Special report

concerning allegations about the conduct of Sir Ken Jones QPM in relation to his dealings with certain confidential Victoria Police information

Pursuant to section 162 of the
Independent Broad-based Anti-corruption Commission Act 2011

February 2014

ibac independent broad-based anti-corruption commission
Victoria

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Letter of transmittal

To: The Honourable President of the Legislative Council
The Honourable Speaker of the Legislative Assembly

I refer to *IBAC's Special report concerning certain operations in 2013*, which was transmitted to you on Tuesday 26 November 2013.

The report referenced the Victorian Ombudsman's report to IBAC concerning OPI's investigation into Sir Ken Jones QPM, a former Deputy Commissioner of Victoria Police.

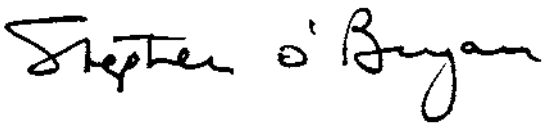
I advised that under sections 29 and 32(5) of the IBAC Act, I had declared myself unable to act in relation to the matter because of a perceived conflict of interest, principally due to the fact that a significant number of former OPI staff are employed by IBAC. I had also taken into account the fact that I had, when senior counsel at the Victorian Bar, once advised OPI in a related matter on an issue involving statutory interpretation.

As such, I advised that I had delegated to the Honourable Mr Murray Kellam AO QC all of my duties, functions and powers, both delegated and otherwise, as IBAC Commissioner for the purposes of dealing with the matter. A copy of this instrument of delegation is provided in Appendix A.

IBAC's approach in relation to persons who are the subject of comment or opinion in this report is described in Appendix B.

Accordingly, I now present Mr Kellam's report concerning this matter to Parliament, pursuant to section 162(1) of the *Independent Broad-based Anti-corruption Commission Act 2011*.

Yours sincerely



Stephen O'Bryan SC
Commissioner

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1. IBAC Foreword

The Honourable Mr Murray Kellam AO QC has prepared this report regarding the Victorian Ombudsman's report to IBAC concerning OPI's investigation into Sir Ken Jones QPM, a former Deputy Commissioner of Victoria Police.

Mr Kellam has concluded that the evidence available to OPI and set out in OPI's final investigation report to the Ombudsman did not support an allegation that Sir Ken had engaged in serious misconduct by leaking or facilitating leaking to the media of confidential police information.

Insofar as OPI's report criticised the conduct of the Deputy Ombudsman, Mr Kellam has concluded that OPI had no jurisdiction to investigate or so report on the issue, and therefore it is not a matter that should be considered by him.

Mr Kellam has further determined that it is not in the public interest for the OPI investigation report to be provided to Parliament, nor for IBAC itself to further investigate the matter.

Mr Kellam has otherwise determined that the Ombudsman's report to IBAC in early March 2013, together with relevant parts of the OPI investigation report, be referred to the Chief Commissioner of Police to consider whether disciplinary action regarding two sworn members of police personnel (one of whom is no longer a member) is appropriate. This referral has taken place.

Accordingly, the matter is now concluded.

2. Introduction

On 18 April 2013, I was engaged as a consultant to IBAC under section 36 of the *Independent Broad-based Anti-corruption Commission Act 2011* (IBAC Act). On 6 August 2013 the IBAC Commissioner declared himself unable to act in relation to the matter which follows and which has been referred to as the 'Flood II' investigation. The Commissioner declared himself unable to act by reason of perceived conflict of interest pursuant to section 29 of the IBAC Act.

Having so declared on 6 August 2013, the Commissioner signed an instrument pursuant to section 32(5) of the IBAC Act which delegated to me, being a sworn IBAC Officer who is qualified under section 20(2) of the IBAC Act, to be the Commissioner, all his duties, functions and powers for purposes of dealing with the matter referred to in detail below.



Murray B Kellam AO
10 February 2014

3. A brief background

The events described briefly below occurred in the context of what may be described, without attribution of blame to any person, as instability in the governance of the Senior Executive of Victoria Police (VicPol) during 2010 and 2011. The manner in which various complaints to both the Office of Police Integrity (OPI) and to the Victorian Ombudsman (VO) relative to this instability were dealt with, was to a considerable degree dictated by complex and sometimes ambiguous legislation. This legislation created difficulties for those subject to it and for the offices of the VO and OPI, which offices were required to deal with such complaints. In particular, the *Whistleblowers Protection Act 2001* (WP Act) imposed a complicated process with regard to investigations and reporting requirements in relation to complaints made about police conduct by whistleblowers[1].

The crime statistics complaint made to the VO

In late February 2011 the VO received a complaint from a whistleblower that VicPol crime statistics released on 28 October 2010 'had been manipulated for political purposes and that the data was misleading' (the 'crime statistics complaint'). The VO determined to investigate the crime statistics complaint under the WP Act (the 'crime statistics investigation').

Section 5 of the WP Act provided that a natural person who had reasonable grounds to believe that a public officer had engaged in improper conduct in their capacity as a public officer could disclose that improper conduct in accordance with Part 2 of the WP Act. Under section 6(4) of the WP Act, a disclosure that related to the then Chief Commissioner of Victoria Police (CCP) Simon Overland APM was required to be made either to the VO or to the Director of OPI.

A disclosure that related to any other member of the police force could be made to the VO, the Director of OPI or to the CCP. Part 3 of the WP Act provided for the protection of whistleblowers. Section 22(2) of the WP Act provided that the VO must not (in a report or in recommendations made under the WP Act) disclose particulars likely to lead to the identification of a person who made a protected disclosure. Section 22(3A) of the WP Act provided that the VO was not permitted to disclose particulars likely to lead to the identification of a person against whom a protected disclosure was made. However section 22A of the WP Act permitted the VO to disclose in a report on any matter laid before Parliament the identification of a person against whom a protected disclosure was made, if it was in the public interest to do so.

In the light of the information provided to the VO in the course of the crime statistics investigation, the VO so determined that the crime statistics complaint was a public interest disclosure under section 22A of the WP Act.

On 8 March 2011 the VO informed the Director of OPI that he was commencing the crime statistics investigation as a result of a public interest disclosure to his office. It is appropriate to interpose here the fact that some short time before this, on 28 February 2011, the host of a 3AW radio talkback program, Mr Neil Mitchell, had announced on air that he was in possession of a leaked intelligence brief related to crime statistics ('the intelligence brief') and which brief was (with redactions) published subsequently on the radio station's website.

[1] The deficiencies in the legislation were the subject of concerns expressed by the VO in a report to Parliament about an investigation into the OPI handling of a complaint dated October 2011. In that report the VO recommended (paragraph 24) that 'consideration should be given to developing legislative amendments to the WPA and/or the Police Integrity Act to provide certainty regarding the following two questions:

- Whether the Director, Police Integrity, can conduct an investigation using Police Integrity Act powers regarding a Whistleblowers Protection Act disclosure.
- Whether information gained as part of a Whistleblowers Protection Act investigation can be used to initiate Police Integrity Act investigations.'

A brief background

In consequence of this leak and in consequence of it being established by VicPol that the only email of the intelligence brief outside VicPol was to the home email address of then Victoria Police Deputy Commissioner Sir Ken Jones QPM, Assistant Commissioner Emmett Dunne (the head of VicPol Ethical Standards Command) determined to refer the matter of the leak to OPI for investigation, which investigation commenced on 8 March 2011, the same day as the VO advised OPI that he was commencing the crime statistics complaint investigation. Pursuant to section 40(4)(a) of the *Police Integrity Act 2008* (PI Act) and as the referral to OPI by Assistant Commissioner Dunne involved the conduct of a Deputy Commissioner, OPI was required to conduct an investigation into the matter.

The intelligence brief leak investigated by OPI

On 10 March 2011 OPI advised the VO that it was investigating the leak of the intelligence brief to 3AW.

During the ensuing days discussions took place between the VO and OPI as to the relationship between the two issues being investigated by their respective offices, and on 17 March 2011 the Director of OPI agreed to hold the OPI investigation into the leak of the intelligence brief in abeyance pending the outcome of the crime statistics investigation by the VO.

The crime statistics investigation report by the VO

The crime statistics investigation was completed by the VO and on 15 June 2011 a report *Investigation into an allegation about Victoria Police crime statistics* was presented to Parliament in respect thereof. It is not necessary here to canvass the report in great detail other than to observe that the VO did not report that he had reached the conclusion that the crime statistics had been manipulated for political purposes as alleged by the complainant. That said, the report contained the conclusion that the crime statistics which had been released were 'misleading and inconsistent with other data'[2] and that VicPol had released the data despite warnings about incomplete quality assurance processes and by 'ignoring other crime data that revealed a different picture'[3]. The report to Parliament contained recommendations, the first being that VicPol should address the continuing inefficiencies in the recording of crime statistics as a matter of urgency and the second being that an independent body should be created to manage, collate and disseminate crime statistics. VicPol supported both recommendations.

Complaints to OPI regarding leaks to *The Age* and to 3AW

However, before the VO tabled the above report in Parliament, and on 3 May 2011, *The Age* newspaper published an article headed 'Police Chief heavied on eve of the poll'. This was one day after Sir Ken had formally announced his intention to resign from VicPol as from 5 August 2011. This article linked the decision of Sir Ken to retire with the decision of Mr Overland to release 'favourable crime statistics' on the eve of the State election the previous year.

On 6 May 2011, OPI received complaints about the source of an alleged leak to *The Age* that resulted in the article published on 3 May 2011 ('*The Age* leak complaint'). The source was said by the complainants to be Sir Ken. OPI commenced an investigation into that complaint on 6 May 2011. That is a significant date in the context of the matters under consideration as that is the day upon which Sir Ken was required by Mr Overland to depart the premises of VicPol 'on leave' until his intended resignation in August 2011.
On 9 May 2011 Mr Overland was interviewed by Mr Mitchell on his 3AW talkback radio program and, amongst other things, was asked about the police management of issues involving parolees. On the day of that interview OPI received a further complaint, regarding the leaking of information to Mr Mitchell dealing with parolee issues (the 'parolee apology email leak'). It was alleged by the complainant that the source of that leak was likewise Sir Ken.

[2] Paragraph 96, *Investigation into an allegation about Victoria Police crime statistics*, VO, June 2012.

[3] Paragraph 105, *Investigation into an allegation about Victoria Police crime statistics*, VO, June 2012.

A brief background

The VO's 'own motion' investigation into conduct of OPI officers

On 16 May 2011, the VO advised OPI that he intended to conduct an 'own motion' investigation into 'administrative actions taken by officers' of OPI. The actions to be investigated were said by the VO to be actions which 'were, or were intended to be detrimental to a person or persons who have made… or were believed to have made…a disclosure' under the WP Act ('WP Act complaint'). Furthermore, the investigation was to consider whether or not such actions 'were an inappropriate use of powers provided by the *Police Integrity Act 2008*'. The VO presented his report *Investigation into the Office of Police Integrity's handling of a complaint* to Parliament on 10 October 2011. That report is instructive as to the legislative difficulties under which both the VO and the Director of OPI were working at the time and to the inevitable tensions those legislative difficulties created.

It is clear that during 2010 and 2011 serious tensions developed between OPI and the VO, at least partly (if not substantially) by reason of the bifurcation of roles created by the legislation. Telling examples of that tension are revealed by a brief consideration of a number of investigations conducted by the respective bodies, and indeed by the OPI investigation report and the response thereto by the VO which are the subject of my consideration.

The first of those reports is the *Crossing the Line* report of OPI[4] being the report of an investigation into the conduct of then Detective Leading Senior Constable Tristan Weston while undertaking secondary employment as a ministerial adviser in the Office of the Minister for Police and Emergency Services and into certain communications between Mr Weston and Sir Ken.

