



SCRUTINY OF ACTS AND
REGULATIONS COMMITTEE

Report on the Police Integrity Bill 2008

Ordered to be Printed

By Authority. Government Printer for the State of Victoria.
N° 109 Session 2006-08

Parliament of Victoria, Australia

**Scrutiny of Acts and Regulations
Committee**

**Report on the Police Integrity Bill
2008**

ISBN 978 0 7311 3039 1



Scrutiny of Acts and Regulations Committee

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Referral to Committee

Extracted from the Minutes of the Proceedings of the Legislative Council

No 69 — Friday, 9 May 2008

6. **POLICE INTEGRITY BILL 2008** – Question — That the Police Integrity Bill 2008 be referred to the Scrutiny of Acts and Regulations Committee for public inquiry, consideration and report within one month of the passage of this Resolution — put.

The Council divided — The President in the Chair.

AYES, 20 NOES, 18

Question agreed to.

Terms of Reference

Parliamentary Committees Act 2003, section 17

The functions of the Scrutiny of Acts and Regulations Committee are –

- (a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly –
 - (i) trespasses unduly upon rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
 - (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;
- (b) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament –
 - (i) as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the *Constitution Act 1975*, or raises an issue as to the jurisdiction of the Supreme Court;
 - (ii) if a Bill repeals, alters or varies section 85 of the *Constitution Act 1975*, whether this is in all the circumstances appropriate and desirable;
 - (iii) if a Bill does not repeal, alter or vary section 85 of the *Constitution Act 1975*, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;
- (c) to consider any Act that was not considered under paragraph (a) or (b) when it was a Bill –
 - (i) within 30 days immediately after the first appointment of members of the Committee after the commencement of a Parliament; or
 - (ii) within 10 sitting days after the Act receives Royal Assent —whichever is the later, and to report to the Parliament with respect to that Act on any matter referred to in those paragraphs;
- (d) the functions conferred on the Committee by the *Subordinate Legislation Act 1994*;
- (e) the functions conferred on the Committee by the *Environment Protection Act 1970*;
- (f) the functions conferred on the Committee by the *Co-operative Schemes (Administrative Actions) Act 2001*;
- (fa) the functions conferred on the Committee by the Charter of Human Rights and Responsibilities;
- (g) to review any Act in accordance with terms of reference which the Act is referred to the Committee.

Police Integrity Bill 2008

Introduced	11 March 2008
Second Reading Speech	13 March 2008
House	Legislative Assembly
Minister introducing Bill	Hon. Bob Cameron MP
Portfolio responsibility	Minister for Police and Emergency Services

Reference to the Committee

On the 9th May 2008 on the motion of the Hon. David Davis MLC, the Legislative Council resolved to refer this Bill to the Scrutiny of Acts and Regulation Committee¹ (the 'Committee') for public inquiry, consideration and report within one month of the passage of the resolution.

The Committee is required to report to the Parliament by 10 June 2008.

Purpose of the Bill

The Bill re-establishes the Office of Police Integrity under this proposed stand alone Act and sets out the functions of the Office and of the Director, Police Integrity; amends the Police Regulation Act 1958 to consolidate provisions relating to the Director, Police Integrity and Office of Police Integrity into the new Act; and makes necessary consequential amendments to other Acts.

The Committee's previous report

The Committee has previously reported on this Bill in Alert Digest No. 4 of 2008 tabled in the Parliament on Tuesday 8 April 2008. The full text of the Alert Digest was available on the internet on Wednesday 9 April 2008.

Ministerial response to the Committee's first report

The Committee received a response from the Minister to its initial concerns on 18 April May 2008 and published that response in Alert Digest No. 5 of 2008 tabled in the Parliament on 6 May 2008.

The full text of that response is shown in **Appendix 1**.

¹

Minutes of the Legislative Council, No. 69, Friday 9 May 2008.

The role of the Committee in considering the Police Integrity Bill 2008

The Committee's approach to the referral was to seek public submissions and comment on the provisions in the Bill against the Committee's terms of reference set out in sections 17(a) and (b) of the *Parliamentary Committees Act 2003*.

The primary concern of the Committee was to seek public participation concerning the question whether the provisions in the Bill trespass unduly upon rights or freedoms or are incompatible with the human rights set out in the *Charter of Human Rights and Responsibilities Act 2006* (the 'Charter').

Conduct of the Inquiry

The public invitation to make written submissions or comment was advertised on Thursday 15 May 2008 in *The Age* and the *Herald-Sun* newspapers. A direct mail campaign also took place to invite relevant key peak bodies to participate.

A period of two weeks was allowed to make submissions to the Committee and a deadline for receipt of submissions was set at Wednesday 28 May 2008. Notwithstanding the deadline the Committee received submissions up to close of business on 2 June 2008.

The press notice and direct mail campaign inviting written submissions drew attention to the assistance that may be provided to prospective participants by the Committee's earlier report in Alert Digest No. 4 of 2008 and the availability of the Bill, Statement of Compatibility, explanatory memorandum and the Minister's Second Reading speech from the Parliament's website.

The text of the press and direct mail notice is shown as **Appendix 2**.

Written submissions received

- Police Association (Victoria)
- Liberty Victoria and the Australian Centre for Human Rights Education, RMIT (Joint submission)
- Victorian Privacy Commissioner
- West Heidelberg Community Legal Service
- Health Services Commissioner

Public Hearings

The Committee held public hearings on Wednesday 4 June 2008. Notices in respect to the public hearings were published in *The Age* and the *Herald-Sun* on Tuesday 3 June 2008.

The following persons gave sworn evidence before the Committee –

- Mr Gregory Davies, Manager (Discipline/ Legal)
Police Association (Victoria)
- Mr Julian Burnside QC (Barrister) & Ms Georgia King-Siem (Barrister)
Liberty Victoria & the Australian Centre for Human Rights Education, RMIT (a Joint submission)
- Dr Graham Hill, Director, Legal Branch
Department of Premier and Cabinet

Further report on the provisions in the Bill

[Clauses]

Statutory powers to limit rights – Compatibility with Charter – Broadly expressed powers – Differential treatment of police officers – Possible misuse of powers

[9(6)]

The Committee's report in its *Alert Digest No. 4 of 2008* identified a number of provisions of the Bill that empower the Director, Police Integrity and others to limit a variety of Charter rights. The Committee observed that that 'such legislation inevitably engages a variety of human rights, but that reasonable provisions will typically satisfy Charter s. 7(2), as well as internal limits on particular rights.'

