

**SCRUTINY OF ACTS AND REGULATIONS COMMITTEE**

**Inquiry into Police Integrity Bill**

Melbourne — 4 June 2008

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Mr G. Davies, manager, discipline-legal, Police Association of Victoria (sworn).

**The CHAIR** — I would like to welcome everyone here. I declare open these public hearings of the Scrutiny of Acts and Regulations Committee of the Parliament of Victoria concerning the Police Integrity Bill and the Public Health and Wellbeing Bill. The purpose of these hearings is to report to the Parliament on whether the proposed laws test or infringe on the scrutiny terms of reference of this committee.

The first witness is Mr Gregory Davies of the Police Association of Victoria. Mr Davies, first of all, thank you for attending these proceedings. In regard to the Police Integrity Bill, the committee is seeking written and oral evidence as to whether the provisions in the proposed laws constitute an undue trespass of rights or freedoms and whether the provisions are incompatible with the rights set out in the Charter of Human Rights and Responsibilities. 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 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 Hansard reporters may not have correctly recorded; however it is not an opportunity to add anything additional or different to what you have actually said at the hearings.

I would like to invite you now to make a statement to the committee on the relevant issues that may be involved in this proposed legislation. Following your opening statements, members of the committee may have questions they may wish to put to you. The committee has determined that it will take sworn evidence.

**Mr DAVIES** — My name is Gregory John Davies. I am the manager of the legal department of the Police Association of Victoria. Firstly, I thank members of the committee for the opportunity to make this presentation today, and thank you for the chance to provide you with a written submission, which has been provided. There are a number of issues that were not able to be covered in our written submission due to time constraints. I will try to cover those matters today, and I hope that they do not take up much of your time.

The Police Association's submission is that the Police Integrity Bill fails to comply in a number of areas with the Charter of Human Rights and Responsibilities Act, which is an act that has been operational since some four to five months ago. The first area where we believe the bill does not comply is in the area of clause 69, which deals with compulsory questioning and derivative evidence in criminal proceedings. Section 24(1) of the charter provides that:

A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Section 25(2) of the charter provides that a person charged with a criminal offence is entitled without discrimination to a number of minimum guarantees, which include having 'adequate time and facilities to prepare his or her defence and to communicate with a lawyer or adviser chosen by him or her', and finally that they not 'be compelled to testify against himself or herself or to confess guilt'. That right of not being compelled to testify against oneself or to make any admission of guilt is enshrined in section 464 of the Crimes Act. It is the inalienable right of every citizen of Victoria or person who is in this state at the time of any criminal interview to answer 'No comment' to allegations that are made against them. This bill will abrogate that right for police officers in this state and will create a class of approximately 11 000 people out of a state of 5 million who are the only people within this state who will no longer enjoy that fundamental right.

In the High Court case of *Hammond v. The Commonwealth*, Justice Murphy stated that the privilege against self-incrimination is part of our legal heritage where it became rooted as a response to the horrors of the Star Chamber. Victoria has adopted a code of criminal procedure calculated to protect persons from self-incrimination. He also said that these laws deliberately eschew inquisitorial methods, the abuse of which so offended the British nation as to cause it to revolt and eradicate them.

Clause 69(1) of the bill abrogates that privilege against self-incrimination, and in the words of Justice Murphy, this is an extraordinary step and requires the Parliament to take great care to ensure that the abrogation of such a fundamental right is finely balanced against the interests of an individual.

Clause 24 permits the director, police integrity, to disclose information obtained from an examination to another law enforcement agency such as the Victoria Police. This means that answers to questions provided under coercive examination will be able to be passed to other organisations in order to obtain other evidence, which is commonly referred to as derivative evidence, that may be used in a criminal prosecution against that person. Nothing in clause 69 prevents the admission of derivative evidence against an accused person, so while the specific answers given to questions asked under coercive powers cannot be used, any evidence that is obtained from those answers

can be used. The committee has observed that the use of derivative evidence derived from coercive powers has been found to be incompatible with human rights in both the United States of America and in Canada. The United Kingdom cases are more compelling and even more relevant to our jurisdiction. I will touch on those shortly. The statement of compatibility that accompanies the bill states, and I quote:

This is not to say that the DPI or SIM —

being the director, police integrity, or the special investigations monitor —

could use the compulsory questioning powers for the purpose of gathering further evidence against an accused for the purposes of the criminal proceeding.

The statement acknowledges, therefore, that coercive powers should not be employed to supplement available evidence against a person in criminal proceedings. Yet the bill will allow exactly that to occur. The direct use immunity is consistent with the approach generally taken in Australia across all jurisdictions. If the prosecution seeks to lead evidence derived from answers given in response to coercive questioning, the court retains the discretion whether the evidence should be admitted in that particular case.