The preliminary investigation of the WP Act complaint made to OPI regarding *The Age* leak complaint, and the parolee apology email leak elicited information that led to the commencement of the *Crossing the Line* investigation, this time on the 'own motion' of the Director of OPI. The *Crossing the Line* report was tabled in Parliament in October 2011. That report canvasses some of the issues, which later became the subject of the OPI investigation report with which I am concerned

Although the principal issue considered by that report is the conduct of Mr Weston in his capacity as a ministerial adviser, it deals with the relationship between Mr Weston and Sir Ken. In the course of that investigation Mr Weston was examined by OPI. He made no secret of his antipathy to Mr Overland. Mr Weston gave evidence that he met with Sir Ken in April 2011 as a result of a suggestion made to him by another Government adviser that he approach Sir Ken to inquire as to whether he would be willing to meet with the responsible Minister (the Hon Andrew McIntosh) to discuss a possible role in the proposed new anti-corruption commission (which in due course became IBAC).

Mr Weston met with Sir Ken on 12 April 2011. In the course of this meeting Sir Ken informed Mr Weston that he had decided already to apply for a position with the proposed new commission and furthermore that he had actually resigned from VicPol. According to Mr Weston, Sir Ken said that he could not remain with VicPol because of what he described as 'issues with integrity'. Mr Weston said in evidence to OPI in the course of the *Crossing the Line* investigation that Sir Ken was 'concerned about cover-ups in budget stuff-ups – he was concerned about just general mismanagement in the force, wastage… millions of dollars missing in, you know, projects that were running over … he was concerned about the appointments of senior staff … he was concerned about the crime statistics… he said that it was in his view the greatest act of corruption he had ever experienced … there were issues with the Sex Offenders Registry … he briefly referred to the issues with the parolee issue'[5].

[4] *Report of an investigation into the conduct of a member of Victoria Police undertaking secondary employment as a Ministerial Adviser and his relationship with a Deputy Commissioner of Police,* OPI, October 2011.

[5] Page 32, *Crossing the Line*, OPI, October 2011.

A brief background

The *Crossing the Line* report deals with a continuing relationship between Mr Weston and Sir Ken thereafter and concludes that such a relationship was 'wholly inconsistent with the professional and ethical standards to be expected of a Deputy Commissioner of Police'[6].

At almost the same time that OPI tabled the *Crossing the Line* report, the VO tabled his report into his 'own motion' investigation which he had commenced on 16 May 2011 into the OPI handling of the complaint that Sir Ken had released confidential police information to the media[7].

The report of the VO dealt principally with the complexity of the whistleblower legislation, the jurisdiction of OPI to investigate the activities of a ministerial adviser and concerns about accountability with regard to telephone interceptions. It also supported the concerns expressed by OPI in the *Crossing the Line* report about the 'irreconcilable conflict of interest' that arose as a result of the appointment of a serving police officer, Mr Weston, as a ministerial adviser.

The report stated 'As the Director has acknowledged, an irreconcilable conflict of interest … arose as a result of Mr Weston's appointment as a Ministerial Officer and that permission for him to undertake that role should not have been granted'. The report did not deal with the complaint made to OPI about Sir Ken releasing information to the media in any substance at all save for the following paragraph[8]:

> '*The OPI's file notes concerning the receipt of the complaint do not refer to any persons having direct knowledge of Mr Jones releasing confidential Victoria Police information to the media. I note that recently the journalist to whom Mr Jones is alleged to have provided information*[9] *published an article stating that The Age has found no evidence Mr Jones leaked information to the media*'.

The report also dealt with the issue of *The Age* leak complaint being a 'public interest disclosure' under the WP Act and which is referred to below.

The VO raises concerns that the complaint made to OPI about *The Age* leak was a public interest disclosure

On 20 June 2011 the VO wrote to the Director of OPI raising concerns that the complaints received by OPI on 6 May 2011 (i.e. *The Age* leak complaint) might have been 'public interest disclosures' under the WP Act.

It is appropriate to observe again at this point that the legislation relating to complaints made to OPI and which complaints might also be subject to the WP Act was complex and required referral between OPI and the VO. That complexity is demonstrated by the passage appearing below in a letter dated 20 June 2011 from the VO to the Director of OPI. Having noted that *The Age* leak complaint appeared to have been made to OPI in accordance with section 86L(2A) of the *Police Regulation Act 1958* (PR Act) the VO stated:

> '*As a result I am concerned as to the consequences of the operation of section 39(2) of the* Police Integrity Act 2008 *(PIA). As you will be aware, that provision reads: (2) This Act and the* Whistleblowers Protection Act 2001 *apply to a complaint made by a member of Victoria Police in accordance with section 86L(2A) of the* Police Regulation Act 1958 *to the Director about any other member of Victoria Police,* ***as if the complaint were a disclosure made to the Director in accordance with Part 2 of the Whistleblowers Protection Act 2001****. [emphasis added].*
>
> *This provision, in effect, deems section 86L(2A) complaints… to be disclosures to you under the (WPA). That being the case, the procedures under the WPA prevail over those under the PIA, and your obligation is not to investigate the complaint under the PIA, but rather, to assess the deemed disclosure within 45 days (section 33(1) WPA).*

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6 It is appropriate to note that in a written submission made to OPI prior to the publication of the *Crossing the Line* report those advising Sir Ken argued that such a conclusion was neither sustainable nor fair.

7 *Investigation into the Office of Police Integrity's handling of a complaint,* VO, October 2011.

8 *Paragraph 8, Investigation into the Office of Police Integrity's handling of a complaint,* VO, October 2011.

9 This is clearly a reference to Mr Nick McKenzie.

A brief background

If that assessment leads you to conclude that the deemed disclosure is a Public Interest Disclosure (PID), your obligation is then to notify me (within 14 days of that conclusion) so as to allow me to:

- *make a determination as to whether the disclosure is a PID (section 34(1)(b) WPA); and*
- *if so, refer the matter to you to investigate if I consider it appropriate (section 43 WPA).'*

Upon receipt of this letter the then Director of OPI very properly suspended the investigation and obtained the advice of counsel. Having done so, the Director concluded that the complaints were 'public interest disclosures' and referred them to the VO.

The referral by the VO of the intelligence brief leak back to OPI

Subsequently the VO determined that the matters were 'public interest disclosures' under the WP Act and on 28 July 2011 referred the matter back to the Director of OPI to investigate the conduct alleged to have been related to Sir Ken. It would appear that the investigation of the matter by OPI took some time and it was not until February 2013, and shortly before OPI ceased to exist, (it being succeeded by IBAC on 10 February 2013) that it delivered its investigation report to the VO dealing with the matters which had been referred to OPI by the VO in late July 2011. The investigation report is 254 pages in length and contains 636 footnotes.

Regrettably, and in apparent breach of section 22 of the WP Act (which Act, although repealed by that time, nevertheless continued in force for the purposes of the investigation) information relating to the contents of the report was leaked by an unknown person or persons to at least one media outlet. Furthermore, and for reasons that are unclear to me, OPI issued a brief press release advising that it had delivered its investigation report to the VO. In addition the report contained a number of recommendations.

The report was intended to be a report of the result of the investigation and although one would have expected a statement of the findings following such investigation, I do not consider that it was appropriate for the report to make recommendations to the VO. Rather, as I understand the legislative regime in place at the time of delivery of the report, it was for the VO to consider the report and to make such recommendations as considered by him to be appropriate. In any event the report was delivered to the VO shortly before 10 February 2013.

After that date the provisions of the PD Act came into effect. In particular, Clause 6 of Schedule 1 of the PD Act provides for the circumstances whereby OPI has completed an investigation of a disclosed matter under Part 5 of the WP Act, and has made a report to the VO under section 62 of the WP Act on the completed investigation. It also provides that after the commencement day (i.e. 10 February 2013), the VO may make a written report on the results of the investigation to IBAC, and may make recommendations as to the action to be taken. However, it further provides that on or after the commencement day, the VO must not make a report under section 63A or 103 of the WP Act on the results of an investigation completed by OPI.

By a letter dated 1 March 2013 the VO wrote to the IBAC Commissioner enclosing his written report in response to the OPI investigation report delivered to him on 6 February 2013 together with a copy of the OPI report redacted to remove material capable of identifying any possible whistleblowers. The VO was highly critical of almost all aspects of the OPI report. Furthermore, the VO advised the IBAC Commissioner that he had referred one aspect of the OPI report to the Victorian Inspectorate (VI) which, pursuant to the *Victorian Inspectorate Act 2011*, is the oversight body for IBAC, the VO and the Auditor-General.

A brief background

As to matters contained in the OPI report which related to (alleged) actions of his staff the VO recommended that such matters be referred to the VI for consideration. Upon receipt of the report of the VO, IBAC quarantined any former OPI staff from involvement in the matter and commenced liaising with the VI. The VI requested that IBAC take no further action on the matter until it had concluded making further enquiries and had responded to the jurisdictional question arising from the recommendation of the VO for referral of certain matters referred to it. Subsequently the VI advised IBAC that it had no jurisdiction to deal with the matter.

Accordingly the matters the subject of the report of the VO and his recommendations to IBAC remained subject to consideration and determination by IBAC.

It is appropriate to consider first the OPI report of its investigation into allegations of unauthorised release of law enforcement data by Sir Ken. The report contains seven parts. It is convenient to examine the report part by part. I propose to consider the matters regarded by the OPI report as relevant and then, where relevant, to consider the responses given by any person affected by the report and finally to consider the position taken by the VO as to the findings of the OPI report. What follows is not a complete statement of every fact considered by the OPI report, nor is it a full analysis of the matters raised by the OPI report and others in response to it. Rather, it is a summary of the matters that are particularly relevant to the determination of the action (if any) that IBAC should now take in respect of the reports from OPI and from the VO which are now before it. It is important to note that my discussion of the relevant matters is, in some areas, restricted by reason of the continuing operation of section 22(2) of the now repealed WP Act.

The investigation by OPI into allegations of unauthorised release of information by Sir Ken

The OPI investigation commenced in response to three disclosures made to OPI on 6 May 2011. As stated above, the Director of OPI concluded in due course that all of those disclosures were 'public interest disclosures' in accordance with section 33 of the WP Act. Having so concluded in accordance with section 34 of the WP Act, the Director of OPI referred each disclosure to the VO. Having considered the disclosures and pursuant to sections 24 and 27 of the WP Act, the VO determined that they were 'public interest disclosures'. The VO then, having considered it appropriate to do so, and pursuant to section 43 of the WP Act, referred each disclosed matter back to the Director of OPI to investigate.

Section 43(2) of the WP Act provided that the Director of OPI 'must' investigate a disclosed matter referred by the VO under that section. The disclosures alleged that Sir Ken was the probable source of confidential information held by *The Age* newspaper journalist, Mr Nick McKenzie, in relation to an article that he was intending to publish regarding concerns about the murder and homicide investigation of Carl Williams. The disclosures also alleged that Sir Ken was the probable source of information referred to in a newspaper article written by Mr McKenzie and Mr Richard Baker published in *The Age* on 3 May 2011.

It should be said at the outset that although Sir Ken declined 'repeated requests by OPI to participate in an interview with OPI investigators in Australia, the United Kingdom or elsewhere' he has had the opportunity to read the draft OPI report and through his legal advisers denies all of the allegations. Furthermore, his legal advisers had a draft of this report made available to them prior to its publication and have had the opportunity to respond to it. They responded by letter dated 30 January 2014, to which further reference is made below.

A brief background

It is also appropriate to note that OPI investigators examined Mr McKenzie and although in general he relied upon 'journalist privilege' in not revealing his sources, he gave specific evidence to OPI that Sir Ken was not the source of his articles. By that, I have assumed that he meant that Sir Ken was not his direct source, as he would not necessarily have any knowledge of the source of information to persons who provided information to him. It is appropriate to note, in addition, that the VO has stated that there is no evidence of which that office is aware that Sir Ken leaked any information to any person.

Before commencing my summary of the OPI report it is appropriate to make reference to the fact that the response by the legal advisers to Sir Ken is 34-pages (together with seven pages of annexures to that report). I shall deal with particular parts of that response in the course of the following analysis of the OPI report and the methodology employed by it. A number of matters raised in the response do appear to have some foundation, as stated below.

The OPI draft report was delivered to Sir Ken's legal advisers on 21 December 2012 under cover of a letter dated 20 December 2012. In that letter the legal advisers were informed that any comments were to be provided in writing before close of business on Tuesday 8 January 2013. Not surprisingly the legal advisers considered that the imposition of an 8 January 2013 deadline provided them with an inadequate period for response, particularly taking into account the fact that their client was resident in the United Kingdom. They sought an extension until 31 January 2013. OPI agreed upon an extension but only until 23 January 2013.

