal offence. It looks like the thin end of the wedge, so that is a reason for concern. Otherwise, it is an unexceptional provision.

**Ms KING-SIEM** — If I could just note that the same thing occurs in clause 125 as far as evidence given to the SIM — the same thing for discipline against personnel of OPI.

**Mrs PEULICH** — Just in relation to that, if that evidence or information can be used to issue disciplinary proceedings by the police department, would that not then facilitate the escape clause or create an escape clause?

**Mr BURNSIDE** — I am not sure I understand the question.

**Mrs PEULICH** — It is called the Office of Police Integrity.

**Mr BURNSIDE** — Yes.

**Mrs PEULICH** — If the transgressions are of such dimension that they warrant dismissal or departure, immediate separation, is that system workable?

**Mr BURNSIDE** — It is clearly workable. The question is whether as a matter of policy it is a good idea. One consideration would be that you have got compulsory powers, you can force people to give evidence and you can therefore require them to say that they did this, that and the other, which constitutes a disciplinary offence, which could lead to an admonishment

**Mrs PEULICH** — Or a dismissal.

**Mr BURNSIDE** — Or, at the extreme, a dismissal. That seems a harsh result, that a person can be required to give evidence against themselves that results in their dismissal from the force. On the other hand, the OPI is there in order to clean up the force or to keep it clean. If it can force people to give evidence that results in the bad egg being dismissed, then you might think that is a good result.

**Mrs PEULICH** — Dismissed, but corruption not necessarily extinguished.

**Mr BURNSIDE** — You would have to postulate particular cases. I suppose if the person who is dismissed has also given honest evidence, you have presumably reached out to other people. If you get compulsorily acquired evidence from officer A that implicates officer B, then there is no question that officer A can then be called into court and give evidence against officer B for an offence. There is no doubt about that at all. That is the point of gathering evidence like this. The sensitivity that people have traditionally is in being forced to give evidence that incriminates you. You are required to give evidence that can incriminate you, but it cannot then be used to convict you of an offence — but it can be used to sack you. There is a significant qualification on the usual position.

**The CHAIR** — I suppose the question there is whether that can be compatible with a person's rights under the charter.

**Mr BURNSIDE** — It is contrary to the usual expectation that you cannot be required to incriminate yourself, but that expectation has been diluted by any number of acts — the Trade Practices Act, the Australian Crime Commission Act, the Corporations Law. Many of these modern acts now force people to give evidence against themselves, but it can only be used for limited purposes, because the ability to investigate things thoroughly is regarded as more important than the time-honoured privilege against self-incrimination. Then you are safeguarded by saying, ‘You can’t be sent to jail by virtue of your own word’. It is really a matter of balancing that ancient privilege against the desirable objective of cleaning up a police force — that is the question. Section 7 of the charter makes it clear that rights should not be diminished except for some reasonable purpose. What is reasonable involves weighing up incommensurable integers like the privilege against self-incrimination and the desirability of an honest police force. You cannot weigh those readily against each another, and yet you have to try and strike a balance between them.

**Ms PULFORD** — Mr Burnside, many of your comments have related to questions of policy. I think we have certainly heard loud and clear your views about the appropriateness of a director and the way in which they would sensibly use the significant powers that are afforded to them by the legislation. We will need to weigh and give consideration to that question of reasonable limitations in respect to incrimination and the way that it relates to discipline in the context where the objective of the legislation is to provide for a very rigorous system of ensuring that our police force is as good as it can be. Putting aside questions of policy and some of those observations about the way the powers could be used if very broadly interpreted or not applied in the way that I think we would want them to be intended, are there, in your view, other provisions that quite specifically offend the charter?

**Mr BURNSIDE** — Other than the ones we have talked about?

**Ms PULFORD** — Yes. Obviously the policy considerations are not so much the work of this committee but specific examples.

**Mr BURNSIDE** — No, I think we have covered all of the ones that seem to affect the charter.

**Ms PULFORD** — Right to life, protection and security, some of those that were raised in the submission.

**Mr BURNSIDE** — Yes, that comes indirectly through the creation of a new armed force in the community. But can I say the policy questions are really what section 7 of the charter requires because it involves balancing the rights on the one hand against the legitimate objectives of the OPI on the other, and striking a balance between them is where you get the reasonable trade-off that section 7 contemplates. So it is all in the area of policy, I think, which is why I cannot give a clear answer and really only want to suggest — —

**Mrs PEULICH** — We will be quoting you on that, Mr Burnside.

**The CHAIR** — Obviously, our role is to inform the Parliament so that they can make those decisions.

**Mr BURNSIDE** — Okay, since you say you are going to quote me, I may have overstated saying it is all in the area of policy. It involves necessarily a substantial consideration of policy matters.

**Mrs PEULICH** — I agree with you.

**Mr BURNSIDE** — It may go beyond pure policy.

**The CHAIR** — Thank you very much. Thanks to Mr Burnside and Ms King-Siem, and again thank you to all those in Liberty Victoria who contributed to what has been a very good submission, and I am thanking them for being involved with our committee and our work.

**Mr BURNSIDE** — Thank you. Can I say that although Georgia only spoke a little bit she was absolutely instrumental in preparing me to come along today.

**Mrs PEULICH** — No doubt the power behind the throne.

**Mr BURNSIDE** — Yes. The brains of the operation. Thank you.

**Witnesses withdrew.**