In *Hammond v. The Commonwealth* the High Court dealt with the appropriateness of conducting a coercive examination when there are concurrent criminal proceedings. The High Court held that to conduct a parallel non-judicial inquiry into the very matters which constitute the basis of criminal proceedings against the proposed witness constitutes an interference with the due administration of criminal justice. Chief Justice Gibbs stated in this particular matter:

It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.

Obviously in these matters, hearings conducted by the Office of Police Integrity, not all matters are held in private. Some of them are very public, which exacerbates the problem greatly.

In the decided matter of *Pioneer Concrete (Vic) Pty Ltd v. Trade Practices Commission*, a 1982 decision reported in the Commonwealth Law Reports, again His Honour Chief Justice Gibbs stated, and this is again in relation to coercive questioning:

... if the power were used to assist the party in proceedings already pending, in a way that would give such a party advantages which the rules of procedure would otherwise deny him, there would be a contempt of court ... the power is a drastic power and is capable of abuse and must be exercised with care.

An important distinguishing feature of the *Hak Song Ra v. Australian Crime Commission* matter is the fact that the Commonwealth Director of Public Prosecutions had formally ruled out any further criminal action against the proposed witnesses. There was no threat of criminal proceedings against them, yet the High Court held that there was potentially a contempt of court and that the power was in fact a drastic power. Chief Justice Gibbs said:

It was said that the privilege is only against testimonial disclosure — disclosure that may be used in evidence — and that since, under both the commonwealth and the state acts, the answers are not admissible in evidence there is no infringement of the privilege ... Again, I am not satisfied that this is correct; I would incline to the view that the privilege is against the disclosure of one's own criminality.

In other words, quite clearly it does not need to be evidence given during a trial, be it criminal or civil; the mere fact that a person is coercively forced to admit criminality is a breach of a person's human rights.

Clause 69(3) does not go far enough to protect the rights of witnesses under examination. The minister's response acknowledges that clause 69(3) only prevents the use of a self-incriminating answer or document in a criminal proceeding. In order to satisfy the proportionality principle contained in section 7 of the charter, it is submitted that derivative evidence must be rendered inadmissible before such a fundamental human right as the privilege against self-incrimination is abrogated under clause 69(1).

If I can refer the committee to *Hammond v. The Commonwealth* to what Chief Justice Gibbs stated, and I will quote from it. This is in relation to a reporting of evidence given under coercive examination, which of course is at a lesser level than the use of the information in a trial; this is just the public reporting that he is talking about:

If a report could not be made in such a case —

as he ruled —

it is difficult to see any reason why the position would be different if the charge was merely contemplated and not pending.

This raises an issue as to whether a person has to be charged with a criminal offence before the right of self-incrimination steps into play or whether there is merely a contemplation that a person may be charged with a criminal offence. There is substantial legal argument as to when the commencement of a proceeding actually takes place. The bill does not address the issue and nor is it addressed in the charter. There is forceful argument that a commencement of a proceeding could be at the time, for example, of the initial issue of a warrant and well before the charging of any particular person.

I would like to refer the committee to the Western Australian legislation, the Corruption and Crime Commission Act of 2003. I quote section 23:

- (1) The Commission must not publish or report a finding or opinion that a particular person has committed, is committing or is about to commit a criminal offence or a disciplinary offence.
- (2) An opinion that misconduct has occurred, is occurring or is about to occur is not, and is not to be taken as, a finding or opinion that a particular person has committed, or is committing or is about to commit a criminal offence or disciplinary offence.

The reporting of such a matter is not covered in the decision, so we do not know whether His Honour was referring to the public reporting in a newspaper or the reporting to another government body. We would submit that reporting means exactly that: reporting to anyone under any circumstances. That is a matter that is not addressed either in the charter or in the bill.

As I have already stated, it is an inviolate right in Victoria that a suspect is entitled to exercise his or her right to silence in the course of a criminal interview conducted by the police pursuant to section 464 of the Crimes Act 1958. The statement of compatibility has acknowledged that the DPI or SIM should not use the compulsory questioning powers for the gathering of further evidence.

The Police Association submits that clause 69(1) is incompatible with the right to a fair hearing — I refer you to section 24 of the charter — and the right not to be compelled to testify against oneself or to confess guilt. In a practical sense, once the prosecution is aware of derivative evidence, it will be virtually impossible for an accused person to establish that a specific piece of evidence has been derived from the answers given by the accused in response to a coercive examination rather than through some other independent source. The rights of an accused can only be adequately safeguarded by excluding the use of derivative evidence under clause 69(1). There have been matters before the courts where it has been held that evidence unlawfully obtained can still be admissible.