In seeking the extension, a request was made for the provision of a copy of the 'complete investigation brief including transcripts and recordings of all material obtained or considered by OPI' in the formulation of the findings. OPI responded to this latter request by stating that the 'report as supplied…sets out in detail the evidence, and the analysis of that evidence, upon which any adverse comment is based.'

The legal advisers made complaint that the material provided to them was inadequate. They referred to the circumstance (occurring many times throughout the report) whereby parts of an intercepted telephone conversation were relied upon in the report but the balance of the conversation and thus the context, remained 'hidden'. I consider there to be weight in both expressions of concern referred to above. In particular, the OPI report does not in all cases 'set out in detail the evidence' as contended by OPI. Rather the evidence is often summarised and in a number of important matters is dealt with by summaries in 'bullet point' form. In general the footnotes refer to the source of the evidence, but, of course the direct evidence that is the subject of those footnotes is not available to the reader of the report.

The response of the legal advisers to Sir Ken was delivered to OPI on 23 January 2013. The response is highly critical of the OPI report stating (inter alia) that it revealed an 'unfair and highly selective approach' and 'repeated reliance on adverse inferences where straightforward, logical and innocent explanations co-exist' and 'a gross abuse of the OPI's investigative powers'. I turn now to a consideration of the OPI report in more detail.

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4. Part 1 of the OPI report – the Driver Taskforce 'leak'

Carl Williams was murdered in Barwon Prison on 19 April 2010. Two days later the Driver Taskforce was created by VicPol to investigate this, and other murders, and to examine various policing and prison processes thought to be relevant to the murders. Superintendent Douglas Fryer was appointed to head the Taskforce. He reported to the Driver Taskforce Steering Committee. Sir Ken chaired that Committee.

On or about 6 May 2010 in the course of the Driver Taskforce investigation, VicPol acquired documentation from Corrections Victoria which included an email dated 6 January 2009 from then Secretary of the Department of Justice, Ms Penny Armytage, whereby she acceded to a request from Mr Williams to be housed with one Matthew Johnson ('the Armytage email'). Mr Johnson was found subsequently to be the person responsible for the murder of Mr Williams.

Clearly Sir Ken had knowledge of the existence of the Armytage email as he had discussed its contents with the CCP in late 2010. On 5 May 2011 and at the earlier request of Mr McKenzie, Superintendent Fryer met with Mr McKenzie. He did so having sought approval from Sir Ken[10]. During the course of the meeting it became apparent to Superintendent Fryer that Mr McKenzie was aware of confidential aspects of the Driver Taskforce investigation, including the existence of the Armytage email. Mr McKenzie told Superintendent Fryer that 'Sir Ken had an email which confirmed that [Ms Armytage] did make [the] decision [to place Carl Williams with Matthew Johnson] … she approved it personally and he [Jones] was concerned about it'.

In addition to this operational information Mr McKenzie informed Superintendent Fryer that he was aware of the private views of Sir Ken as to the Driver Taskforce and was also aware of the contents of discussions between the State Coroner and the Driver Taskforce in relation to operational matters.

It should be observed that Superintendent Fryer himself knew 'the views Deputy Commissioner Jones held in relation to Driver Taskforce operational matters' they being views which 'Deputy Commissioner Jones had previously expressed.' It is further appropriate to note that the OPI report does not reveal that Superintendent Fryer had covertly recorded the conversation he had with Mr McKenzie. The fact that he did so is revealed in the VO report *Allegations of detrimental action involving Victoria Police*[11].

Both the reports of the VO and OPI summarise the conversation in question by use of bullet points, which in each case are markedly different. Taking into account the great significance of the conversation had between Superintendent Fryer and Mr McKenzie it was clearly appropriate for the conversation to have been reproduced in full, or at least for relevant parts of it to have been reproduced rather than summarised by use of bullet points.

Superintendent Fryer informed OPI that he questioned Mr McKenzie as to whether the source of his information was Sir Ken but Mr McKenzie refused to confirm or deny that he, Sir Ken, was the source. Subsequent to his meeting with Mr McKenzie, Superintendent Fryer discussed the 'leak' with Sir Ken and inquired as to whether OPI should be advised of the leak 'as there is a leak and it forms part of their oversight role'. Superintendent Fryer's contemporaneous notes of the conversation record that Sir Ken responded by saying: 'No, everything we tell OPI goes to Overland because he and Jetovic (sic) are mates, let [Deputy Ombudsman] Taylor know'. Superintendent Fryer did not contact Deputy Ombudsman Taylor but later that day reported the contents of his discussion to Assistant Commissioner Graham Ashton.

[10] The details of this meeting are the subject of consideration in a further VO report *Investigation into allegations of detrimental action involving Victoria Police*, June 2012.

[11] Paragraph 55, *Investigation into allegations of detrimental action involving Victoria Police,* VO, June 2012.

Part 1 of the OPI report – the Driver Taskforce 'leak'

On the evening of 6 May 2011, Mr McKenzie attended the residence of Sir Ken. The purpose of that meeting was said by Mr McKenzie to be to discuss with Sir Ken the content of an article that was to be published in *The Age* the next day, relating to the Driver Taskforce and the Armytage email. On the same evening Sir Ken telephoned Superintendent Fryer. Superintendent Fryer made notes of that conversation although the contents of the notes are not reproduced in the OPI report. In the course of the conversation Superintendent Fryer told Sir Ken that in his conversation with Mr McKenzie of 5 May 2011, statements were attributed to Sir Ken by Mr McKenzie such as 'Deputy Commissioner thinks this, is concerned about that'. Sir Ken responded by saying that he would 'never do such a thing' and told Superintendent Fryer that he had only 'spoken to (or met) McKenzie once' and that was at a hotel for about 10 minutes.

The OPI report states that 'Deputy Commissioner Jones did not inform Superintendent Fryer that immediately before his conversation with Superintendent Fryer, Mr McKenzie had attended at his home'. Furthermore, it is contended that Sir Ken did not report to any person the facts that Superintendent Fryer had obtained about the information of which Mr McKenzie had possession.

In its consideration of whether or not the evidence implicated Sir Ken in the leak of the information about the Driver Taskforce to Mr McKenzie, the OPI report referred to events which had occurred prior to 6 May 2011 and which were described in it as revealing a 'pattern of withholding' on the part of Sir Ken and demonstrating that his request to Superintendent Fryer to withhold information from OPI and others 'was not the first occasion we had made such a request'.

The first event that is argued to demonstrate this pattern took place on 15 February 2011. On that day Sir Ken asked Superintendent Fryer to 'secretly contact' Mr Taylor and another member of the staff of the VO. Sir Ken is alleged to have told Superintendent Fryer that the VO was supportive of 'our direction' and that the VO was similarly concerned about matters surrounding the death of Mr Williams.

According to Superintendent Fryer, Sir Ken instructed Superintendent Fryer that he was not to inform Superintendent Fryer's immediate supervisor, then Assistant Commissioner Moloney, of the intended meeting. Superintendent Fryer questioned Sir Ken as to why that was necessary, with which Sir Ken reiterated his direction for secrecy stating that Assistant Commissioner Moloney had his hands 'full with other matters'. In fact, contrary to this direction Superintendent Fryer did subsequently brief Assistant Commissioner Moloney.

The second example by which it is contended that the conduct of Sir Ken fitted the pattern of withholding information is related to the leaked intelligence brief that is dealt with in more detail in Part 2 of the OPI report and referred to below.

However, in addition, a number of other events were relied upon in the OPI report as 'preceding events' to the complaints made to OPI on 6 May 2011.

These included the following matters:

- Between June and October 2010, Mr Overland became aware of the fact that Sir Ken had been indiscreet both internally and externally about decisions whereby he disagreed or had a contrary view to Mr Overland. In his interview with OPI Mr Overland stated that at that time he had two conversations with Sir Ken about those matters. Sir Ken is said by Mr Overland to have not responded happily to Mr Overland's complaints stating 'we don't live in a Stalinist regime' and stating further that he 'should be able to speak his mind.' The second of those discussions took place after the then Minister for Police and Emergency Services, the Hon Bob Cameron, approached Mr Overland and expressed a view that Sir Ken had been indiscreet.
- On 22 November 2010, Mr Mitchell of 3AW revealed that he was in possession of a leaked internal email written and sent by Sir Ken to Mr Overland in relation to the use by police of covert mini cameras whilst on duty. Originally, Mr Overland had asked Sir Ken to examine the increasingly widespread use of such devices by members. Sir Ken had issued an advice stating that the devices should not be used until a departmental policy was determined.

Part 1 of the OPI report – the Driver Taskforce 'leak'

- On 28 November 2010 the *Herald Sun* newspaper published a story about a rift between Mr Overland and Sir Ken.
- On 20 April 2011 Mr Mitchell announced on his 3AW program that two Deputy Commissioners were planning to leave VicPol. Following Mr Mitchell's announcement, then Deputy Commissioner Lay advised Mr Overland that he had told only very few people of his consideration of leaving VicPol, one of whom was Sir Ken and who he (Lay) suspected was responsible for the leak.

The OPI report relies upon contact between Sir Ken and Mr McKenzie on 9 May 2011 as demonstrating the 'inappropriate nature of his relationship with Mr McKenzie'. In the early morning of that day Sir Ken sent an SMS to Mr McKenzie regarding a *Herald Sun* article, which article had alleged that OPI was investigating him over the Driver Taskforce leak. Soon thereafter Sir Ken sent a similar message to Mr Taylor. The OPI report does not provide the detail of either SMS message.

However, later that morning Mr McKenzie telephoned Sir Ken. The OPI report states that Sir Ken told Mr McKenzie that he could not understand why Mr Overland felt the need to defend Ms Armytage and they discussed a belief held by Mr McKenzie that the VO investigation (presumably referring to the crime statistics investigation being undertaken by the VO at that time) was being undermined. Once again the OPI report does not set out the transcript of the intercepted telephone conversation. Mr McKenzie stated that he had been given some information which he wanted to discuss with Sir Ken 'face to face'. The OPI report asserts that Sir Ken was receptive to this request. OPI has no evidence that such a meeting took place, however it is argued by OPI that 'Deputy Commissioner Jones' failure to reject Mr McKenzie's invitation adds weight to the inappropriate nature of his relationship with Mr McKenzie'.

The OPI report deals with discussions had between Sir Ken and his former staff officer, Inspector Christopher Gawne, and to the relationship between Inspector Gawne and Mr McKenzie. Inspector Gawne was the staff officer to Sir Ken from 1 July 2009 until 28 December 2010 when he was seconded to the Professional Standards Command (PSC) as an Acting Superintendent. From 22 March 2011 Inspector Gawne performed the role of a Police Service Area Inspector in Geelong. Inspector Gawne was examined in the course of the OPI investigation and stated that Mr McKenzie had contacted him unexpectedly. He believed Mr McKenzie had obtained his telephone number from a friend and colleague of his, Inspector Debra Robertson.

The first meeting between him and Mr McKenzie took place at a restaurant in Geelong on 29 April 2011. Although the meeting was recorded in Inspector Gawne's police diary, the record contains no detail regarding the discussion. However, Inspector Gawne recalled that Mr McKenzie had an interest in 'background information' on Sir Ken, together with information on issues that Sir Ken was dealing with, and information regarding his views on the management of the Crime Department. In addition, Mr McKenzie is said to have raised with Inspector Gawne the possibility of a story regarding liquor licensing and conflicted police in Geelong.

A second meeting took place between Mr McKenzie and Inspector Gawne on a date which is not clear, but which the OPI report concludes to have been prior to 6 May 2011. Inspector Gawne gave evidence to OPI investigators that he and Mr McKenzie discussed the death of Mr Williams including his cell placement, the Driver Taskforce investigation, the involvement of Corrections Victoria, and the Department of Justice. Inspector Gawne had been responsible for taking minutes for the Driver Taskforce Steering Committee and thus would have had a detailed knowledge of these matters. The OPI report merely summarises the evidence given to it by Inspector Gawne and thus it is not possible to say what his contribution to the 'discussion' with Mr McKenzie was.