The Committee notes that some of the statutory powers provided for in the Bill are expressed in broad terms and, therefore may conceivably be construed or applied in some instances in a manner that is incompatible with the Charter.² However, the Committee observes that clause 9(6) of the Bill provides that the Director's 'complete discretion' is 'subject to this Act and other laws of the State' (including the Charter.) The Committee also observes that all provisions of the Bill are subject to the following Charter provisions:

- Charter s. 32(1), which provides that 'all statutory provisions must be interpreted in a way that is compatible with human rights... so far as it is possible to do so consistently with their purpose.'
- Charter s. 38(1), which provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right' unless another law means that 'the public authority could not reasonably have acted differently.'

Whilst the Committee observes these Charter provisions are capable of being displaced by contrary wording, purposes or requirements in the Bill, the Committee, having examined the relevant provisions of the Bill, considers that they do not restrict the full operation of the Charter and therefore do not permit conduct that would unreasonably limit a Charter right.

The Committee also notes that some of the Bill's coercive powers are applicable only to police officers and that the Bill's provisions may limit the ability of police officers to seek recourse for any improper or illegal conduct.³ The Committee observes that the Charter's rights against discrimination do not include a right against discrimination on the basis of employment as a police officer.

The Committee further notes that people granted statutory powers by the Bill may misuse those powers and, therefore, may unreasonably limit people's rights.⁴ The Committee observes that, aside from determinations of the legality of detention and of civil and criminal proceedings, the Charter does not set out any rights about who can wield statutory powers, how they are supervised or what mechanisms are in place to prevent their misuse. The Committee also observes that the Bill's purpose is to prevent the misuse of power by the police (including the restriction of people's Charter rights) and that such a purpose inevitably requires some deviation from traditional mechanisms of controlling statutory powers.

² Submission from Privacy Victoria, referring to clauses 37(1)(h) & 58(2); Submission from the Police Association, referring to clauses 106, 107 & 109(4); Submission from Liberty Victoria, referring to clauses 102 & 103; Testimony of Julian Burnside, additionally referring to clauses 63(3)(b), 64, 51, 58, 68, 88 & 90.

³ Submission from the Police Association, referring to clauses 109(1), 109(6) & 110.

⁴ Testimony of Julian Burnside, referring to clauses 10 & 87.

Having considered the statutory powers in the Bill, in the context of other applicable laws, the Committee is satisfied that the powers do not warrant any special mention or adverse comment in respect to possible incompatibility with the rights set out in Part 2 of the Charter.

Fair hearing – Questioning while proceedings are on foot – Derivative evidence – Whether reasonable limit

[69]

Charter s. 7(2) provides that human rights may be ‘subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society’. Charter s. 24(1) provides that people charged with a criminal offence have ‘the right to have the charge decided after a fair hearing.’

The Committee notes that clause 46(1) permits the compelled questioning of people who have been charged with a criminal offence. The Committee also notes that, in response to a question put by the Committee, the Minister remarked that:

*Clause 46 states that the Director must take all reasonable steps to ensure that the conduct of the investigation does not prejudice those proceedings. This provision reflects the common law position that coercive questioning on matters which form the basis of criminal proceedings constitutes an interference with the due administration of criminal justice (see *Hammond v Commonwealth* (1982) CLR 188). Accordingly, if coercive questioning powers are used to bolster a prosecution’s case and obtain additional evidence where proceedings have commenced, the risk of interference in the administration of justice would only be overcome in extraordinary circumstances.*

The Committee observes that the Minister’s responses, which were reported in *Alert Digest No. 5 of 2008*, may be considered in interpreting the relevant provisions of the Bill under s. 35(b)(iv) of the *Interpretation Act 1984*. The Committee considers that clause 46 is compatible with the Charter right to a fair hearing.

The Committee further notes that clause 69(3) bars the use of answers to compelled self-incriminatory questions in a criminal proceedings, but does not bar the use of evidence derived from those answers. The Committee additionally notes that, in response to a question put by the Committee, the Minister remarked that:

The ‘use’ immunity provided by clause 69(3) does not extend to derivative evidence (evidence that would not have been obtained but for the self-incriminating evidence) and is drafted in this way for two reasons.

First, the immunity is consistent with the Charter of Human Rights and Responsibilities (the Charter). Section 25(2)(k) of the Charter provides that a person charged with a criminal offence is entitled ‘not to be compelled to testify against himself or herself or to confess guilt’. Accordingly, the immunity from self-incrimination is limited in the Bill to criminal proceedings to which the witness is a party.

Second, the ‘direct use’ immunity is consistent with the approach generally taken in Australia. Statutory restrictions on the indirect or derivative use of evidence compelled from an accused against an accused are rare. Superior courts in other jurisdictions have accepted that the right to a fair trial may preclude the use of certain types of derivative evidence. However, as you note in your letter, Australian courts have not taken this approach. Ultimately, if the prosecution seeks to lead evidence derived from answers given in response to coercive questioning, the court retains its discretion whether the evidence should be admitted in the particular case.

The Committee observes the Charter's right to a fair hearing is broader than the limited right against compelled testimony in Charter s. 25(2)(k) and is defined by the international law of human rights, including the decisions of overseas courts, rather than Victorian evidence law or the practice of Australian courts.⁵

The Committee refers to Parliament for its consideration the questions of:

- ***whether or not clause 69(3), by permitting the use of information derived from compelled questioning in a prosecution of the person questioned, limits such people's Charter right to a fair hearing.***
 - ***and if so, whether or not clause 69(3) is a reasonable limit on that right according to the test set out in Charter s. 7(2).***
-

Rights and freedoms – Separation of powers – Contempt of the Director – Whether arrest and detention pending court hearing constitutes the exercise of judicial power

[78 and 79]

The Committee notes the Bill provides the Director with a power to arrest and detain a person for contempt of the Director.

Contempt of the Director may occur where a person who, in answer to a summons, is attending an examination or otherwise attending the Director –

- (a) *fails without reasonable excuse to produce any document or other thing the person is required by the summons to produce; or*
- (b) *being called or examined as a witness, refuses to be sworn or to make an affirmation or, without reasonable excuse, refuses or fails to answer any question relevant to the subject-matter of the investigation; or*
- (c) *engages in any other conduct that would, if the Director were the Supreme Court, constitute a contempt of that Court.*

Where the Director is of the opinion that a person is guilty of contempt the Director may issue a 'certificate of charge' and issue a warrant to arrest the person. A person arrested is to be brought before the Supreme Court forthwith and may be detained in police custody in the meantime.

The Committee is of the opinion that the contempt powers vested in the Director by the Bill do not constitute the exercise of 'judicial power'. The Director makes no merits adjudication that may result in a criminal or pecuniary sanction. The contempt powers rather are designed to bring a person before the court for an independent adjudication of the question whether the alleged contempt is established according to law.

The Committee refers the Director's contempt powers provided in the Bill to the Parliament for its consideration.

⁵

Submission of the Police Association, pp 1-10.