I move now to the production and inspection of protected documents, if I may. I refer the committee to the 2008 Supreme Court decision in *Ragg v. Magistrates Court of Victoria & Corcoris*. Justice Bell recognised that both the right of the defence to obtain documents under subpoena and the prosecution's duty to disclose represent fundamental human rights consistent with the right to equality before the law, which is referred to at section 8 of the charter, and the right to a fair trial, which is referred to in the charter at sections 24(1) and 25(2). Justice Bell adopted the introductory comments of Martin Hinton in his article entitled 'Unused material and the prosecutor's duty of disclosure'. Justice Bell decided that while the prosecution has a duty to disclose all such material in its possession, there had been matters not disclosed to the courts that may have been of use or of importance to the defence case. As I have stated, a prosecution is compelled to disclose such material; the OPI is not. The only way a defendant can gain access to this material, which is in the possession of the prosecution, is through the use of a subpoena.

To unduly restrict a defendant's access to such material is incompatible with the defendant's right to equality before the law and the right to a fair trial. One could say that it would be impossible for someone to receive a fair trial if the judge or magistrate presiding over the matter was not in possession of all of the facts. If the matters had been selectively presented to that judge or magistrate, they could not possibly be in possession of all of the material, the defence could not mount a fair defence to the accused or the defendant. It would in fact be impossible to receive a fair trial.

In that case of *Ragg v. Magistrates Court of Victoria & Corcoris*, Justice Bell identified the long held test for a defendant obtaining material under subpoena. I quote:

The defence has to establish only that 'it appears to be "on the cards" that the documents will materially assist the defence'.

He went on to say:

On the basis of the above authorities, I consider the true test is whether there is a reasonable possibility that the sought-for information would materially assist the defence.

Pursuant to clause 107(6) a court must refuse access to a document if the court determines that it is a protected document.

Clause 107(7) provides that a defendant will need to establish exceptional circumstances in order to gain access to a protected document in a criminal matter. There is no mechanism whatsoever to obtain a protected document in a civil matter.

In *R v. Mokbel*, Justice Gillard observed at paragraph 81 when dealing specifically with a subpoena issued against the OPI:

In my view, what His Honour said applies equally to the balancing process considering other public interest matters against disclosure. Adapting what His Honour said, in my opinion the principle is that the overriding need for a fair trial is that documents or things must be disclosed to an accused person if there is good reason to think that the disclosure may be of substantial assistance to the accused person in meeting the case for the prosecution. And, of course, meeting the case for the prosecution involves issues of credibility of Crown witnesses. Credibility not only in the sense of those matters bearing on the reliability of a witness such as memory and observation, but also to expose lack of truth, exaggeration or interest.

The restrictions sought to be imposed by clause 107 and clause 108 are draconian and trespass substantially upon the common-law rights of the accused persons.

If I can refer the committee to a decided case, a United Kingdom matter, *Atlan v. The United Kingdom*, a 2001 case, where it was stated that upon the unanimous findings of the court, violations of the United Kingdom charter had been made. It was found that the prosecution had repeatedly denied the existence of undisclosed material and failed to inform the judge of the true position when it appeared that there had been undisclosed material directly bearing on the defence advanced at the trial.

In *Rowe and Davis v. The United Kingdom*, a 2000 decision, which arose from proceedings in which an important ruling had been given by the Court of Appeal in England, it was stated that having reviewed the facts of the case and the development of English practice, the court found that the applicants' rights had been violated. In so doing the court recognised it as a, and I quote:

... fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms —

that is the term that they used —

between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.

In addition article 6(1) of the United Kingdom charter requires, as indeed does English law, that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused. This bill goes against, quite clearly, that proposition.

Clause 105 permits the director to deem certain documents to be protected documents. Ordinarily the question as to whether public interest immunity should apply to a document is a matter for a trial judge to determine. That is a fundamental cornerstone of justice in this state, the independent operation of our judiciary. Much as with the argument over mandatory sentencing, this bill will take away from our courts, our judges and magistrates, the opportunity to decide public interest matters and will remove that decision from them.

The mandatory exclusion of protected documents from civil proceedings is incompatible with section 8 of the charter, which is equality before the law, and section 24, the right to a fair hearing. Again, as observed by Justice Bell in *Ragg v. Magistrates Court of Victoria & Corcoris*, the equality of arms principle applies to both criminal and civil trials. The minister's statement of compatibility states:

The procedures for criminal proceedings in clauses 107 and 108 enable greater participation of an accused without undermining the reasons why the documents should be kept confidential and is consistent with the approach set out by the House of Lords in *R v H* [2004] 2 AC 134 as being appropriate in public interest claims for non-disclosure of documents or things.