On the evening of 6 May 2011, Inspector Gawne received a telephone call from Mr McKenzie alerting him to the forthcoming publication of an article relating to the death of Mr Williams. According to Inspector Gawne, Mr McKenzie wanted to speak with Sir Ken. Inspector Gawne passed on the request to Sir Ken, who it is said, was 'keen to speak with Mr McKenzie'. Inspector Gawne then contacted Mr McKenzie and provided him with Sir Ken's contact details.

Part 1 of the OPI report – the Driver Taskforce 'leak'

On the morning of 7 May 2011 Sir Ken had a telephone conversation with Inspector Gawne relating to an article that had appeared in *The Age* that morning. In the course of the conversation Sir Ken denied leaking information to Mr McKenzie about the Carl Williams murder investigation. Sir Ken conceded that he had had a discussion with Mr McKenzie in the course of the telephone conversation and that 'I…made it clear to him, you know – what the go was and what I thought'[12].

A further link between VicPol and Mr McKenzie that the OPI investigation revealed and relied upon was an association between Inspector Gawne and Inspector Robertson and Mr McKenzie.

Inspector Gawne gave evidence to OPI that Inspector Robertson was a friend and a colleague whom he had met when they were both working at PSC. He gave evidence that thereafter he spoke to her on a regular basis and that she was sympathetic to Sir Ken's concerns about VicPol's Executive, despite never having met him. Inspector Gawne also gave evidence that he was aware that Inspector Robertson maintained a friendship with an adviser[13] to the Coalition State Government ('the adviser'). Inspector Robertson gave evidence to OPI and confirmed that she had formed a friendship with Inspector Gawne whilst they were working together at PSC. She said that thereafter Inspector Gawne would telephone her constantly. On 24 May 2012 she said '… he spoke to me on numerous occasions about Ken Jones and his concerns… or… Chris relayed those concerns that things weren't good at the top'.

Inspector Gawne gave evidence to OPI that Sir Ken was concerned about a number of issues, which he 'wanted to speak to someone about'. Inspector Gawne, acting under a belief that it would 'assist Sir Ken in trying to get his concerns across' contacted Inspector Robertson who he knew had a contact in State Government. It is appropriate to observe that the OPI report contains no evidence of any association between Sir Ken and Inspector Robertson nor any evidence that he knew that she had a friendship with either Mr McKenzie or any adviser to the Government.

Inspector Robertson gave evidence to OPI that she was contacted by Inspector Gawne who told her about 'serious corruption concerns that [Sir Ken had] with the Chief Commissioner' and that Sir Ken 'needed to contact someone in the Government'. Inspector Robertson said that the 'serious corruption concerns that [Sir Ken] had with the Chief Commissioner' related to 'the death of Carl Williams and Driver [Taskforce]… the parolee issues with LEAP[14]…and the bogus stats that had been put out allegedly by the Chief Commissioner'.

Inspector Robertson also gave evidence that prior to making an enquiry with the adviser, she provided the phone number of the Premier to Inspector Gawne. Inspector Robertson informed OPI that 'when [Gawne] told me there was corruption I said, "Look I haven't spoken to [the Premier] in years, but I have his number." That's who Sir Ken should be speaking to'. Inspector Robertson told OPI that Inspector Gawne got back to her 'that night or a day or two later' and advised that Sir Ken 'didn't think it was appropriate to ring the Premier direct'. Inspector Robertson stated that she was surprised by Sir Ken's rejection of the use of the Premier's telephone number, stating 'I don't know who else you'd go and speak to'.

Inspector Robertson had also known Mr McKenzie for almost a decade and in her evidence given to OPI she referred to him as 'a good mate'.

[12] Although not specifically stated in the OPI report it is clear that at least from 6 May 2011, the telephone service of Sir Ken was being intercepted. It is an unsatisfactory feature of the investigation report that no reference is made to the nature of the conduct of the investigation. Reports of investigations prepared by the Independent Commission Against Corruption (ICAC) (NSW) invariably contain a summary of the conduct of the investigation. For example an ICAC report *Investigation into the possession and supply of steroids and other matters involving a corrective services NSW officer*, September 2013 contains the following paragraph at page 8: 'The Commission made use of lawful covert surveillance, both physical and electronic, pursuant to a warrant obtained under the *Surveillance Devices Act 2007* and a warrant obtained under the *Telecommunications (Interception and Access) Act 1979*.' Transparency and accountability required a similar if not more detailed statement as to the use of telephone intercepts in the OPI report.

[13] I have not named the adviser. There is no evidence that the adviser acted in any manner other than appropriately.

[14] The Law Enforcement Assistance Program database.

Part 1 of the OPI report – the Driver Taskforce 'leak'

The OPI report places considerable reliance upon events which took place after 6 May 2011 (i.e. the date upon which Sir Ken was required to go 'on leave' by Mr Overland). It is apparent that by that date, Mr Overland and others in the Executive of VicPol had suspicions about the possibility that Sir Ken was either directly or indirectly involved in internal information being released to the media[15].

In the course of the morning of 6 May 2011 Mr Overland was advised for the first time of the meeting which had taken place between Superintendent Fryer and Mr McKenzie the day before. Shortly before receiving this advice Mr Overland had discussed with the Police Minister, the Hon Peter Ryan, his intention to require that Sir Ken go on leave, although it appears that it was not suggested to the Minister by Mr Overland that it was intended that Sir Ken go on leave that day. Later that day, and after a meeting of VicPol's Executive (at which Sir Ken was not present), Sir Ken was told by Mr Overland that he was required to go 'on leave'[16].

The OPI report concludes that events that transpired immediately after this 'highlight the manner in which information passed between Deputy Commissioner Jones, Inspector Gawne, Inspector Robertson and the adviser. Those events also provide insight into the relationship between Mr McKenzie and the three police members'.

On the afternoon of Saturday 7 May 2011, Mr Overland was summoned to a meeting with the Premier and the Deputy Premier. At 6:32pm that day and after the meeting had concluded, an online article entitled 'Vic top cop told to explain deputy's exit' appeared on an internet news service, *ninemsn*. The article stated that Mr Overland had been asked to explain to the Government why he had ordered Sir Ken 'to leave his post immediately' on the previous Friday. The OPI report states that OPI 'has evidence that at the precise time that this article was published, Inspector Robertson telephoned Inspector Gawne and had a conversation that lasted over 11 minutes'.

The detail of that evidence does not appear in the OPI report. On Monday, 9 May 2011 the then Premier announced that Mr Jack Rush QC, as he then was, would undertake a review of the Senior Command structure of VicPol ('Rush Inquiry').

The *Crossing the Line* report concluded that during the nights and days following the announcement of the Rush Inquiry, Sir Ken, Mr Davies, the Secretary of the Police Association (TPA), and Mr Weston attempted to negotiate the withdrawal of Sir Ken's resignation. The nature of these negotiations was the subject of considerable criticism in the *Crossing the Line* report.

Shortly after 4pm on 9 May 2011 Inspector Gawne telephoned Sir Ken to discuss the announcement of the Rush Inquiry. Sir Ken advised him that he had received advice that his resignation would not become effective until 'the subject of action' by the Government and that the Government could ask him to consider withdrawal of his resignation pending the outcome of the Rush Inquiry. Inspector Gawne agreed and said he would 'feed that in' to Government.

Within 20 minutes of this conversation a further conversation took place between Sir Ken and Inspector Gawne. In the course of that further conversation Sir Ken suggested that the Rush Inquiry was 'insurance' in the event that the VO did not 'nail' the crime statistics complaint 'but if the Ombudsman nails it [Mr Overland] is done'. Several minutes after that conversation took place Inspector Gawne telephoned Inspector Robertson and had a conversation which lasted almost 15 minutes.

Inspector Gawne gave evidence to OPI that he made the call to 'advise Inspector Robertson of Sir Ken's concerns around what was happening in the management of the police force and that in the natural justice type argument (sic) that he should have been given the option to have his .... resignation withdrawn'.

[15] See the discussion about these concerns set out in paragraphs 64–75 of the VO report *Investigation into allegations of detrimental action involving Victoria Police*, June 2012.

[16] These events are summarised in more detail in paragraphs 64–77 of the VO report *Investigation into allegations of detrimental action involving Victoria Police*, June 2012.

Part 1 of the OPI report – the Driver Taskforce 'leak'

Immediately after that telephone call ended, Inspector Robertson telephoned Mr McKenzie. The call lasted only 57 seconds. Inspector Robertson told OPI investigators that she 'may' have been speaking with Mr McKenzie about an issue involving the trafficking of women involved in the sex industry. Three minutes after terminating his call to Inspector Robertson, Inspector Gawne again telephoned Sir Ken and said 'I've fed that in'.

A short time later in the afternoon of 9 May 2011 Sir Ken notified both Mr Weston and Inspector Gawne by SMS that 'Only G in Council can accept resignation of CCP, DC or AC'.

Several minutes after this SMS was sent Inspector Robertson telephoned Inspector Gawne and had a four-minute telephone conversation with him. Immediately following this telephone conversation Inspector Robertson telephoned the adviser.

At 7:24pm on 9 May 2011, Sir Ken was telephoned by Inspector Gawne who passed on a suggestion from a former police officer that Sir Ken should make a direct approach to the Premier and Deputy Premier to have his resignation put on hold. Sir Ken informed Inspector Gawne that he had written a letter to 'the Government because Mr Weston had advised him that the Government had asked whether he would consider withdrawing his resignation'. He read extracts of the letter to Inspector Gawne. However several hours later Sir Ken telephoned Inspector Gawne and expressed concerns that the proposal to withdraw his resignation appeared to have been 'cooked up by the staffers' and said that he may have been foolish in sending the letter. He said 'keep it to yourself because I don't think it's got any further than a few people in the outer office'. Inspector Gawne said 'Well, I'll make some inquiries and find out'.

The OPI report states that its investigation has established that Mr Weston, who raised with Sir Ken the proposal that he withdraw his resignation , prepared two copies of a briefing note relating to the matter, one copy of which was left in the Minister's in-tray. Mr Weston gave evidence to OPI that before sending the briefing note to the Minister he had emailed it to Mr Davies. He said that Mr Davies wanted some changes made to it and that 'we did kick it back and forth to make sure that we were both happy with it'.

Mr Davies gave evidence to OPI that he had no recollection of ever seeing the briefing note. At 12:45pm on 11 May 2011 Mr Davies met with Mr McKenzie in Spring Street, Melbourne. Mr Weston gave evidence to OPI that subsequent to this meeting he received a phone call from Mr Davies stating 'I need to talk to you urgently in person'. Mr Weston then met with Mr Davies in Spring Street at 2:15pm. According to Mr Weston, Mr Davies informed Mr Weston that *The Age* 'know about' the briefing note. Mr Weston has stated that he believed that the leak of that matter to Mr McKenzie came from OPI. However the OPI report notes that 'Mr Davies and Mr Weston were unaware that Deputy Commissioner Jones had shared the "proposal" with Inspector Gawne (4:01pm, 9 May 2011), who had shared it with Inspector Robertson (4:38pm 9 May 2011), who then immediately telephoned Mr McKenzie (4:55pm, 9 May 2011).'

The OPI report concludes that:

> *'Inspector Gawne's attempts to facilitate discussions between Deputy Commissioner Jones and the Government involved the disclosure of highly confidential operational information concerning the Driver Taskforce investigation to Inspector Robertson, a close friend of Mr McKenzie. Inspector Gawne was not entitled to provide the information to Inspector Robertson; Inspector Robertson did not have a "need to know" of the broad strokes or the specifics of Deputy Commissioner Jones's concerns in this regard. The actions of Inspector Gawne also led to the disclosure of operational information to the adviser who clearly did not have a "need to know"… On balance it is most likely that Inspector Gawne's release of confidential information to Inspector Robertson triggered a chain of events that helped inform articles written by Nick McKenzie and Richard Baker. This chain of events appears to have started as far back as February 2011 when Inspector Gawne and Inspector Robertson were attempting to facilitate access to the Government on behalf of Deputy Commissioner Jones.'*

Part 1 of the OPI report – the Driver Taskforce 'leak'

OPI conclusions to Part 1

The OPI report concludes that while Sir Ken may not have been the direct source of leaks of confidential VicPol information to the media, he used a 'network of intermediaries' to assist in 'publicly ventilating' his 'corporate concerns'. The OPI report observes further that the 'use of intermediaries by Sir Ken as a means of communication, in addition to contravening the 'need to know' principle, heightened the likelihood that confidential information would enter the public arena'.