Deprivation of life – Use of firearms

[103]

Charter s. 9 provides that everyone has the right ‘not to be arbitrarily deprived of life.’ The Committee notes that clause 103 provides that the Director, Police Integrity may authorise the use of firearms by personnel of the Office of Police Integrity. The Committee also notes that, in response to questions put by the Committee, the Minister remarked that:

An authority under clause 103 does not provide a defence for any criminal or civil liability for the discharge of a firearm.

...

The Director can only authorise the possession, carrying or use of a firearm for the purpose of protecting the member.

The Committee observes that the Minister’s responses, which were reported in *Alert Digest No. 5 of 2008*, may be considered in interpreting the relevant provisions of the Bill under s. 35(b)(iv) of the *Interpretation Act 1984*. The Committee considers that clause 103 is compatible with the Charter’s right to life.

Rights or freedoms – Fair trial – Procedural fairness – Disclosure of documents

[107 and 108]

The Committee notes the procedures established by the Bill concerning disclosure of OPI documents. In regard to procedural fairness, the Committee observes that Courts have traditionally played a pivotal role in adjudicating on issues where government agencies have made claims of public interest immunity for documents and other evidence held or collected by them. These questions will necessarily involve the difficult balancing that must be made on the one hand, between a persons right to have access to evidence that may assist their case or weaken the case of the prosecutor, and on the other, the desirability to protect the public interest, in evidence or documents that are sensitive or secret, for example evidence or documents, that if disclosed, would impinge on state security or reveal the identity of covert operatives, law enforcement operations or investigative methods.

The Committee having reviewed the provisions in the Bill dealing with the court procedure involved with the adjudication of a claim of public interest immunity, measures that include the appointment of special counsel to assist a person making such a claim, is of the view that the provisions do not unduly trespass on the right of a person to have such a claim determined by an independent judicial process in the interests of preserving their rights to a fair trial.

Whether the provisions strike an appropriate and fair balance is a question for Parliament to determine.

Extract from the Proceedings

The Minutes of the Committee show that the following Divisions took place during consideration of the *Report on the Police Integrity Bill 2008* on Friday, 6 June 2008.

Motion—That –

- a) the following words be inserted immediately under the heading *The Role of the Committee in considering the Police Integrity Bill 2008* on page 1 of the report –

As a result of the receipt of inaccurate advice from the Executive Officer, that the Committee cannot report on the same Bill twice, the original motion of the Committee of 10 April 2008 was overturned by email; and

- b) the referral from the Legislative Council of 9 May 2008, concerning the Police Integrity Bill 2008, be included in the body of the report after the above paragraph.

Moved Mr Edward O'Donohue MLC
Seconded Mr Ryan Smith MLA

The Committee divided.

Ayes, 3	Noes, 5
Mr Edward O'Donohue MLC	Mr Carlo Carli MLA
Mr Ryan Smith MLA	Mr Colin Brooks MLA
Mrs Inga Peulich MLC	Mr Khalil Eideh MLC
	Mr Telmo Languiller MLA
	Ms Jaala Pulford MLC

And so it passed in the negative.

Motion—That the following words be included on page 2, as the last paragraph under the heading *Conduct of the Inquiry* –

If the original motion that was passed by the Committee on 10 April 2008 had been acted upon it would have been possible for public hearings to have taken place in or around late April.

Moved Mr Edward O'Donohue MLC
Seconded Mr Ryan Smith MLA

The Committee divided.

Ayes, 3	Noes, 5
Mr Edward O'Donohue MLC	Mr Carlo Carli MLA
Mr Ryan Smith MLA	Mr Colin Brooks MLA
Mrs Inga Peulich MLC	Mr Khalil Eideh MLC
	Mr Telmo Languiller MLA
	Ms Jaala Pulford MLC

And so it passed in the negative.

Motion—That the following words be included at the end of the body of the report on page 6 –

Evidence led during the public hearings calls into question the Government’s interpretation of Section 7 of the Charter of Human Rights and Responsibilities and the Minister’s assurances in the Police Integrity Bill 2008’s Statement of Compatibility that the balance between the objectives of the Police Integrity Bill 2008 and the rights of individuals have been struck correctly.

Moved Mrs Inga Peulich MLC
Seconded Mr Edward O’Donohue MLC

The Committee divided.

Ayes, 3	Noes, 5
Mr Edward O’Donohue MLC	Mr Carlo Carli MLA
Mr Ryan Smith MLA	Mr Colin Brooks MLA
Mrs Inga Peulich MLC	Mr Khalil Eideh MLC
	Mr Telmo Languiller MLA
	Ms Jaala Pulford MLC

And so it passed in the negative.

Appendix 1

Minister's response to Committee

Police Integrity Bill 2008

The Bill was introduced into the Legislative Assembly on 11 March 2008 by the Hon. Bob Cameron MLA. The Committee considered the Bill on 7 April 2008 and made the following comments in Alert Digest No. 4 of 2008 tabled in the Parliament on 8 April 2008.

Committee's Comment

Charter Report

Deprivation of life – Authority for Office of Police Integrity personnel to use firearms – Effect of authority – Use for purposes other than protection

Charter s. 9 provides that everyone has the right 'not to be arbitrarily deprived of life.'

The Committee notes that clause 103(1) provides that the Director of Police Integrity may 'authorise' a member of the staff of the Office of Police integrity to 'use a firearm for the purposes of an investigation'. The Committee observes that the 'use' of a firearm may include the discharge of the firearm in the direction of another person. The Committee considers that clause 103 may engage the Charter right of anyone investigated by the Director not to be arbitrarily deprived of life.

The Committee also notes that clause 109(2) provides that staff of the Office of Police Integrity can be sued or prosecuted in respect of a 'critical incident', including where a person is killed or serious injured as the result of the discharge of a firearm. The Committee observes that, whilst this clause allows such proceedings to be initiated, it does not identify whether or not an authorisation under clause 103(1) provides a defence to civil or criminal liability.

The Committee further notes that clause 103(2) provides that an authority under clause 103(1) may only be given:

'if, in the opinion of the Director, the member reasonably requires to use a firearm —

- (a) to enable the member to perform functions and exercise powers of the Director or an authorised officer in relation to the investigation; and*
- (b) for the protection of the member when performing those functions or exercising those powers.'*

The Committee additionally notes that the explanatory memorandum remarks that authorisations under clause 103 are only available where the Director is satisfied that the use is required:

‘to perform the functions or exercise powers of the Director or an authorised officer in an investigation, or to ensure the safety of that member in performing those functions or exercising those powers.’

The Committee observes that it is not clear whether or not the Director can authorise a person to use firearms for purposes other than the protection of the person.