I am glad that the minister used that particular decision because a careful reading of it states that the derogation from the golden rule of full disclosure to an accused may be justified, but such derogation must always be the minimum derogation necessary to protect the public interest in question and must — and this is vital in this issue — never imperil the overall fairness of the trial. There is, of course, the further issue of the status of staff members from the Office of Police Integrity being accorded the status of a protected person and not being compellable or, in other words, not being able to be forced to get into the witness box and give any evidence. So the situation may well arise that not only may the documents not be produced but in the inability of being able to examine or cross-examine a member of the OPI staff, it may never come to light that such a document even exists.

Nothing in clauses 105, 106, 107 or 108 refers to the golden rule of full disclosure or to the need to ensure that adequate protection is afforded to the interests of the defence when dealing with public immunity issues. As identified by Justice Gillard, it is a well-established and common practice in Victoria for an inspection of subpoenaed documents to be limited to the legal representatives of an accused person. There is no provision in clause 107 for this to occur.

Justice Gillard also observed in *R v Mokbel* at paragraph 74, and I quote:

An accused man must have the opportunity to inspect any document which may provide an opportunity to cross-examine.

Justice Bell in *Ragg v Magistrates Court of Victoria & Corcoris* stated:

It is clear that the accused does not have to establish that the defence would actually be assisted by the production of the documents. A test of that kind would have the capacity to produce monstrous unfairness, is not supported by authority and was not put forward by Mr Ragg.

The defence has to establish only that ‘it appears to be ‘on the cards’ that the documents will materially assist the defence.’

The Police Association submits that the new test introduced by clause 107 of exceptional circumstances will, in the words of Justice Bell, produce monstrous unfairness. We further submit that clauses 105, 106, 107 and 108 are incompatible with the right to equality before the law, incompatible with the right to have adequate time and facilities to prepare a defence and communicate with a lawyer or adviser chosen by him or her, incompatible with the right to a fair trial, incompatible with the general principles of disclosure established under common law and recently articulated in the *Mokbel* and *Corcoris* decisions in the Victorian Supreme Court, and incompatible with the approach articulated by the House of Lords in *R v H*.

I move to clause 114 and the oversight by the special investigations monitor. It is the Police Association’s submission that the oversight powers contained in part 5 of the bill are manifestly inadequate. There is no provision for a complaint to be made to the SIM generally regarding the conduct of the OPI and its staff. Therefore, a complaint made in relation to alleged criminal conduct of a member of the OPI must be made to the Ombudsman, and the response to a criminal allegation made to the Ombudsman is not met with a criminal investigative response; it is met with an administrative response, which is entirely inappropriate, as inappropriate as if the situation were reversed and an administrative problem was met with a criminal investigation.

The case of the *OPI v. Bolton*, which is roughly one month old, provides a striking example of the need for the SIM to be empowered to receive and investigate complaints regarding the conduct of the OPI and its staff. It is evident from the facts in the *OPI v. Bolton* that the following issues relating to the conduct of the OPI in that matter warrant further investigation. That material has been provided to the committee prior to today. These are the matters. The OPI staff and investigators repeatedly denied the existence of audio recordings, both in writing and on oath, which had been subpoenaed by the defence. The presiding magistrate observed that if the audio recordings existed, they should be disclosed to the defence. An OPI investigator gave sworn evidence that no such audio recordings were made; that was contrary to what was recorded in her notes. The same OPI investigator subsequently recanted that evidence and swore that, ‘There is a very strong possibility that our interview was recorded’. The evidence of the OPI investigator was entirely at odds with the evidence of three other witnesses called for the prosecution, who all swore that their interviews with the OPI had been audio recorded. The audio recordings were never produced, despite the evidence of their existence, and are presumed to have been destroyed contrary to the Public Records Act.

In *Atlan v. The United Kingdom* in 2001 the prosecution repeatedly denied the existence of undisclosed material and failed to inform the judge of the true position. This was found to constitute a violation of article 6(1) of the UK charter, being the right to a fair trial. I will quote from that case. Again, it was the unanimous finding that a violation of that article was made. It states that:

... they had repeatedly denied the existence of undisclosed material and had failed to inform the judge of the true position ...

Notwithstanding the fact that the matters arising in the Bolton case gave rise to issues of potential misconduct and the violation of section 24(1) of the charter by the OPI, there is presently no means by which Bolton can lodge a formal complaint to the special investigations monitor. The assistant director of the Office of Police Integrity, Mr Graham Ashton, was interviewed by the media on 12 February 2007. He made the following important observations, and I quote:

Noble cause corruption is something we focus heavily on at the OPI because it is often a misunderstood concept. Noble cause corruption is the breeding ground from which more endemic corruption occurs and more serious corruption grows out of that ... there's little understanding that the more serious corruption will generally flow from an environment that's created by the noble cause corruption.