The OPI report places considerable emphasis on the part played by Mr McKenzie. It is critical of the VO's report relating to its investigation into an allegation that Mr Overland took detrimental action against Sir Ken because, so it was alleged, Mr Overland suspected he was the whistleblower in the VO investigation into the early release of crime statistics by VicPol in October 2010. In particular the OPI report is critical of a finding, which it described as 'an exoneration of Sir Ken', to the effect that there was no evidence to show that he was the source of the unauthorised disclosures to Mr McKenzie. Mr McKenzie was interviewed by OPI investigators. As the OPI report states he has at all times, both to OPI and to the VO, denied that Sir Ken was his source.

The OPI report contains the following piece of transcript relating to this matter.

> *McKenzie: There's not – and I – I will say this: there wasn't one source. There was many – many sources over a long period of time, going back months.*
>
> *OPI: Prior to publication?*
>
> *McKenzie: Absolutely, yeah. I mean, I've been following the Hodson stuff for a long, long time and my knowledge has been building up very slowly over a long period of time – what was happening in prison, the players, you know. The concerns we reported, "Oh, my God, Deputy Commissioner's got concerns" – blind Freddy, if he knew the facts, would have had those concerns. It wasn't amazing that Deputy Commissioner had them at all. Everybody in Driver had those concerns. Many people in the Crime Department had those concerns. Just you hammer it all home on – I didn't need Deputy Commissioner to say to me, "McKenzie, come here. I've got these concerns. This is what's happened in prison." You could see what had happened.'*

The OPI report rejects the evidence of Mr McKenzie in relation to whether or not Sir Ken was the source of such disclosures. First, it relies upon the accuracy of the information he had in his possession as to 'concerns' held by Sir Ken. Secondly it relies upon Mr McKenzie's so called 'secret' attendance upon Sir Ken's home on the evening of 6 May 2011. Thirdly it relies upon the fact that Mr McKenzie in his article of 7 May 2011 stated that Sir Ken 'could not be contacted for a response last night'. This, the OPI report argues, was demonstrably untrue as the evidence is clear that Mr McKenzie met Sir Ken on the previous evening.

It is appropriate to observe that Mr McKenzie was provided by OPI with parts of Part 1 of the draft OPI report to which he provided a response. In his response Mr McKenzie stated that at his meeting with Sir Ken on the evening of 6 May 2011, Sir Ken 'did not give a comment and was not prepared to give a comment'. In relation to his use of the phrase that Sir Ken 'could not be contacted for a response last night', Mr McKenzie stated 'I strongly assert that the use of this phrase, and my explanation around it, is entirely consistent with my version of events. I went to Sir Ken's house to inform him of an already written article for which he was not the source and, upon Sir Ken expressing concern that the article made him appear a source, certain changes were made to lessen this'.

Futhermore, the OPI report refers to what it describes as 'discrepancies in Mr McKenzie's dealings' with the VO. The first such matter arises from a two-page extract of Mr McKenzie's interview with the VO on 23 March 2012, which states that Mr McKenzie in giving sworn evidence to the VO claimed that he met with Sir Ken only once 'prior to a deadline for a story…The story in question was about Carl Williams' death in prison and the systematic failings around that'. In a later interview with OPI investigators in July 2012 Mr McKenzie stated 'I told the Ombudsman I met him only once – I think I've met him twice. I may have met him more times, but I think the first time I met him was over a police corruption issue in a hotel…'.

Part 1 of the OPI report – the Driver Taskforce 'leak'

The second 'discrepancy' upon which the OPI report relies is the issue of how Mr McKenzie obtained the telephone number of Sir Ken. Mr McKenzie gave sworn evidence to the VO that he obtained the telephone number from a 'civilian', not someone in the police force. The report states that Mr McKenzie provided OPI with the name of the civilian, however that person 'failed to respond to OPI's request for an interview'.

The report does not explain why OPI did not take the matter further with this witness if it considered the matter to be relevant. However, the report relies upon the sworn evidence of Inspector Gawne who said that after having been contacted on 6 May 2011 by Mr McKenzie who was seeking to speak to Sir Ken, Inspector Gawne provided Sir Ken's phone number to Mr McKenzie. Subsequently, an intercepted message sent by Sir Ken to Mr McKenzie on 8 May 2011 requested Mr McKenzie to 'Please call this number [deleted] but not from your mobile'.

In his response to the draft report Mr McKenzie states that he simply overlooked his earlier meeting with Sir Ken when he told the VO that he had only met him once.

The response of Sir Ken to Part 1

As stated above, although Sir Ken did not participate in the OPI investigation, he was provided with a copy of the draft OPI report. Also as stated above, the legal advisers to Sir Ken delivered a detailed response to the OPI report. The OPI report refers to the response in summary in a number of places in the report. I considered it appropriate to obtain and consider the response in full, rather than rely only upon the summary of the response as appearing in the OPI report. Accordingly, where I refer below to the response of Sir Ken to the OPI report I am referring to the document (and attachments) provided to OPI on 23 January 2013, rather than to the summaries of such response contained in the OPI report.

As stated above, the response is highly critical of the OPI report and the methodology adopted by OPI. Indeed it is contended that the OPI report 'demonstrates a clear methodology… of pre-judging Jones' guilt and then conducting an investigation to support that conclusion'.

I shall return to some of these criticisms later. However in response to Part 1 of the OPI report dealing with the Driver Taskforce leak, Sir Ken denies that he was the 'source of the information' – the subject of the Driver Taskforce leak.

The response points out that Mr McKenzie has consistently denied that Sir Ken was his source. Indeed it is argued that the OPI theory in relation to this leak requires a conclusion that Mr McKenzie has been consistently untruthful in making that denial, and furthermore that in making that denial in the course of giving evidence to the VO on oath he has committed a perjury. I consider that there is some weight in that argument as advanced in the response.

If Sir Ken was in fact a direct informant of Mr McKenzie, all Mr McKenzie had to do, as he has done in other regards, was to rely upon journalist privilege. However, he has on several occasions stated positively that Sir Ken was not his informant. Furthermore, the conclusion reached by the OPI report that Sir Ken was guilty of a 'glaring omission', in that he did not tell Superintendent Fryer of his discussion with Mr McKenzie of 'the evening of 6 May 2011' is rejected by the response on the basis that the evidence is unclear as to whether or not the conversation in question took place before or after Sir Ken spoke to Superintendent Fryer.

It will be recalled that the OPI report refers to the telephone conversation in question merely as having occurred 'on the evening of 6 May 2011'. The OPI report notes that Superintendent Fryer made notes of the conversation. I expect that such notes made by a senior police officer would have contained a precise reference to the time of the conversation and if so that the OPI report should have referred to it.

Nevertheless, it is appropriate to observe that whilst the response of those advising Sir Ken is critical of the fact that the OPI report left the chronology of these conversations unclear, the true facts are no doubt within the knowledge of Sir Ken and the lack of clarity as to the true chronology could have been resolved by him.

Part 1 of the OPI report – the Driver Taskforce 'leak'

The response is further critical of the term used in the report of a 'select few' having access to the information about the Driver Taskforce, when it is argued that the Taskforce was comprised of at least 20 people including several people from OPI who oversaw the investigation. The response notes that the draft OPI report did not refer to an opinion expressed by Superintendent Fryer to the VO's investigators in September 2011, that he [Fryer] 'had no reason to think' that the information known by Mr Mackenzie had come from Sir Ken. The response refers to the failure of the OPI report to refer to this opinion as 'an extraordinary selectivity in the treatment and presentation of the material available to OPI'.

I observe that the OPI report does refer to the fact that Superintendent Fryer had said to OPI that he was 'concerned that the source of Mr McKenzie's information was either Sir Ken or someone closely connected to him'[17]. If he did say this to OPI it would appear that it was somewhat different from what Superintendent Fryer had earlier told the VO.

The OPI report states that the matters raised with Superintendent Fryer by Mr McKenzie at their meeting on 5 May 2011 were matters which were within the knowledge of 'a few select people'[18] within VicPol. The response relies upon a statement made to the VO by Superintendent Fryer on 28 September 2011 to the effect that in his view the information known by Mr McKenzie came from someone associated with the Driver Taskforce Steering Committee or 'someone very close' to the Committee[19]. It argues that the people who were 'very close' to the Steering Committee 'were numerous and include Driver Taskforce investigators, ex Petra Taskforce members, senior command within VicPol, VicPol lawyers and senior personnel within the VicPol Media Unit'.

Furthermore Sir Ken submits that 'core operational information gathered by the Driver Taskforce, the truly critical information known only to a few' including him, was not leaked. In support of this contention the response refers to a number of highly confidential and critical matters that it argues were known only to a very few, including Sir Ken.

The response sets out in some detail the nature of a number of those critical matters. It is not appropriate to repeat those matters here, but I accept, as the response states, that the matters in question and referred to in the response were indeed both highly confidential and of considerable importance.

By way of comment at this point, the matters referred to were not the subject of any leak and I accept the weight of the argument that had knowledge of such matters been in the possession of Mr McKenzie it would have been an indication of the source of the leak being at the very centre of the small 'need to know' group who were acquainted with such knowledge. Taking into account the significance of the discussion between Superintendent Fryer and Mr McKenzie it is regrettable that the OPI report contains no statement as to whether or not any investigation was undertaken by OPI to identify precisely who had, and who did not have, knowledge of the actual matters raised by Mr McKenzie.

That would have been an appropriate starting point to the investigation as it would have identified the group of people who had the relevant knowledge and thus the potential sources of the leak. The failure to have undertaken this basic step in the investigation does lend weight to the complaint made by the legal advisers to Sir Ken that the report demonstrates a 'methodology adopted by the OPI of pre-judging Jones's guilt and then conducting an investigation to support that conclusion'.

[17] The OPI report did not provide a direct quotation of this statement of Superintendent Fryer but rather appears to have paraphrased it.

[18] Likewise the evidence of Superintendent Fryer is not quoted directly in the report but is paraphrased.

[19] Paragraph 60, *Investigation into allegations of detrimental action involving Victoria Police*, VO, June 2012.

Part 1 of the OPI report – the Driver Taskforce 'leak'

The facts that are established about the Driver Taskforce leak

I turn now to consider what I conclude is properly established by the OPI investigation into the Driver Taskforce leak. As stated above on 19 April 2010 Mr Williams was murdered and the Driver Taskforce was established and then Superintendent Detective Doug Fryer was appointed to head the Taskforce. Superintendent Fryer reported to the Steering Committee of the Taskforce that was chaired by Sir Ken. Up until 28 December 2010 Inspector Gawne was responsible for taking the minutes of the meetings of the Steering Committee. On 20 April 2010 OPI determined that it would 'provide an independent investigation by oversight to ensure the conduct of a thorough, objective and unbiased independent investigation'. The oversight agreement made between OPI and VicPol to this effect was signed by Sir Ken on 10 June 2010.

In May 2010 the Driver Taskforce acquired a substantial amount of documentation from Corrections Victoria which included the Armytage email.

The evidence is clear that Sir Ken was of the opinion that Ms Armytage had done the wrong thing by interfering in operational matters and furthermore that the VicPol investigation into her involvement in the matter was insufficiently rigorous. It is apparent that he and Mr Overland did not agree about the direction that the investigation was taking. I do not consider that anything turns on this disagreement, as reasonable minds might well differ as to the course an investigation should take.

On 15 February 2011, Sir Ken asked Superintendent Fryer to contact Mr Taylor in relation to his concerns regarding Ms Armytage's involvement in the matters surrounding the death of Mr Williams. The response provided on behalf of Sir Ken argues that this was a 'logical and proper direction given Jones' knowledge concerning the Ombudsman's ongoing related investigations' and therefore cannot be inferred to be 'part of some orchestrated cover up'. I am unable to comment one way or the other on this as there is no material before me to demonstrate what level of knowledge the VO had about the Driver Taskforce nor what level of knowledge Sir Ken had about the VO involvement in that matter. Superintendent Fryer was also instructed by Sir Ken not to inform his immediate superior, Assistant Commissioner Moloney, of his meeting with Mr Taylor.