The Committee will seek further advice from the Minister as follows:

- 1. Will the Director of Police Integrity’s authority under clause 103(1) for a member of staff of the Office Police Integrity to use a firearm provide a defence to civil or criminal liability (to the extent of the authority) resulting from the discharge of that firearm by that member?**
- 2. For what purposes other than protection of the member will the Director of Police Integrity be able to authorise the discharge of a firearm by a member of the staff of the Office of Police Integrity?**

Pending the Minister’s response, the Committee draws attention to these provisions.

Fair hearing – Compelled self-incrimination – Use of evidence derived from compulsory self-incriminatory questioning in criminal proceedings – Function of Director of Police Integrity to publicly expose serious misconduct – Compulsory questioning during ongoing criminal proceedings

Charter s.24(1) provides that people charged with a criminal offence have ‘the right to have the charge decided after a fair hearing.’ Charter s. 25(2)(k) provides that such people are entitled to a guarantee that they cannot ‘be compelled to testify against’ themselves.

The Committee notes that clauses 69(1) and 125(1) provide that a person being examined by the Director of Police Integrity or the Special Investigations Monitor must answer questions even if those answers might tend to incriminate him or her. The Committee notes that clauses 69(3) and 125(4) provide that any answers given by a person under compulsory examination cannot be admitted as evidence against him or her in most judicial proceedings, apart from proceedings relating to compliance with the directives of the Director of Police Integrity, the Special Investigations Monitor or Victoria Police disciplinary proceedings.

The Statement of Compatibility remarks, in relation to Charter s. 25(2)(k):

The right has been interpreted as not precluding compulsory questioning, in separate proceedings, provided there is a use immunity: see particularly the decision of the Court of Final Appeal of Hong Kong (including Sir Anthony Mason) in HKSAR v Lee Ming Tee [2001] HKFCA 14... The use immunity is sufficient to ensure the accused is not indirectly made a witness against himself.

The Committee therefore considers that clauses 69(1) and 125(1) are compatible with the Charter right of witnesses who are or become criminal defendants not to be compelled to testify against themselves.

The Committee also notes that clause 24 permits the Director to disclose information obtained from an examination to a law enforcement agency and that clause 121(1) provides that the Special Investigations Monitor may make recommendations to the Director. The Committee therefore observes that answers compelled from a person under clauses 69(1) and 125(1) may be used by law enforcement agencies to identify and obtain other evidence that can be used against that person in a prosecution.

The Committee further notes that clauses 69(3) and 125(4) do not prevent the admission of such evidence. The Committee observes that Australian evidence law does not provide a basis for a court to refuse to admit evidence merely because it was obtained as a result of information obtained during a compulsory examination of the person being tried. The Committee also observes that United States and Canadian courts have held that the use of evidence derived from compelled answers (where such evidence could not have been obtained but for those answers) is incompatible with defendants' rights to due process in those countries' respective constitutions: *Kastigar v United States* 406 US 441, (1972); *R v S.(R.J.)* [1995] 1 SCR 451. The Committee therefore considers that clauses 69(1) and 125(1) may limit the Charter rights of criminal defendants who have previously been compulsorily examined about subjects that could have led to or aided their investigation or prosecution to a fair hearing of the charge against them.

The Committee additionally observes that overseas decisions have held the admission of evidence derived from compulsory questioning in a later criminal prosecution of the person questioned may be compatible with fair hearing rights where the compulsory questioning was for a narrow regulatory purpose and directed to persons who had freely chosen to make themselves subject to such inquiries. For example, the Hong Kong decision cited by the Statement of Compatibility related to questioning by an agency responsible for regulating public share trading about public share trading activities and occurred long before any criminal prosecution.

The Committee notes that the relevant function of the Special Investigations Monitor's is limited to ensuring compliance with the Police Integrity Act by staff of the Office of Police Integrity. The Committee therefore considers that clause 125(4) is compatible with Charter s. 24(1).

However, the Committee also notes that the relevant function of the Director of Police Integrity is to 'publicly expose serious misconduct' (clause 6(2)(d)) and that 'serious misconduct' is defined by clause 3 to include any indictable offence punishable by imprisonment, any conduct that affects Victoria Police's reputation or public confidence and any disgraceful or improper conduct (whether in the member's official capacity or otherwise.) The Committee observes that the function in clause 6(2)(d) may extend to the investigation of virtually any crime committed by a police officer, including crimes that are committed privately by the police officer. The Committee also observes that the Director's function in clause 6(2)(d) may also include investigating criminal conduct by private citizens, to the extent that that conduct relates to possible misconduct by a police officer. The Committee considers that clause 69(1), by permitting this function to be exercised through the compulsory self-incriminating questioning of all such persons and not providing for the inadmissibility in a later prosecution of such a person of evidence that would not have been obtained but for that questioning, may be incompatible with the Charter right of compulsorily questioned people to a fair hearing on any criminal charges they later face.

The Committee further notes that clause 46 provides that the Director of Police Integrity can exercise his or her compulsory questioning powers on a person even though that person is currently the subject of criminal proceedings that relate to the matter being investigated. The Statement of Compatibility remarks:

That is not to say that the DPI or SIM could use the compulsory questioning powers for the purpose of gathering further evidence against an accused for the purposes of the

criminal proceeding. It may only use its powers for the purposes set out in the Bill. However, the fact that a person has been charged with an offence relating to a complaint, should not prevent the OPI from conducting or continuing to conduct an investigation and identifying, for example, the extent of the involvement of other persons in corrupt police practices...

The Committee observes that the Director's function under clause 6(2)(d) of 'publicly exposing serious misconduct' may encompass assisting prosecutors in ongoing prosecutions in relation to such misconduct, including the use of compulsory questioning of the defendant under clause 69(1) and the disclosure of intelligence derived from that questioning to police and prosecutors under clause 24. The Committee also observes that the goal of investigating 'other persons in corrupt practices' through the compulsory questioning of a person presently facing criminal charges would still be served if evidence that would not have been obtained but for that compulsory questioning was inadmissible in any prosecution of the person who was questioned.

The Committee will seek advice from the Minister as follows:

- 1. Where the Director of Police Integrity compels a police officer or summonsed witness to give self-incriminatory information under clause 69(1), why is the immunity provided by clause 69(3) limited to the use of that information in a later criminal prosecution of the witness, rather than extending to other evidence that could not otherwise have been obtained?**
- 2. Where the Director of Police Integrity compulsorily examines a person under clause 69(1) in relation to whom other proceedings are on foot, will intelligence derived from that questioning be available to State agencies who are involved in or a party to those proceedings?**

Pending the Minister's response, the Committee draws attention to these provisions.

Fair hearing – Inadmissibility of drug and alcohol testing – Protected documents procedure

Charter s.24(1) provides that people charged with a criminal offence have 'the right to have the charge decided after a fair hearing.'