When he referred to an investigation into the Victoria Police armed offenders squad he stated, and again I quote:

So I think if you find that here you've got an elite squad that should be staffed by professionals doing a difficult job, you're entitled to expect, I think, that the highest ethical standards are conducted in that squad because if they are investigating serious crimes the last thing a community wants is for prosecutions to be put at risk by slipshod investigations or by shoddy police work.

Mr Ashton's comments are, with respect, of equal application to the operations of the OPI. Only a few OPI prosecutions have proceeded to hearing at this time. The fact that the problems identified in *OPI v. Bolton* have arisen so early in the active life of the OPI only reinforces the need for formal measures to be enacted to deal with complaints on a comprehensive basis. The material nondisclosure by the OPI of evidence relevant to the defence was only exposed in this matter through the use of a subpoena. The introduction of a protected document provision will probably prevent the future detection of such conduct, which is clearly capable of constituting a violation of an accused person's right to a fair trial.

In relation to oversight matters the New South Wales Independent Commission Against Corruption Act establishes a parliamentary joint committee to oversee that ICAC body. Similar provisions have been incorporated in the Police Integrity Commission Act of 1996 in parts 6 and 7. In Queensland the Crime and Misconduct Act 2001 established the office of parliamentary commissioner, who has direct oversight of that body. The Australian Crime Commission is subject to the oversight of a joint committee of the commonwealth Parliament. In Western Australia section 188 of the Corruption and Crime Commission Act 2003 establishes the office of parliamentary inspector.

I suppose it is fair to say we only need to pick up today's newspapers to see what happens or what is potentially able to happen with an anticorruption body such as the New South Wales Crime Commission, which has no direct oversight. There is no doubt that anticorruption-type bodies are equally as open to alleged corruption as any other body.

It is interesting to note that the accused person in that matter has a female partner who is currently on secondment from the New South Wales Crime Commission to the New South Wales Independent Commission Against Corruption. I do not make any allegations against either of them — that will be a matter for the police and ultimately the courts to decide upon if that is what is thought necessary — but it is a clear and stark example of what can happen when there is no appropriate oversight.

The bill dictates that the director must report annually to Parliament, and that is well and good. There is no compulsion for the director to report on any other matter to the Parliament at all. The bill uses the word 'may' report to Parliament, which clearly is not a compulsion upon him to report to the Parliament. That will leave the Parliament in the position where a bureaucrat, for want of a better term — and I do not use that in a derogative sense — will be deciding what is good and what is not good for the Parliament. The Parliament will not get the opportunity to make that decision.

I move on to clauses 109 and 110 relating to protected persons and critical incidents. Clause 109 makes it almost impossible for an aggrieved person to commence civil action against a staff member of the OPI. Subclauses (3) and (4) prohibit action being taken without leave of the Supreme Court, and the Supreme Court cannot grant leave unless they are convinced that there is a substantial ground for concluding that the OPI officer has acted in bad

faith. It is our submission that the term 'acted in bad faith' sets the bar as high, effectively, as being able to prove to the Supreme Court that someone has committed a criminal offence. It is a quite different proposition from the proposition advanced in the statement of compatibility that the proposed legislation protects OPI officers who are acting in good faith. Section 123 of the Police Regulation Act 1958 affords that level of protection to police officers in this state, but they must have been working, they must have been on duty and they must have been acting in good faith. That level of protection is provided by this bill to OPI officers where they are involved in critical incidents and certain criteria are met. For the remainder of their activities the bar is set at 'acted in bad faith'. If I can provide a very brief example where the rights of not only police officers but every other citizen of the state of Victoria are imperilled by this proposed act, it is simply this: two members of the OPI staff conducting a police investigation are at a police station; one of them is carrying a couple of cups of coffee and drops one accidentally, and because they are a very busy person they do not have time to step out, pick up a mop and clean it up. They are not acting in bad faith, no-one is in custody and it is not a critical incident, so they leave it as it is. A child comes into the police station to tell someone at the police station that they are lost and cannot find their parents. As they do they slip and break their neck. The OPI and the staff and the people who were involved in that cannot be sued. Surely that is not the intention of the Parliament with this bill.

Depending on the cause of action, it may be impossible to demonstrate bad faith to the Supreme Court without having access to adequate discovery and the protected documents procedure involved in civil matters, and the impossibility of compelling a member of the OPI staff to give evidence will probably prevent that. The common-law presumption of statutory interpretation that, where possible, statutes should not be interpreted as abrogating common-law rights is a presumption based on high authority of long standing, and some of those matters go back as far as 1904 to *Clancy v. Butchers' Shop Employees Union*; *Australian Tramways Employees Association v. Prahran and Malvern Tramway Trust* of 1913; there is a 1954 decision, *Commissioner of Inland Revenue v. West-Walker* in New Zealand; and a Commonwealth Law Reports decision from 1987, *Re Bolton, ex parte Bean*.