Even if in the circumstances it was appropriate to advise the VO, the latter direction appears to me to be inexplicable, but that said I agree that it cannot necessarily be assumed that the direction given by Sir Ken was part of 'some orchestrated cover up'.

As stated above and after Superintendent Fryer was contacted by Mr McKenzie seeking a meeting, Superintendent Fryer met with Mr McKenzie at a Melbourne cafe on 5 May 2011. In the course of that discussion it became apparent to Superintendent Fryer that Mr McKenzie was aware of confidential aspects of the Driver Taskforce investigation.

It will be recalled that after the meeting concluded Superintendent Fryer spoke to Sir Ken, and enquired as to whether OPI should be advised of the leak as it formed part of their oversight role and that Sir Ken instructed him not to advise OPI as 'everything we tell OPI goes to Overland because he and Jetovic (sic) are mates, let (Deputy Ombudsman) John Taylor know'. This response is difficult to understand. Whilst Sir Ken may have had concerns about OPI being too close to Mr Overland, the fact is that OPI was in charge of the oversight of the Driver Taskforce leak investigation and not the VO. Likewise, the concern expressed by Sir Ken that OPI might advise Mr Overland is difficult to understand as there was every reason for him to be told forthwith of the leaking of such highly confidential material.

Part 1 of the OPI report – the Driver Taskforce 'leak'

As stated above the OPI report places considerable reliance upon the fact that Sir Ken telephoned Superintendent Fryer 'on the evening' of 6 May 2011 but did not inform him that he had met with Mr McKenzie at his home prior to making the telephone call to Superintendent Fryer. However, as observed by me above it is not established by the facts recited in the OPI report whether or not the meeting with Mr McKenzie took place before or after Sir Ken spoke to Superintendent Fryer. The OPI report observes that Superintendent Fryer in giving evidence to OPI referred to his notes of the conversation and yet the time of the conversation does not appear in the OPI report. It assumes that at the time Sir Ken spoke to Superintendent Fryer he had already met with Mr McKenzie and that his failure to inform Superintendent Fryer of that fact reflects his duplicity.

I have no confidence that such a conclusion is open on the facts as stated in the OPI report. The OPI report does not clearly establish that the meeting between Sir Ken and Mr McKenzie occurred before the telephone conversation he had with Superintendent Fryer and thus the conclusion as to duplicity on the part of Sir Ken.

Whilst it is true that certain aspects of the behaviour of Sir Ken, such as his meeting with Mr McKenzie on 6 May 2011, may raise suspicion, in the absence of any direct evidence, the argument that he was responsible for the divulging of confidential information to Mr McKenzie rests solely on the hypothesis that Sir Ken provided information to intermediaries with the intention that those intermediaries would pass the information in question to the media, a matter to which I will return later.

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5. Part 2 of the OPI report – Police intelligence brief 'leak'

The OPI report argues that a 'further example of Deputy Commissioner Jones' pattern of withholding information' occurred in respect of a leaked VicPol intelligence brief to radio station 3AW.

It will be recalled that the release of VicPol crime statistics for the third quarter of 2010 was later the subject of a VO investigation and report which investigation established that the statistics were in part, misleading and inconsistent with other data[20].

Sir Ken was the appointed media spokesman for the release of the final quarter statistics for 2010. In preparing for the release of the figures Sir Ken sought additional statistical data from VicPol's Melbourne Intelligence Team. In particular, data was sought in relation to assault trends in the Melbourne CBD. On 20 February 2011 Sir Ken requested Superintendent Rodney Wilson to conduct a more detailed analysis of this matter than had been the case previously in the third quarter. Sir Ken expressed concern to Superintendent Wilson about the comments made previously by Deputy Commissioner Walshe to the effect that there had been a decrease in assaults in the Melbourne CBD.

On 22 February 2011 the intelligence brief that had been prepared by members of VicPol's Melbourne Intelligence Team was provided to Superintendent Wilson who then provided it to Sir Ken by email. It was forwarded automatically to Inspector Gawne who had been previously the staff officer to Sir Ken, but who at this time was seconded to PSC. Within 20 minutes of receipt of the email Sir Ken emailed the Intelligence Brief to his personal email account.

The 2010 fourth-quarter crime statistics were released publicly on 23 February 2011. On the same day Sir Ken was interviewed on Mr Mitchell's talkback program on 3AW in relation to those statistics.

On the following day and in the course of his talkback program, Mr Mitchell expressed concern about the accuracy of the VicPol statistics. He said that it had been suggested that there had been a 'selective use of statistics'. He said that it had been 'suggested' to him that the street assault figures did not include 'assaults in car parks or fast food outlets or licensed premises'.

On the following day, Friday 25 February 2011, Mr Overland was interviewed by Mr Mitchell on his program and asked to confirm that the statistics that had been released earlier that week were correct. Three days later, on Monday 28 February 2011 Mr Mitchell informed his listeners that he had before him a 'leaked police intelligence brief', which he said (accurately) had been drawn up on 22 February 2011. He said that brief showed that 'assaults in multiple level car parks are up 500%; assaults at train stations are up 33%; assaults in restaurants and take away food shops are up 42%...'.

Subsequently the leaked intelligence brief was posted on the 3AW website, with the security classification and the identity of the authors redacted. On the morning of 28 February 2011, Sir Ken was notified of the leak of the intelligence brief by email, a copy of which was also automatically forwarded to Inspector Gawne. That morning Inspector Gawne directed Inspector White, a PSC Inspector, to commence an investigation into the leak. Later that day VicPol issued a press release regarding the leaked intelligence brief. The press release stated that Mr Overland had not seen the brief nor was he aware of its contents and that in responding to Mr Mitchell earlier in the week Mr Overland 'was responding in good faith to a different set of data'.

[20] *Investigation into an allegation about Victoria Police Crime statistics*, VO, June 2011.

Part 2 of the OPI investigation report – Police intelligence brief 'leak'

On 8 March 2011 Assistant Commissioner Dunne referred the subject of the leaked intelligence brief to OPI. On 10 March 2011 then OPI Assistant Director, Mr John Nolan, met with Mr Taylor to discuss the leaked intelligence brief and the potential of the impact of the investigation into it upon the then current VO investigation into the whistleblower complaint of the alleged manipulation of crime statistics by VicPol. As stated above and as result of a request from the VO to the then Director of OPI, the investigation into the crime statistics leak was held in abeyance pending the outcome of the VO investigation into the alleged manipulation of crime statistics as from 18 March 2011. In June 2012, upon the conclusion of that investigation, the OPI investigation into the leak of the intelligence brief was resumed. The OPI report states that the resumed investigation established the following matters:

- The brief had been prepared at the request of Sir Ken and had not been generated for any other purpose.
- On 2 March 2011 Inspector Gawne received the PSC file relating to the leak of the intelligence brief, which he then referred to his subordinates for investigation.
- At 5:45pm on 2 March 2011 Inspector Gawne attended at the home of Sir Ken. Inspector Gawne has agreed that he 'may have' discussed the leaked brief with him at that time and recalled that Sir Ken had expressed a view that anyone who had access to it on the 'email list' could have leaked it to the media.
- An audit of the VicPol email system established that a total of 10 people received the brief by email prior to its publication on the 3AW website. Included in that number were Sir Ken and Inspector Gawne.
- No person other than Sir Ken was found to have emailed statistics outside VicPol. Apart from Sir Ken and Inspector Gawne, eight other VicPol personnel had electronic access to the brief between 20 February 2011 and 24 February 2011. Those others were either engaged in producing the brief or received it as part of their routine duties or received it only after the period when the probable leak occurred.
- On 7 March 2011 at 4:40pm Assistant Commissioner Dunne met with Inspector Gawne in relation to the email audit results and informed him that the email audit revealed that no person other than Sir Ken emailed the statistics outside VicPol. Just over an hour later Inspector Gawne sent an email to Inspector White declaring a conflict of interest, due to his personal and professional relationship with Sir Ken and advising Inspector White to liaise directly with Assistant Commissioner Dunne in relation to the investigation.
- Also on 7 March 2011 and at 8:02pm Sir Ken sent an email to Assistant Commissioner Dunne from his private email account whereby he advised Dunne that he had printed a copy of the brief at his home on 22 February 2011 but had shredded it on either 23 or 24 February 2011.
- In a telephone conversation with Inspector Gawne on 9 May 2011 Sir Ken was critical of the fact that Assistant Commissioner Dunne had referred the investigation of the matter to OPI on 8 March 2011.

Part 2 of the OPI investigation report – Police intelligence brief 'leak'

OPI conclusions to Part 2

The conclusion that OPI reached after completing its investigation is qualified, as stated in the OPI report, by the fact that the investigation was suspended between 18 March 2011 and June 2012 during which time VO conducted the crime statistics investigation under the WP Act. The report states that the '...18 month suspension of OPI's investigation impacted on OPI's ability to gather contemporaneous evidence and reach a more definitive conclusion on these matters'.

Nevertheless, the OPI report concluded that 'on balance' it was Sir Ken who was the 'most likely individual responsible for providing the intelligence brief to 3AW'. The OPI report stated that this conclusion had been reached on the basis of the following considerations:

'1. The period between the production of the Intelligence Brief and its leak to 3AW was
a. relatively short. It is known that Deputy Commissioner Jones:
b. received the Intelligence Brief on 22 February 2011 at 4.05 pm.
c. sent the Intelligence Brief to his personal email account on 22 February 2011 at 4.21 pm.
d. printed the Intelligence Brief; and
e. was interviewed on 3AW by Neil Mitchell (telephone) on the morning of 23 February 2011,

2. Mr Mitchell was in receipt of statistical data from the Intelligence Brief on or before 24 February 2011.

3. Deputy Commissioner Jones's statement made to then Deputy Commissioner Lay on 25 February 2011 (the day of the Mitchell interview of Overland) that 'there will be more of this to come in the next two or three days'.

4. Deputy Commissioner Jones also failed to provide notification at specific junctures to relevant stakeholders as might have been reasonably expected:
a. He failed to notify the Victoria Police Executive of the existence of the Intelligence Brief after its creation and before its exposure on 3AW.
b. The failure to notify the Victoria Police Executive of his possession and handling of the document, including sending the document outside the Victoria Police secure IT network, after the leak became public on 28 February 2011.
c. He maintained knowledge of (the) PSC investigation into the leaked document between 28 February 2011 and 7 March 2011 including a discussion with Inspector Gawne on 2 March 2011 and he failed to disclose his involvement with the document, speculating that anyone on the email list could have leaked it to the media.

5. Deputy Commissioner Jones was motivated, and further investigations reveal that he possessed the intention and engaged in conduct, to disclose confidential Victoria Police information for purposes of undermining the then Victoria Police executive leadership and the Chief Commissioner.'

In addition to these considerations, the OPI report observes that given the sensitivities surrounding crime statistics, together with a rumoured VO investigation into the issue, and the level of violence in the Melbourne CBD 'Deputy Commissioner Jones was obligated (sic) to inform his superior officer, Mr Overland, of the issues that (had) been identified' by the intelligence brief. Furthermore the OPI report observes that:

'Deputy Commissioner Jones was sufficiently aware of the leak from 28 February 2011, when the PSC under his purview, commenced an investigation into how the documents ended up at 3AW. He had an opportunity at that stage to volunteer his association with the intelligence brief. Instead, Deputy Commissioner Jones failed to self-report his commissioning of the intelligence brief and what he did with it. Only after an IT system audit revealed him as the only person to have sent it external to VicPol systems did Deputy Commissioner Jones then respond to PSC Assistant Commissioner Dunne's request for information regarding his handling of the intelligence brief.'

Part 2 of the OPI investigation report – Police intelligence brief 'leak'

The response of Sir Ken to Part 2

The response provided on behalf of Sir Ken to the matters raised in Part 2 of the draft OPI report, notes that before it was leaked, the intelligence brief was in the possession of a number of persons, all of whom had equal capacity as he had to have leaked the document.