The Committee notes that clause 34 provides that evidence derived from the drug or alcohol testing of a member of staff of the Office of Police Integrity is inadmissible except in certain proceedings.

The Committee recalls its Alert Digest No 15 of 2007, which reported on a similar provision in the Police Regulation Amendment Bill 2007 (clause 5, inserting a new section 85E into the Police Regulation Act 1958.) The Committee expressed a concern that such a rule of evidence may engage the Charter right of some criminal defendants to a fair hearing by excluding evidence that might be relevant to the defence case.

In his response to the Committee's concern, the Minister remarked that the section:

Section 85E is necessary to protect what is primarily akin to a health record from being adduced in evidence where it is irrelevant. Failure to protect such test results from production would place the underlying program at risk and discourage police officers who have an alcohol or drug of dependence problem from seeking treatment and rehabilitation.

The protections offered by the new provisions are important to protect what is primarily a welfare-based program, which provides appropriate punitive responses to police officers who behave inappropriately.

The Committee observes that clauses 107 and 108 of the present Bill provide a procedure for permitting courts to determine whether or not to admit 'protected documents'. The Statement of Compatibility remarks:

The procedures for criminal proceedings in clauses 107 to 108 replace the existing procedures adopted by courts in dealing with public interest immunity claims. They give effect to the balancing exercise required when competing interests are at issue and enable greater participation of an accused without undermining the reasons why the documents should be kept confidential.

The Committee also observes that a document setting out the results of drug or alcohol testing may be a 'protected document' where it is held by the Office of Police Integrity.

The Committee will seek further advice from the Minister as follows:

- 1. Will defendants who want to inspect or adduce documents that set out the results of drug and alcohol testing of police (under Division 4A of Part IV of the Police Regulation Act 1958) or OPI personnel (under Division 5 of Part 2 of the Bill) be able to use the 'protected document' procedure in clauses 107 and 108 to gain access to those documents in order to adduce them in court?**
- 2. Given the procedure in clauses 107 and 108, what is the need for clause 34?**

Pending the Minister's response, the Committee draws attention to these provisions.

Minister's Response

Thank you for your letter of 8 April 2008 in which you seek advice in relation to the Police Integrity Bill 2008.

The Police Integrity Bill 2008 ('the Bill'):

- re-establishes the Office of Police Integrity (OPI) under a stand-alone Act and sets out the functions of the OPI and of the Director, Police Integrity (Director);*
- amends the Police Regulation Act 1958 (PRA) to consolidate provisions relating to the Director and the OPI into the new Act; and*
- makes necessary consequential amendments to other Acts.*

I note that your letter includes six questions which I will respond to in turn below.

Will the Director, Police Integrity's authority under clause 103(1) for a member of staff of the Office of Police Integrity to use a firearm provide a defence to civil or criminal liability (to the extent of the authority) resulting from the discharge of that firearm by that member?

An authority under clause 103 does not provide a defence for any criminal or civil liability for the discharge of a firearm. The purpose of the section is to provide a scheme to regulate when OPI staff may possess, carry and use firearms. If a firearm is possessed, carried or used by OPI staff without an authority from the Director under clause 103, this may be evidence of bad faith.

For what purposes other than protection of the member will the Director, Police Integrity be able to authorise the discharge of a firearm by a member of the staff of the Office of Police Integrity?

The Director can only authorise the possession, carrying or use of a firearm for the purpose of protecting the member. The use of the word 'and' in clause 103(2)(a) prevails over the use of the word 'or' in the explanatory memorandum.

Where the Director, Police Integrity compels a police officer or summonsed witness to give self-incriminatory information under clause 69(1), why is the immunity provided by 69(3) limited to the use of that information in a later criminal prosecution of a witness, rather than extending to other evidence that could not otherwise have been obtained?

The purpose of the immunity in clause 69(3) is to protect the human rights of a witness subject to compulsory questioning during an examination by the Director. Clause 69(3) prevents the use of a self-incriminating answer, document or thing in any criminal proceeding, except those in respect of a failure to provide the information or in respect of giving false information. The 'use' immunity provided by clause 69(3) does not extend to derivative evidence (evidence that would not have been obtained but for the self-incriminating evidence) and is drafted in this way for two reasons.

First, the immunity is consistent with the Charter of Human Rights and Responsibilities (the Charter). Section 25(2)(k) of the Charter provides that a person charged with a criminal offence is entitled 'not to be compelled to testify against himself or herself or to confess guilt'. Accordingly, the immunity from self-incrimination is limited in the Bill to criminal proceedings to which the witness is a party.

Second, the 'direct use' immunity is consistent with the approach generally taken in Australia. Statutory restrictions on the indirect or derivative use of evidence compelled from an accused against an accused are rare. Superior courts in other jurisdictions have accepted that the right to a fair trial may preclude the use of certain types of derivative evidence. However, as you note in your letter, Australian courts have not taken this approach. Ultimately, if the prosecution seeks to lead evidence derived from answers given in response to coercive questioning, the court retains its discretion whether the evidence should be admitted in the particular case.

Where the Director, Police Integrity compulsorily examines a person under clause 69(1) in relation to whom other proceedings are on foot, will intelligence derived from that questioning be available to State agencies who are involved in or a party to those proceedings?

*Where a proceeding is on foot, the prosecuting authority is already of the view that sufficient evidence exists for the prosecution to succeed. Clause 46 states that the Director must take all reasonable steps to ensure that the conduct of the investigation does not prejudice those proceedings. This provision reflects the common law position that coercive questioning on matters which form the basis of criminal proceedings constitutes an interference with the due administration of criminal justice (see *Hammond v Commonwealth* (1982) CLR 188). Accordingly, if coercive questioning powers are used to bolster a prosecution's case and obtain additional evidence where proceedings have commenced, the risk of interference in the administration of justice would only be overcome in extraordinary circumstances.*

Where intelligence, as opposed to evidence, is inadvertently obtained during an examination and not from the Director's path of questioning, the Director may be obliged to share the intelligence with the relevant prosecuting agency. However, this would only arise

where the public interest requires the Director to forward the information to the relevant agency.

Will defendants who want to inspect or adduce documents that set out the results of drug and alcohol testing of police (under Division 4A of the Police Regulation Act 1958) or OPI personnel (under Division 5 of Part 2 of the Bill) be able to use the 'protected document' procedure in clauses 107 and 108 to gain access to those documents in order to adduce them in court?

The procedures in clauses 107 and 108 ('protected document procedures') do not circumvent the inadmissibility of drug and alcohol testing under clause 34 of the Bill and section 85E of the PRA. If a defendant seeks to obtain the results of tests of OPI personnel or police, the evidence will be inadmissible except in the circumstances set out in subclause 34(2) (for OPI personnel) and subsection 85E(2) of the PRA (for police). These provisions operate to protect the privacy of OPI personnel and police in all but a limited list of proceedings. For example, drug and alcohol test results may be admissible in a criminal proceeding that arises out of, or is connected with a critical incident.