It is our submission obviously that the protections afforded to OPI personnel in these circumstances are well beyond those that are afforded to police officers and other members of the public sector employed by the government in Victoria such that it basically makes the OPI, particularly without proper oversight, unaccountable to anyone. I will make a couple of final points, if I may. This bill confers upon the OPI the powers of a royal commission, but it goes beyond providing it with the powers of a royal commission; it provides it with something greater. Royal commissions do not charge people, they do not prosecute people; they make recommendations to the appropriate authorities, which then independently examine material and, if necessary, prosecute.

As far as compatibility with other states and territories within Australia is concerned, only the Northern Territory has legislation equivalent to our Charter of Human Rights and Responsibilities Act. No other state has it. This charter only came into force on 1 January this year, and the proportionality principle in section 7 of the charter is critical in relation to this bill. The provisions identified in the submission are not a reasonable or justified intrusion upon the human rights of police members. The objectives of the OPI can be achieved through less restrictive means by providing for the inadmissibility of derivative evidence; limiting the OPI's role in coercively examining a suspect when criminal charges are imminent; and leaving public interest immunity claims, where they have been for 150 years in this state, for the good of the courts to determine, without legislative restrictions. It can be achieved by protecting OPI members who are acting in good faith rather than requiring proof of bad faith by having proper oversight in complaint procedures. The OPI will still be able to function and perform the role that Parliament wants it to perform, but the charter rights of police members will be preserved. Ladies and gentlemen, that is all I have for you. Again, I thank you for your time.

**The CHAIR** — Thank you, Mr Davies, and thanks to the Police Association for that submission. I will just open it up to questions.

**Mr BROOKS** — Thank you, Mr Davies, for your comments today. I will start with one of the first issues you raised in relation to clause 69 and the issue of compulsory questioning. It is an issue that was picked up in this committee's earlier report. I note that both in your submission and in the verbal presentation then you did not refer to clause 46, which the minister included in his response to the committee to those earlier matters raised. That clause requires the DPI to take all reasonable steps to ensure that any proceedings that are on foot are not prejudiced; I think the word used in that clause is that the DPI 'must'. I was just wondering whether you want to comment on whether you thought that was sufficient to protect the charter rights.

**Mr DAVIES** — I cannot say that it is sufficient, sir, because this places enormous responsibility on one person who effectively is not accountable to anyone. If he or she, whoever the director may be at any time, makes an incorrect decision or a number of incorrect decisions, it may or may not fall to the courts to ask the director to justify his or her actions. Without proper oversight these are, as I made mention earlier, draconian and very serious powers that are being basically unleashed without any control other than the reserve and hopefully good judgement of the person concerned. Of course ‘apprehended bias’ is a term you will probably be well aware of. Bias in an adjudicator does not necessarily have to be real; it only has to be apprehended in the mind of the accused. We may find ourselves, it is reasonable to say in our submission, in a position before a judge or before a magistrate where they say in relation to either the use of coercive information or the lack of provision of documentation that ‘I am not in a position to provide this accused person with a fair trial if you maintain your position that you will not release these documents or that you must rely upon derivative evidence as a result of coercive examination’. It is not inconceivable that that will place a trial judge in a position where he or she says to counsel, ‘Would you like to address me on the issue of a permanent stay because I will be most amenable to that sort of submission?’.

**Mrs PEULICH** — I do not have any questions at the moment. My one concern, Chair, is that the committee is scheduled to consider the evidence on Friday to finalise its report, and your Hansard transcript probably will not be available to us for a few days. I am asking perhaps through the Chair whether it would be possible to actually make speedier amendments to your Hansard record and make that available to us perhaps within a shorter time frame given the constraints on the committee. Some of the more technical, illustrative material I think would be most useful to our deliberations on this bill.

**Mr DAVIES** — Certainly if the material is made available to me, I will have it done immediately.

**Mrs PEULICH** — Chair, you are able to sort of facilitate that?

**The CHAIR** — If the Hansard material is available. I mean we will not have the Hansard material available for our report for Parliament, but I assume we would have it available on Friday.

**Mrs PEULICH** — We would need to have access to it before the meeting on Friday, Chair.

**The CHAIR** — Yes, we will have the Hansard notes, but they will not be corrected — all the presentations today — in time for our presentation to Parliament; this is going to be on Tuesday. Obviously we will speed it up.

**Mr JASPER** — Mr Davies, thanks for the submission that you provided. I join with your concerns in that you indicate in much legislation we get now there is often ‘may’ instead of ‘must’, and I think that there needs to be a review by Parliament itself in relation to that particular wording. The other issue relates to section 85, which has been used a lot within the Parliament over many years. I think it needs to be generally reviewed on the usage of section 85. There is comment on that in the submission, particularly in relation to sections 109 and 110. You would be aware that recently the Scrutiny of Acts of and Regulations Committee has extended its review because of the charter of human rights; it is really new to us as a committee in the use of that. You mentioned the Northern Territory is the only other jurisdiction in Australia that has a similar situation. The question I put to you is that all of your submission seems to centre on the fact of the failure of the bill to comply with the charter of human rights. As far as the scrutiny is concerned, is it a fair comment to say that this is the basis of your submission?