The response contains strong criticism of the draft OPI report not having made detailed reference to the email sent by Sir Ken in response to Assistant Commissioner Dunne on 7 March 2011 relating to the leak. The failure to do so is stated to be a 'gross departure from any reasonable standard of fairness'. In that email, Sir Ken informed Assistant Commissioner Dunne that he had forwarded the intelligence brief on to his home email address as part of his preparation that night for a press conference that was to take place the following day. The email noted that in the course of 22 February, Sir Ken had received news from his wife who was in the United Kingdom of a medical emergency involving his daughter whereby he left a meeting in Epping and returned to his home so that he could 'better monitor what was happening'.

The response of those advising Sir Ken argues that there was nothing 'out of the ordinary, or nefarious' in him forwarding the intelligence brief to his home and that previously he had used his personal email account for work-related matters. As to his failure to advise VicPol's Executive of the existence of the intelligence brief before its exposure on 3AW he said that '[I]n order to preserve the integrity of the Ombudsman's new investigation that had commenced [into VicPol's crime statistics], [he] had to behave in a way that would least likely influence the landscape that the Ombudsman was about to examine'. He contended that it was unlikely that he would leak a document that he had himself commissioned and which was 'central to an investigation' then being undertaken by the VO. He rejected a suggestion that he had constructed a set of circumstances that would lead to the public embarrassment of Mr Overland, and noted that prior to the intelligence brief being leaked he had determined to resign already and had flagged his intention to do so as early as June 2010.

The facts that are established about the Police intelligence brief leak

I set out below the relevant facts that I consider are established by the OPI investigation into the leak of the intelligence brief. The OPI report relies heavily upon the fact that it was later established that the only dissemination of the intelligence brief outside VicPol was to Sir Ken. However, the intelligence brief was also emailed automatically to Inspector Gawne, who at that time was no longer the Staff Officer appointed to Sir Ken, but who was working with PSC. In total the email was sent to ten persons in VicPol.

There can be no doubt that the earlier release of crime statistics on 28 October 2010 by Mr Overland had caused Sir Ken serious concern . That concern was later confirmed by the VO report into the issue as having some justification.

Prior to 16 February 2011, Sir Ken had expressed his concerns about a number of issues, including the issue of the crime statistics, to Inspector Gawne. He had told Inspector Gawne that he wanted to speak 'to someone about' those concerns. Inspector Gawne knowing that Inspector Robertson had a contact in Government, obtained from her the contact details of the Premier and in due course, the Premier's Chief of Staff Mr Kapel, who Sir Ken met on 16 February 2011.

Inspector Robertson gave evidence to OPI that Inspector Gawne informed her that Sir Ken had 'serious corruption concerns' that related (inter alia) to 'the bogus stats that had been put out allegedly by the Chief Commissioner'. Whilst clearly this evidence is hearsay, it is consistent with other direct evidence of statements made by Sir Ken about this matter. Mr Weston gave evidence that in a meeting he had on 12 April 2011, Sir Ken told him that the release of the crime statistics on October 2010 was the 'greatest act of corruption (Sir Ken) had ever experienced'. Similar language was said to have been used by Sir Ken to both Mr Davies and Inspector Gawne.

Part 2 of the OPI investigation report – Police intelligence brief 'leak'

However, the fact that Sir Ken obviously held strong views about the matter of the crime statistics, and used what some may consider was exaggerated language to describe it, does not mean that he leaked the intelligence brief. There is no doubt it came into the possession of the media quickly, which increases the likelihood that one of the ten people who had possession of the information was responsible. The fact that Sir Ken was the only one of those people to have emailed the intelligence brief outside of VicPol (despite that being in breach of VicPol procedures) adds little, particularly when it was the fact that he was to be the VicPol media spokesman on radio the next morning.

In this regard the response from his legal advisers to the OPI report points out that Sir Ken had from time to time forwarded emails to his own home, had asked his staff to forward material to his home email account and had sent emails to the then CCP who had responded to his home account. Any one of the ten people who had possession of the information could have printed or photocopied the internal document.

The OPI report deals only with the email of the brief to Sir Ken's home email service but does not exclude the possibility of internal email of the Brief by one of the ten people to others inside VicPol and of course does not deal with the possibility that any one of those people could have photocopied the document. The OPI report does not suggest that a thorough investigation of who else had an opportunity to deal with the brief was undertaken. In those circumstances I cannot conclude that Sir Ken was responsible either directly or indirectly for this particular leak. The evidence is simply not strong enough to say that.

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6. Part 3 of the OPI report – the parolee apology 'leak'

Part 3 of the OPI report relates to a further complaint received by OPI from a previous whistleblower on 9 May 2011 alleging that Sir Ken had engaged in the further unlawful disclosure of confidential VicPol information to the media. The whistleblower made this further disclosure on the basis of a view held by the whistleblower that the leak in question corresponded with a pattern of conduct for which it was suspected Sir Ken was responsible, being allegedly improper conduct of the kind that constituted the protected disclosure to OPI of 6 May 2011.

The factual background to this matter is that sometime prior to 5 May 2011 Mr Overland had allocated to Sir Ken the task of investigating the alleged systems failure of the LEAP database to track and manage parolees. On 5 May 2011 Sir Ken sent an email to Mr Overland stating that he was coming to the 'end of his initial review'. He sought guidance as to the next steps and in particular as to whether VicPol should consider advising 'the bereaved families' of persons who had been murdered by parolees about 'what we have found'.

Mr Overland responded to the email on the same date, deferring public disclosure pending the submission of a full report, together with 'written advice from (Sir Ken) setting out the factual circumstances that leads (sic) to the conclusion drawn to date'. In his email in response Mr Overland noted that VicPol had a responsibility to the Coroner. As to the issue of notification of bereaved families, Mr Overland noted that careful consideration would have to be given as to how the families were to be advised. He said 'If we have let the families down I do not want to exacerbate the situation by handling notification badly'.

On 8 May 2011 an article appeared in the *Sunday Herald Sun*. The article attributed a 'police source' as stating that the 'animosity between Deputy Commissioner Jones and Mr Overland was steeped in professional jealousy'. More significantly the article stated that they were 'understood to have clashed recently over the Victoria Police parolee deaths controversy, which (the) Deputy Commissioner was in charge of reviewing. It is understood (the) Deputy Commissioner wanted to visit, with Mr Overland, some of the families involved and apologise'.

The OPI report states that on the same day the Editor of the *Herald Sun* had telephone contact with Sir Ken wherein he sought to advise of a forthcoming article whereby the journalist Ms Carly Crawford's 'main line' was to relate to the parolee apology issue. The editor extended an invitation to further comment but Sir Ken declined to do so. The transcript of this intercepted telephone call is not included in the body of the report. This is only one of many examples in the report of important matters being the subject of summary rather than a recitation of the original evidence.

On the next day, Monday 9 May 2011, Mr Overland was interviewed by Mr Mitchell on 3AW. It is relevant to note that Mr Mitchell had earlier interviewed Sir Ken on 19 April 2011 and questioned him about homicides committed by persons who were on parole[21]. Sir Ken on that occasion had said that he was looking into the issue 'for the Chief to determine what went wrong'.

In the course of the interview of Mr Overland on 9 May 2011 Mr Mitchell asked Mr Overland if Sir Ken had provided him with a report in relation to the parolee issue. Mr Overland responded by saying 'Well that is interesting Neil. I hadn't got a report. I got a private email from Sir Ken – sent to me on Thursday afternoon. I sent a private email back to him, not disagreeing with what he was saying, but actually asking for more work to be done… it's interesting that it's now in the public domain… it's a private email between a Deputy Commissioner and myself'. Mr Mitchell then asked Mr Overland if he was inferring that Sir Ken had leaked the email to which Mr Overland responded 'No, I am just saying it's interesting'.

[21] Paragraphs 122–125, *Investigation into allegations of detrimental action involving Victoria Police,* VO, June 2012.

Part 3 of the OPI investigation report – the parolee apology leak

Because the '3AW leak' has become a matter of some significance, it is appropriate at this point to make the comment that I do not consider that this interview revealed that Mr Mitchell was in possession of the email, or had knowledge of its content at all.

The OPI report does not contain the transcript of the interview. However a substantial section of the interview is set out in the response to the OPI report provided by the legal advisers to Sir Ken. That section makes it clear that at no point did Mr Mitchell refer to having seen or viewed the email. The specific question asked of Mr Overland by Mr Mitchell did not refer to him having possession of or having access to any email. Clearly Mr Overland (and perhaps not unreasonably taking into account the timing of his receipt of the email and the asking of the question by Mr Mitchell) assumed it did. However Mr Mitchell's question could well have been, and in all likelihood was, a follow-up enquiry based upon his interview with Sir Ken on 19 April 2011 rather than a question based upon the coincidental exchange of emails several days earlier.

Indeed, the transcript reveals that Mr Mitchell said as much. He said 'the first thing that came to my mind when I'd heard he had gone, I thought "I wonder whether he'd finished that report?" That's a reasonable thing to ask'.

That said however, the issue of the exchange of views about the parolee issue between Sir Ken and Mr Overland was nevertheless clearly in the public domain. On the same day, Monday 9 May 2011, the *Herald Sun* published an article written by Ms Crawford and others, stating 'The *Herald Sun* understands that Deputy Commissioner Jones and Mr Overland had a conversation about the parolee scandal the day the Deputy Commissioner was marched out'. The article attributed the source to a 'senior police source', but Mr Weston gave evidence to OPI that he had provided Ms Crawford with the information after he had been told about it by Sir Ken on the evening of 6 May 2011. The article also stated that 'Sources say Mr Overland is also privately suggesting the Office of Police Integrity may be considering launching an investigation into Deputy Commissioner (Jones) over our report that appeared on Saturday about Carl Williams' death'.

On that same day, Sir Ken sent an SMS to Mr McKenzie stating 'H Sun has fallen for it. Carly Crawford has it in her yarn about OPI and Williams story. Mud sticks'.

Mr Weston provided evidence to OPI on 30 June 2011 to the effect that Sir Ken had briefed him on the parolee issue and told him that there were problems with the parolee system and that 'people have died because of it'. Neither the transcript of Mr Weston's evidence nor substantial parts of it were reproduced in the OPI report. Rather, the OPI report provides a summary of his evidence. Critical as this evidence is, it required to be set out in detail in the OPI report rather than be merely the subject of a summary.

That said, the OPI report states that Mr Weston told OPI that on 6 May 2011 he had been contacted by Sir Ken who said that he had been 'ordered out of the building'. Mr Weston claims that he was told by Sir Ken that prior to being asked to commence a period of leave, Sir Ken had told Mr Overland that 'we should go and apologise' in relation to the parolee issue. Mr Weston admitted to OPI that after receiving the telephone call from Sir Ken, he discussed the parolee issue with Ms Crawford. Mr Weston told Ms Crawford about the discussions that Sir Ken had had with Mr Overland in relation to the parolee issue. There can be no doubt that Mr Weston had no hesitation in passing on anything that he considered to be detrimental to Mr Overland to the media. More detail of the 'media campaign' conducted by Mr Weston against Mr Overland is set out in OPI's *Crossing the Line* report[22].

[22] Pages 53–76, *Crossing the Line*, OPI, October 2011

Part 3 of the OPI investigation report – the parolee apology leak

OPI conclusions to Part 3

Notwithstanding the fact that this Part of the OPI report contains the heading 'The leak of confidential correspondence', the report does not conclude that the actual parolee apology email exchange had been leaked to the media. Rather, it concludes that a version of it had been released. The OPI report concludes that Mr Weston was a 'conduit used by Deputy Commissioner Jones to facilitate the release of incorrect and corporately damaging information to the media'.

The OPI report considers the question of the extent to which Sir Ken was responsible for the leak of the contents of the email to the media. It concludes that 'Mr Weston's evidence to the OPI is sufficient to substantiate that Deputy Commissioner Jones was instrumental in acting as the source for this information into the media'.

The report concludes that 'whether the email itself was leaked is immaterial; the content of that document and discussions with the Chief Commissioner were directly misrepresented by a party to the original communication and provided to someone who had no legitimate "need to know" the state of a preliminary systems review by Victoria Police'. Furthermore, the report concludes that Sir Ken 'was aware, or ought to have been aware, of Mr Weston's conduct and his deliberate media campaign to undermine the office of Mr Overland'.