The purpose of the protected document procedures is to provide the courts with special procedures for dealing with public interest immunity claims by the OPI. The procedures clarify how OPI objections may be determined and do not give defendants additional avenues or grounds for obtaining evidence.

Clauses 107 and 108 will only apply to documents containing test results where the admissibility of the document is not restricted (as explained above) and the OPI claims the document is a 'protected document'. For example, where a member of OPI personnel seriously injures a person with the discharge of a firearm, a drug or alcohol test result will be admissible under clause 34. However, the OPI may object to the production of the test result on the grounds that it is a protected document or thing. The court would then determine the OPI's claim using one or more of the procedures in clauses 107 and 108.

Given the procedure in clauses 107 and 108, what is the need for clause 34?

I refer to and repeat the response to the previous question. The procedures in clauses 107 and 108 serve the purpose of protecting the public interest in keeping sensitive OPI information confidential. Clause 34, on the other hand, operates to protect the personal privacy of OPI operatives.

Bob Cameron MP
Minister for Police & Emergency Services

18 April 2008

The Committee thanks the Minister for his response.

Appendix 2

Advertisements and notices

The following advertisement appeared on Thursday, 15 May 2008 in the *Herald-Sun*, p. 7 and *The Age*, p. 4. This is identical to the notice that was circulated to parties believed to have an interest in the inquiry.

Police Integrity Bill 2008

Submissions invited

The Scrutiny of Acts and Regulations Committee of the Victorian Parliament reviews legislation introduced in the Parliament and reports on specified terms of reference which are set out in section 17 of the Parliamentary Committees Act 2003. Under these terms of reference, the Committee invites submissions from individuals and organisations concerning this Bill.

This inquiry concerns whether the provisions in the Bill – unduly trespass on rights or freedom; or are incompatible with the human rights set out in the Charter of Human Rights and Responsibilities Act 2006.

The Committee's recent report on the Bill published in Alert Digest No. 4 of 2008 may be of assistance in formulating submissions to the Committee. This can be found at www.parliament.vic.gov.au/sarc (see 'Alert Digests Reports on Bills'). The Bill, Charter Statement of Compatibility, explanatory memorandum and second reading speech can be found at www.parliament.vic.gov.au (see 'Legislation & Bills').

Further information may be obtained from the Senior Legal Adviser, Mr Andrew Homer on (03) 8682 2891 or andrew.homer@parliament.vic.gov.au

Submissions must be received by Wednesday 28 May 2008 and may be forwarded by email to the Senior Legal Adviser as above or delivered to –

Mr Carlo Carli MP
Chairperson,
Scrutiny of Acts and Regulations Committee
Parliament House
Melbourne Vic 3000

The following advertisement appeared on Tuesday, 3 June 2008 in the *Herald-Sun*, p. 24 and *The Age*, p. 4.

Police Integrity Bill 2008 and the Public Health and Wellbeing Bill 2008

Public Hearings

The Scrutiny of Acts and Regulations Committee will hold public hearings concerning whether the provisions in either of these Bills –

- unduly trespasses on rights or freedoms;
- or are incompatible with the human rights set out in the Charter of Human Rights and Responsibilities Act 2006.

Date: Wednesday, 4 June 2008, 10:00am to 1:00pm

Venue: 55 St Andrews Place, Melbourne

Evidence will be taken from individuals and organisations which have made written submissions to the Committee.

Members of the public and the media are welcome to attend as observers.

Further information can be obtained from Simon Dinsbergs on 8682 2895.

Minority Report

Scrutiny of Acts and
Regulations Committee

on

Police Integrity Bill 2008

We, the undersigned members of the Scrutiny of Acts and Regulations Committee, have produced this minority report to be included with Alert Digest No. 7 of 2008 because of matters that have occurred at and between Committee meetings in recent weeks. The matters we raise concern the Committee's procedures and the production of the Committee's report on the Police Integrity Bill 2008.

SARC's Role

SARC has a role according to section 17 of the *Parliamentary Committees Act 2003* to:

- (a) consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly—
 - (i) trespasses unduly on rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent on insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent on non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the **Information Privacy Act 2000**;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the **Health Records Act 2001**;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to Parliamentary scrutiny;
 - (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities;

The Committee must undertake these functions pursuant to the Act.

We the undersigned provide this Minority Report pursuant to section 34(2) of the Parliamentary Committee's Act 2003 which states that:

A Joint Investigatory Committee must include with a report made by it to the Parliament any minority report on behalf of a member of the Committee if so requested by the member.

The Committee is entitled to undertake public hearings to discharge its obligations by undertaking public hearings as outlined in section 27(1) of the Parliamentary Committees Act 2003 which states that:

27 Public hearings

- (1) A Joint Investigatory Committee may hold a public hearing on any proposal, matter or thing being inquired into or being considered by the Committee.

SARC Voted Unanimously to Conduct Public Hearings on the Police Integrity Bill 2008

Following the Scrutiny Of Acts and Regulations Committee's (SARC) meeting held on 10 April , 2008 to consider The Police Integrity Bill 2008 and consistent with the functions of the Committee stated in the Parliamentary Committees Act 2003 set out above, the Committee voted by a unanimous vote (moved by Ryan Smith MLA and seconded by Telmo Languiller MLA) to undertake a public inquiry and to hold public hearings which would be publicly advertised by the placement of public advertisements in the two main daily newspapers ..

The motion passed by unanimous vote was as follows :

“That the Committee seek submissions concerning the Police Integrity Bill 2008 and that –

- *parties believed to have an interest in the Bill be notified by the secretariat; and*
- *an advertisement be lodged in the Herald-Sun and The Age newspapers, with a budget of \$1,500 (+ GST)”*

Minority Report

Although the timelines for the conduct of public hearings for Bills introduced to the Parliament are invariably tight, an implementation timeline was discussed and agreed to by SARC.

Following the meeting of 10 April 2008, a number of serious incidents took place to undermine this course of action which could be construed as an attempt by Government members of the Committee to shut down the public inquiry and to sabotage the holding of public hearings on the Policy Integrity Bill 2008.

Non Government members of the Committee could deduce that the failure of the Executive Officer to enact the decision of the Committee, which in effect, acted to sabotage the legitimate direction of the Committee to undertake a public inquiry and to call for submissions via the placement of newspaper advertisements, and the subsequent scheduling of public hearings at the earliest possible opportunity, was indeed directed by the Government MPs who hold the majority on the Committee and the Chairman, Mr Carlo Carli MLA.