**Mr DAVIES** — It is certainly a very large proportion of the submission, Mr Jasper, yes. It was indicated to us that that is what we should direct our attention towards: compatibility with the charter. Quite clearly the charter, as you say, is new to you; it is certainly new to us as well. But it is an important document, and if it is to be a relevant and contemporary document that due regard is paid to, then it needs to be complied with. This is one of the very first major bills that has to comply with the requirements of that charter, and therefore in the constraints of the short time available that is what we have addressed. Certainly if we were given more time we could expand our submission several times over. The committee very graciously gave us an extra 48 hours to make our written submission, and we thank you for that, but nevertheless that gave us 12 days to go through what is a substantial piece of legislation. To try to research all of the various decided cases both here and throughout the British commonwealth is a fairly onerous task that cannot be done quickly. That is why we have restrained ourselves in the main to the compatibility with the charter.

**Mr JASPER** — So in general terms you would say that the charter of human rights is abrogating a lot of the responsibilities as far as your members are concerned?

**Mr DAVIES** — What we say is that the Charter of Human Rights and Responsibilities Act creates an expectation amongst all Victorians that they will be afforded a minimum level of human rights in this state, and what we also say is that the Police Integrity Bill removes a large number of those human rights for police officers in this state so that roughly 11 200 out of the approximately 5 million people in this state will not have the same human rights as everyone else.

**Mr SMITH** — Thank you for coming along today. I really appreciate your time, and I concur with you that there has been limited time to look at this legislation in enough detail. I want to start by asking you in reference to clause 69(3) whether this clause is in any way different to existing law that deals with public interest immunity, and then: does it go further?

**Mr DAVIES** — We are talking about privilege against self-incrimination being abrogated.

**Mr SMITH** — Yes.

**Mr DAVIES** — Clause 69(3) says that the answer, information, document or thing, is not admissible in evidence against the person before any court or person acting judicially except in proceedings for perjury or false information, a breach of discipline, a failure to comply with a direction under clause 47, an offence referred to in clause 68(3) or the contempt of the director.

**Mr SMITH** — Is it the view of the Police Association that that goes further than the public interest immunity laws?

**Mr DAVIES** — It is slightly different. Public interest immunity applications, as I alluded to earlier, are made to a judge or magistrate, and in the normal course of events the trial judge, having been privy to all of the information and all of the circumstances of the matter, the importance or otherwise of any particular information, documents or evidence, then makes an informed decision. This tends to take that decision-making away from the judiciary and provides them with a hard and fast set of rules. As I mentioned earlier in answer to one of Mr Brooks's questions, we are then left in a position potentially where a trial judge says, 'I cannot possibly afford this person a fair trial if I have to comply with these requirements. If the prosecution intends to maintain that line I will be prepared to take a permanent stay application'.

**Mr SMITH** — You have mentioned that you think the Parliament should have more oversight in these matters.

**Mr DAVIES** — Absolutely.

**Mr SMITH** — What is the view of the Police Association on extra powers of oversight the SIM should have?

**Mr DAVIES** — The Parliament can create those powers either through the offices of the special investigations monitor or by some other means that the Parliament decides is suitable. Whether that be a parliamentary committee, whether that be a parliamentary committee that exercises that oversight role through the special investigations monitor, the choice is the Parliament's. No-one in this state in this day and age should be concerned about being answerable to someone. We are all answerable — I am answerable, the Parliament is answerable to the voting public, everyone is answerable. To create an office where a person is only required to supply an annual report — and without being glib, that might be three or four pages of a financial report and a glowing self-assessment of 12 months work well done; that is simply the fact of the matter — to require no more oversight than that places us on very dangerous ground, and as I said, the papers today are full of one such example from interstate.

**Mr SMITH** — That is true. Finally, was the Police Association consulted during the drafting of the bill at all?

**Mr DAVIES** — We were not consulted in relation to this bill at all. Its existence came as a complete surprise to us.

**Mr SMITH** — Thank you very much.

**Ms PULFORD** — Further on the matter of SIM oversight and reporting, how would you suggest that that interacts with the charter and the extent to which any charter rights are limited by what the Police Association says is the limitations imposed by the bill on SIM?