A number of crucial actions were taken by email voting, in contravention of Parliamentary practice, until the holding of the subsequent SARC meeting. On Monday 5 May, 2008 Government members of SARC (Chairman Carlo Carli, Colin Brooks, Jaala Pulford, Khalil Eideh and Telmo Languiller) brought forward a motion to close down the inquiry and not proceed with the public hearings previously and unanimously agreed to at 10 April, 2008.

The motion to shut down the inquiry had the effect of preventing SARC inquiring fully as part of its role as per Section 17 (a) of the Parliamentary Committees Act (2003) into the Police Integrity Bill (2008) which was and continues to be under active consideration in the Legislative Council .

The sequence of incorrect and incomplete advice provided to the Committee by the Executive Officer, the failure of Committee staff to enact the wishes of the Committee as per resolution at its 10 April, 2008 meeting, the failings of Chairman Carlo Carli to ensure that the wishes of the Committee were properly executed, and the action taken by Government members to shut down the inquiry for which Committee members had previously voted, raises very serious questions about external influence exerted on Government members.

Non Government MPs attempted to have the original motion reinstated and to demonstrate a lack of confidence in the Chair by moving at SARC the motion :

That the Committee seek submissions concerning the Police Integrity Bill 2008 and that –

- *parties believed to have an interest in the Bill be notified by the secretariat; and*
- *an advertisement be lodged in the Herald-Sun and The Age newspapers, with a budget of \$1,500 (+ GST)*

and, further, that this Committee condemns the manner in which the legitimate decision making process of the Scrutiny of Acts and Regulations Committee has been subverted by the Chairman and the Executive Officer when, after a decision was taken by a unanimous vote of all members of the Committee to hold public hearings on the Police Integrity Bill at its meeting on 10 April 2008 which included a decision to take out advertising space in the daily newspapers, the Government Chairman Mr Carlo Carli failed to implement this decision , thereby missing vital timelines, and via unprecedented email voting sought to illegitimately overturn the vote with all Government members falling into line to gag the Committee. Further, that the Chairman of the Committee be repudiated for attempts to lock up this scurrilous action within the government dominated Committee process, denying Opposition MPs their opportunities to adequately scrutinize this controversial piece of government legislation and thereby moves a motion of no confidence in the Chairman, Mr Carlo Carli.

The Committee divided on the motion with the following results –

Noes, 5

Carlo Carli MLA(Chair)
Khalil Eideh MLC
Jaala Pulford MLC
Telmo Languiller MLA
Colin Brooks MLA

Ayes, 3

Edward O'Donohue MLC
Inga Peulich MLC
Ryan Smith MLA

The Legislative Council Votes To Support SARC's Legitimate Role

On 9 May 2008, Leader of the Opposition in the Legislative Council, Mr David Davis moved the following motion in the Legislative Council:

That the Police Integrity Bill 2008 be referred to the Scrutiny of Acts and Regulations Committee for public inquiry, consideration and report within one month of the passage of this Resolution.

The question was put and agreed to with Labor MPs voting against the motion. This could only be construed as a further attempt by the Brumby Government to shut down any public inquiry into Police Integrity Bill.

SARC Public Hearings into Police Integrity Bill 2008

As per the vote of the Legislative Council of the Victorian Parliament, advertisements were taken out, written submissions were called for and received and a public hearing was subsequently held on 5 June 2008, with the following witnesses giving sworn evidence:

- Greg Davies representing The Police Association
- Julian Burnside and Georgia Kim-Siem representing Liberty Victoria
- Dr Graham Hill representing the Department of Premier and Cabinet

It is the view of the undersigned that serious concerns have been raised by witnesses giving evidence which, in the view of the undersigned MPs, were initially downplayed and disregarded. It was also initially proposed by the Chair that the Committee complete the final SARC report on this legislation without MPs having access to the Hansard transcripts of evidence from witnesses and without having sufficient time to consider the issues and evidence before reporting to the Parliament.

Consequently, this minority report wishes to underscore the significant issues which emerged through the public hearings which deserve the Parliament's full consideration

Issues For the Parliament's Consideration

1. Lack of Consultation in Drafting of the Police Integrity Bill 2008

In evidence given by Mr Greg Davies, a number of issues in the legislation were raised that gave cause for grave concerns by The Police Association of Victoria.

Of concern to the undersigned was Mr Davies answer when asked if the Government had consulted with the Police Association of the drafting of the Bill.

Mr SMITH — 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.

It is certainly extraordinary that the input of The Police Association, which purports to represent the overwhelming majority of serving police, was not sought in the drafting of the Police Integrity Bill 2008 and calls into question the Government's commitment to the consultative process.

2. Relevant Qualifications Required for Appointment of Director of Police Integrity

Mr Burnside of Liberty Victoria raised concerns about the qualifications required for the appointment of the Director of Police Integrity, which is specified in Clause 10 of the Bill. The relevant clause stipulates that:

10 Appointment of Director

- (1) The Governor in Council may appoint an eligible person as Director.
- (2) A person is an eligible person if the Governor in Council is satisfied that he or she—
 - (a) 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 a court of another State or Territory of equivalent status to the County Court; and
 - (b) has the ability to carry out the functions and powers of the Director; and
 - (c) is not a member of the Parliament of Victoria or of the Commonwealth or of another State or a Territory of the Commonwealth; and
 - (d) is not, and has not been, a member of Victoria Police; and
 - (e) is not, and has not been in the period of 5 years immediately preceding the proposed date of appointment, a member of the police force of the Commonwealth or of another State or Territory of the Commonwealth.

Mr Burnside expressed significant concern that the appointment of a person as Director of Police as per Clause 10 is inadequate.

“Mr BURNSIDE — The director under the bill has enormous powers, extraordinary powers... Those extraordinary powers include ... 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... but we think the seriousness of the powers warrants a person of clear, demonstrable, distinguished legal service.”

Mr Burnside raised this matter again later in his evidence.

*“**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.”*

With the dramatically increased powers available to the Director of Police Integrity under the provisions of this Bill, and Non Government MPs' concerns about accountability, the lack of experience that this Bill allows for in the appointment of the Director is troubling.

Dr Hill's response to this concern was as follows.

Dr HILL —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.

This report draws the attention of the Parliament to the concerns with regard to the required experience and skills of the Director of Police Integrity for its consideration.

3. Concerns About Operational Responsibility and Accountability

The undersigned have serious concerns about the operational responsibility and accountability framework implicit in the Police Integrity Bill as it impacts on further investigations and the reporting requirements of the Director of Police integrity.

A. Further Investigations

The Police Integrity Bill 2008 specifies that :

“ 48. Further investigations

- (1) After receiving the report on an investigation completed by the Chief Commissioner under Part IVA of the **Police Regulation Act 1958**, the Director may—
 - (a) request the Chief Commissioner to conduct a further investigation into the complaint; or
 - (b) conduct such an investigation himself or herself under this Part.
- (2) The Chief Commissioner must—
 - (a) in accordance with section 86O of the **Police Regulation Act 1958**, conduct the further investigation as requested; or
 - (b) report in writing to the Director as to why such an investigation is not considered necessary.
- (3) After receiving the report on an investigation or further investigation completed by the Chief Commissioner, the Director may—
 - (a) in writing request the Chief Commissioner to take any action the Director considers appropriate in addition to any action taken or proposed to be

taken by the Chief Commissioner or in substitution for any action proposed to be taken by the Chief Commissioner;

- (b) refer to the Director of Public Prosecutions any matter that is relevant to the performance of functions or duties by the Director of Public Prosecutions.
- (4) If the Director refers a matter to the Director of Public Prosecutions under subsection (3)(b)—
- (a) the Director must notify the Chief Commissioner in writing—
 - (i) of the referral; and
 - (ii) of the advice received from the Director of Public Prosecutions in respect of the referral; and
 - (b) the Chief Commissioner must not take any disciplinary action, or further disciplinary action, against a member of Victoria Police who is the subject of the referral until the Chief Commissioner has received the Director's notification under paragraph (a)(ii).

49 Chief Commissioner to respond to Director

If, under this Part, the Director requests the Chief Commissioner to take any action, or to conduct a further investigation, the Chief Commissioner must give a written response to the Director stating—

- (a) whether or not the Chief Commissioner proposes to take the action or conduct the further investigation; and
- (b) if the Chief Commissioner does not propose to take the action or conduct the further investigation, the reasons for that decision.”

Dr G. Hill, Director of the Legal Branch, Department of Premier and Cabinet was asked what recourse the Director of Police Integrity could take if a Chief Commissioner ignored a DPI requested investigation by the Chief Commissioner.

The response was that the DPI “**could**” table an adverse report to the Parliament, however that this clearly was not mandatory.

In his testimony regarding a hypothetical situation where a Police Commissioner failed to act on the request of the Director of Police Integrity to undertake a further investigation, Dr Hill stated that:

“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 — 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.”

B. Given the evidence above and concerns submitted by key stakeholders, the oversight of the regime of the Office of Police Integrity continues to be at the heart of the non Government MPs concerns about the accountability and reporting requirements of the Office

of Police Integrity. The view of the authors of this report is that current reporting requirements via an annual report to the Parliament is simply inadequate given the significant powers given to the Office of Police Integrity. This view is best expressed by Mr Davies on behalf of the Police Association of Victoria when he states that:

“ ...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.

C. A compounding concern is evidence which points to a lack of any real powers of the Special Investigations Monitor which is charged with the responsibility of giving oversight to the Office of Police Integrity. Notwithstanding the concerns about the adequacy about this model of fighting corruption, the concerns about and methods of strengthening the SIM powers are best illustrated by the evidence given by Mr Davies on behalf of the Police Association of Victoria

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...”

Further, Mr Davies states:

Mr DAVIES — ...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...”

And further, Mr Davies states:

Mr DAVIES —...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.

On the key issue of accountability, The Police Association of Victoria and Liberty Victoria agreed that the lack of a stringent reporting and accountability framework for an office

dealing with police corruption is a most serious concern, also shared by the authors of this minority report which we refer to Parliament for its earnest consideration.

D. A range of other matters about legal processes and powers of the Office of Police Integrity and their interplay with the Government's own Human Rights Charter have been raised at public hearings and in written submissions, and are now more fully reported on in this Alert Digest, with key questions directed rightfully to the Parliament for its full consideration.

These matters include the use of "derivative evidence", the potential lack of regulations and training for the use of firearms by authorised officers, the broad search and seize powers without a warrant, the lack of guaranteed access to all documents that may be used in court against a person facing legal proceedings, and the removal of the right to remain silent – all provisions in this bill which do infringe upon the rights of individuals who are subject to the provisions of this bill, with the Parliament now having the onerous duty of judging whether the balance between the objects of the Bill and the rights of the individual are correctly struck.

Operations and General Terms of Reference for SARC

1. Following the Government MPs efforts to shut down this inquiry, the Committee was left with a relatively brief length of time to consider the evidence, finalise the report and meet the narrow SARC Minority Report timelines.

If the Government dominated Committee had not been obstructionist, public hearings could have been held in or around late April and the Committee would have had an adequate length of time to consider each significant issue in sufficient detail.

2. We draw to the Parliament's attention that SARC has been operating under a narrow definition of the Committee's powers, that is that issues pertaining to policy are outside the bounds of the Committee's terms of reference. This narrow definition has been a strong constraint on SARC's deliberations of all bills considered hitherto.

Mr Julian Burnside of Liberty Victoria expressed the view that the Committee's terms of reference should, very much, include that of policy debate especially in its deliberations about under Section 7 of the Charter of Human Rights. Mr Burnside's response to a question from Committee MP, Ms Jaala Pulford illustrates the case in point:

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.”*

This evidence calls into question the Chair’s ability to adequately and impartially guide the functioning of this important Committee.

Conclusion

The undersigned express a strong disappointment at the attempts to misuse the SARC Committee to shut down effective scrutiny of the Office of Police Integrity Bill 2008, and in the failure of the Chair, Mr Carlo Carli, to conduct himself in an impartial and non-partisan manner on a significant piece of legislation which is the first real test of the Labor Government’s Human Rights Charter.

To shed light on key issues of concern, members of the Committee pressed for public hearings. Given the very narrow interpretation of the Committee’s terms of reference by the Chair, and its control of the numbers on the Committee, the authors of this report wish to thank the Legislative Council for insisting that SARC fulfil its role as per the Parliamentary Committees Act 2003.

The overriding view amongst key stakeholders is that the Police Integrity Bill 2008 does not provide for sufficient powers of oversight from the Parliament or from the Special Investigations Monitor to enable this new regime to operate effectively and with some level of public confidence.

Furthermore, various crucial legal issues stemming from the conflict between the objectives of the Bill and the Government’s own Human Rights Charter- notwithstanding the Minister’s assurances in the Bill’s Statement of Compatibility about these measures being reasonable limitations of human rights- have now been identified in this Alert Digest as key questions for the consideration by the Victorian Parliament.

In closing, the Government could have used this opportunity to be fully open and accountable in answering the key issues of concern given its failure to create a truly independent anti corruption commission body, but has clearly failed to do so. Instead, the government has created a regime over which significant questions remain and need to be addressed- a process which has been frustrated by the Government’s majority control of SARC and its attempts to evade full scrutiny of this bill.

Ryan Smith
MLA for the District of Warrandyte

Inga Peulich
MLC for South Eastern Metropolitan Region

Edward O'Donohue
MLC for Eastern Victoria Region