**Mr DAVIES** — I do not know that a complete oversight actually rectifies all of the problems in relation to the charter; in fact it clearly would not. Nevertheless, it would create a layer of accountability that does not exist. It would give the Parliament control, and ideally we are not talking about operational interference for political purposes if anybody were to raise that later on; we are not talking about that, we are talking about proper compliance with the act. Whilst there is a provision within the bill for the SIM to monitor compliance with the act, you cannot actually take any action. Unfortunately, while we have the highest regard for the office of SIM, and for the current incumbent for that matter, quite simply he is a toothless tiger.

The one complaint provision that has been extended from the current legislation is that if you are coercively examined by the OPI and you are not afforded the opportunity to give your full version of events you may, at present, within three days make a complaint in writing to the SIM and be investigated. This bill extends that time frame but does nothing else. Of course if an adverse finding comes out of a hearing and it is not handed down until the day after the time limitation expires, you have nowhere to go.

**Mrs PEULICH** — The 90 days is too short?

**Mr DAVIES** — I do not know whether there should be a time restriction on it because if it is a complex investigation that the OPI might be conducting it might be well beyond 90 days before its findings are made public. It may be, particularly when you consider that this bill also provides the director with the power to say ‘No, you cannot be legally represented before this’ — perhaps public coercive — ‘hearing by a lawyer. You can give us answers to our questions. We will make our findings public in due course, and you get a finding where you say, ‘That is not what I was talking about; that is something completely different. I have been taken out of context’, or ‘I did not get to address that point in the way that I wanted to. I would like to make a complaint to the SIM about it’, you cannot; you are statute-barred.

**Mr SMITH** — Good point.

**Mrs PEULICH** — In relation to the Police Association’s view that the entire regime should be subjected to parliamentary committee oversight, do you have any views as to what an appropriate structure may be? Obviously that is for Parliament to debate and so forth, but do you have a view that you could perhaps tease out?

**Mr DAVIES** — Absolutely. As I alluded to earlier, that is, as you say, a matter for the Parliament and it is not for us to tell the Parliament how to run its affairs, but it is our submission that either a parliamentary committee is created, a parliamentary committee that oversees an inspector-type role, or a special investigations monitor office, appropriately staffed, resourced and equipped. We are not talking about taking budget away from the OPI; we are not trying to diminish the role of the OPI in any way, we are simply trying to put appropriate safeguards in place when we are talking about these sorts of draconian powers. If 11 000-plus citizens of this state are to be subjected to a different human rights regime than the other 5 million-odd, there should be reasonable opportunities for redress, and that includes not only the monitoring role but the ability to sue, the ability to charge people with criminal offences if and when sufficient evidence arises that warrants that taking place.

How the Parliament decides to monitor it is entirely a matter for the Parliament, but one would imagine the simplest way would be to beef up the office of the SIM, provide it with sufficient resources, and gain a direct reporting line from the SIM to the parliamentary committee.

**The CHAIR** — You are asserting that police are being discriminated against as a category on the basis that — when we look at the charter, we have to look at the charter as to whether there are reasonable limits on people’s rights. It seems to me that the fact that the OPI is investigating police does not necessarily mean that the police are being discriminated against. It is a question of: are we meeting the reasonable limits test as per charter? Generally when we talk about discriminated groups we tend to talk about minorities or groups that are fairly identifiable, not police officers. It seems to me that our judgement has to be about the issue of reasonable limits. Can you elaborate on that?

**Mr DAVIES** — With all due respect, Mr Carli, I would say that 11 200 out of 5 million is certainly a minority and they are certainly identifiable — most of them are in blue uniforms. We have no issue with police

being investigated over allegations. We represent 98 per cent of the police force in this state and I can guarantee you that nobody wants to work with a corrupt person. We have had the ethical standards department and various versions of its predecessor which have conducted that role quite rigorously for a number of years and we take no exception to that whatsoever. What we do take exception to is the fact that a specific piece of legislation has been created that abrogates the rights held by every person in this state and applies it to 11 000 people, when the OPI itself has publicly said that, after over four years of operation, there is no evidence of generic or systemic corruption throughout the Victorian police force. There are certainly isolated incidents; unfortunately, there always will be, whether it be in a police force, whether it be in a local government, whether it be in any form of public life or private life for that matter. There will always be instances of people doing the wrong thing. We are quite happy to have those matters investigated and investigated thoroughly, rigorously and taken to their logical conclusion, but we think it is only fair that our members, who are sworn to uphold the law and uphold the right in Victoria, be afforded the same legal processes and same human rights as everyone else in the state.

**The CHAIR** — Mr Davies, thanks very much, and again thanks to the Police Association for its submission.

**Mr DAVIES** — Thank you, Mr Carli.

**Mrs PEULICH** — If you could expedite the return of your corrected Hansard transcript that would be useful.

**Mr DAVIES** — Absolutely. I will guarantee you I will have it back the same day that I get it.

**Witness withdrew.**