The response of Sir Ken to Part 3

First, and partly for the reasons expressed by me above, the response rejects the OPI contention that the radio interview between Mr Neil Mitchell and Mr Overland on 9 May 2011 revealed that the email exchange between Sir Ken and Mr Overland of 5 May 2011 had been leaked to Mr Mitchell.

The response refers to the interview between Mr Mitchell and Sir Ken, which took place on 19 April 2011. On that date the *Herald Sun* had published an article that suggested that a number of Victorians may have been murdered by parolees and that some of the murders could have been prevented by appropriate investment in VicPol IT systems.

On the morning of 19 April 2011, the Premier had been interviewed by Mr Mitchell about the matter. Subsequent to that interview, Mr Mitchell interviewed Sir Ken. In the course of the interview Sir Ken said '…I'm very concerned about it as indeed is the Chief and he's got me looking into this in some depth'. Mr Mitchell then said '… What do we say to them (referring to the families of the victims) Sorry?' To which Sir Ken said 'Well. Indeed we do. Indeed we do'. The response sets out in detail the transcript of the discussion between Mr Mitchell and Mr Overland that took place at the time of the interview on 9 May 2011. On behalf of Sir Ken it is argued that:

> *'It is clear from that interview that Mitchell asked about the status of a report that had been discussed in an interview with Jones three weeks earlier. Overland then incorrectly jumps to the conclusion that Mitchell was referring to the email exchange of 5 May 2011. This simply was not the case and would be evident to anyone who listened to the interview. It is clear, from the transcripts that Mitchell at no point indicates that he is in possession, or has knowledge of, the parolee email. Mitchell is simply seeking to follow up on his 19 April 2011 interview with Jones. Overland introduces the issue of a "private" email exchange being leaked. There is no evidence to suggest that anyone other than Jones and Overland knew of the email until Overland revealed its existence in that interview.'*

As stated above, my examination of the transcript referred to in the response leads me to conclude that this argument is compelling. It is a surprising omission in the OPI report that this argument having been clearly articulated in the response provided on behalf of Sir Ken was not the subject of any consideration in the OPI report.

Part 3 of the OPI investigation report – the parolee apology leak

Furthermore, by his response, Sir Ken 'rejects that he provided the account as alleged by Mr Weston to have been given to him' in relation to his discussions with Mr Overland about the parolee murders[23]. Furthermore, he rejects any suggestion that he used Mr Weston 'as a conduit for some distorted version of the interaction between himself [and Mr Overland] on the issue'. He points out that there was no dispute between him and Mr Overland as stated by Mr Weston. Rather he contends that no final decision had been made concerning the approach to victims' families, and that he had merely asked Mr Overland to consider advising them, a course with which Mr Overland did not disagree. A reading of the email exchange of 5 May 2011[24] relating to this matter tends to confirm this view. The emails do not support the *Herald Sun* claim that there had been a 'clash' between them at all.

The facts that are established about the parolee apology leak

Mr Weston gave evidence to OPI that on the day of being ordered to go 'on leave' (6 May 2011) Sir Ken was in touch with Mr Weston by telephone and informed him that shortly before being asked to go on leave he had spoken to Mr Overland about the 'parolee thing' and said that 'we should go and apologise'. He told Mr Weston that Mr Overland had said he was not going to do so. Sir Ken 'rejects' providing that account to Mr Weston, but the evidence of Mr Weston is that soon after that conversation Mr Weston discussed the parolee issue with Ms Crawford, a *Herald Sun* journalist, and told her the contents of his conversation with Sir Ken. On both 8 May and 9 May 2011 articles co-authored by Ms Crawford were published in the *Herald Sun* which repeated the matters discussed with her by Mr Weston. The version of Mr Weston as to what he was told by Sir Ken in the telephone conversation with him on 6 May 2011 is likely to be generally correct, although whether or not Mr Weston embellished what he had been told when he repeated it to Ms Crawford can only be the subject of conjecture.

For the reasons previously stated by me, I do not think it can be fairly concluded that the raising of the parolee issue by Mr Mitchell with Mr Overland in the course of the 3AW radio program on 9 May 2011 was directly or indirectly related to the email exchange between him and Sir Ken on 5 May 2011. Indeed the transcript of the discussion between Mr Overland and Mr Mitchell which is set out in the response of Sir Ken, suggests strongly that Mr Mitchell was not in possession of either the emails nor aware of their contents. It is certainly possible that there was no leak at all and that it was merely coincidental that Mr Mitchell raised the matter.

OPI did not interview Mr Mitchell. No doubt he would have protected his sources if interviewed, but notwithstanding that likelihood, he may well have been able to shed light on the circumstances under which he raised the parolee issue with Mr Overland in his interview of 9 May 2011. That said, I consider that the evidence does establish that other information about the parolee issue between Mr Overland and Sir Ken came into the public arena by reason of discussion between Sir Ken and Mr Weston.

[23] Although 'the account' alleged by Mr Weston is rejected, no alternative account was provided by those advising Sir Ken, nor is the fact that Sir Ken had a telephone conversation with Mr Weston on the evening of 6 May 2011, denied.

[24] The email exchange is not set out in full in the OPI report but is included as Appendix 1 to the VO report *Investigation into allegations of detrimental action involving Victoria Police*, June 2012.

7. Part 4 of the OPI Report – other disclosures of confidential Victoria Police information

The OPI report refers to what it described as 'other disclosures of confidential information' by Sir Ken. It argues that notwithstanding that Sir Ken 'indicated his engagement with the media was irregular, guarded and professional' the 'evidence does not support Deputy Commissioner Jones' assertions and indications about his engagement with the media' and that 'Deputy Commissioner Jones's direct relationship with media figures is evidenced through the following examples:'

On the morning of 7 May 2011 Sir Ken telephoned a *Sunday Age* journalist, Mr Peter Munro who had left a message earlier on Sir Ken's work mobile phone. Sir Ken returned that call using his wife's mobile phone. At the start of the call, Sir Ken said the following to Mr Munro:

> *'Listen, you – don't use that phone any more, it's probably being monitored… You've already pinged it, but there's nothing I can say to you anyway…. I really can't make any more comments.'*

However Mr Munro persisted and said:

> *'I guess though here's the thing, we spoke yesterday on background, and I understand at the time your reluctance to talk on the record was in part because you were still in there working, trying to do good things. But that opportunity has been taken away from you now.'*

This latter comment was undoubtedly due to the fact that on 6 May 2011 Sir Ken had been requested by Mr Overland to go 'on leave'.

Munro said further:

> *'If I was – obviously in terms of talking on background I would – I'd structure it in a way that wouldn't get back to you. It would – you know, we talk about senior police sources or Government sources or whatever …'. And further: 'well yeah, 'cause yesterday we were speaking about, you know, various offers coming, private offers and also public offers so I assume that still applies. The IBAC role, the offer about – just so I'm clear, when you were talking yesterday about the various offers and you said there's one public and one private. I was working on the assumption that the public one related to the setting up of the IBAC. I hope I didn't misinterpret you there.'*

The following morning an article written partly by Mr Munro appeared in the *Sunday Age* newspaper which article included the following statement:

> *'A senior police source said Deputy Commissioner (Jones) was dismayed by serious problems at Victoria Police, including a failure to communicate child protection concerns, a $100 million blowout for replacing a crime database and flaws in the existing database, which failed to identify parole violators.*
>
> *"You're getting signal after signal that something is seriously amiss…someone needs to address these issues – the community are getting the shit end of the stick." the source said.'*

In addition to the conversation had between Sir Ken and Mr Munro on 7 May 2011, OPI also had evidence of SMS communications between Sir Ken and Ms Lisa Maksimovic, an ABC journalist. At 5:48pm that day Ms Maksimovic sent an SMS to Sir Ken asking:

> *'Have you heard anything about the outcome of govt's meeting with simon (sic)?? Lisa.'*
> *He responded by saying 'No, probably made him (Australian) of the year'.*

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A series of SMS exchanges followed. These included Sir Ken stating that Mr Overland would be doing his best to 'discredit' him. The OPI report concludes that this email exchange demonstrates that Sir Ken and Ms Maksimovic had a 'casual and pre-existing' relationship.

Further SMS messages were exchanged between Sir Ken and Ms Maksinovic on 9 May 2011 whereby Sir Ken made clear his lack of regard for Mr Overland.

However, on 25 May 2011, a further SMS exchange occurred between Ms Maksimovic and Sir Ken whereby she enquired as to whether he would be interested in speaking to *Australian Story*. His response was 'Let's see how this thing plays out first. I am still a cop until 5 August in any event'.

A further matter relied upon by the OPI report in this Part is what it describes as 'Mr Weston's role as a conduit and facilitator for Deputy Commissioner Jones'.

The relationship between Sir Ken and Mr Weston was examined partly in the OPI report *Crossing the Line*. Mr Weston was at all material times a Detective Leading Senior Constable who as from 28 January 2011 was assigned to the office of the Minister for Police and Emergency Services as Police Adviser. At all times Mr Weston had made no secret of his antipathy towards Mr Overland. In the course of his OPI examination relating to the *Crossing the Line* investigation he said:

> *'I was of the view, and I made no secret of it, that Mr Overland was a bad fit for the police force, and that ultimately the only thing that I think that would resolve it would be for him – him to be no longer the Chief Commissioner, and not just to him, but also much of the structure that – that'd been created and the people that had been promoted about him I think were the inept and incompetent…'*

The OPI report adopts the finding of the *Crossing the Line* report to the effect that Mr Weston was 'responsible for promoting a campaign against Mr Overland'[25]. I consider that the evidence establishes that such a finding has a sound basis.

A further matter upon which this Part of the OPI report relies is what is described in it to be the intervention of Sir Ken to halt a 'plan' by Mr Weston to discredit Mr Taylor[26]. In May 2011 Mr Weston learnt of allegations made against the Deputy Ombudsman and Mr Overland in 1997 in relation to complaints made to the Commonwealth Ombudsman about the conduct of an Australian Federal Police (AFP) investigation.

The allegations were to the effect that in 1997 Mr Taylor, who was then employed by the Commonwealth Ombudsman, had undertaken a 'reluctant and inadequate investigation' into a complaint which had been made to the Commonwealth Ombudsman about the AFP, for whom Mr Overland then worked. The allegation made against Mr Overland was that he had attempted to dictate to a Commonwealth Ombudsman investigation how part of the investigation should be conducted.

In the course of the OPI investigation leading to the *Crossing of the Line* report Mr Weston admitted that he had 'concerns about this supposed relationship between Mr Taylor and Mr Overland' and that he was concerned that an 'unknown connection between the Ombudsman's office and Mr Overland' might affect the outcome of the VO investigation into the release of crime statistics prior to the 2010 Victorian election.

[25] The basis for this conclusion is set out in pages 53–76, *Crossing the Line*, OPI, October 2011.

[26] The background detail to this matter is dealt with on pages 66–69, *Crossing the Line*, OPI, October 2011.

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On 14 May 2011, Mr Weston telephoned Sir Ken and informed him of the alleged connection between Mr Taylor and Mr Overland and the evidence that he had been able to collect in support of the allegation. In the course of a later telephone conversation that day Mr Weston again discussed the so-called connection with Sir Ken. He was recorded as saying:

> *'… this is the sort of thing if it – you know, if it appears in the media and they say, "Well clearly here we have Overland leaning on the Ombudsman's office to provide an outcome"*[27]*.'*

Mr Weston informed the Herald Sun reporter Ms Crawford of his information regarding the alleged connection in question.

On the same day (14 May 2011) Mr Davies, the Secretary of TPA, visited Sir Ken at his home. Mr Davies had been the person who had informed Mr Weston of the alleged connection between Mr Taylor and Mr Overland. Mr Davies gave evidence to OPI that in the course of that meeting the issue of the 'connection' was discussed and that Sir Ken stated that the suggestion that there was such a connection was 'completely baseless and wrong'. After meeting with Sir Ken, Mr Davies immediately telephoned Mr Weston advising him to 'go cold on the Taylor story' and to 'pull it' if it had already gone to a journalist.

The OPI report concludes that it is likely that Sir Ken 'influenced Mr Davies decision to go cold on the story undermining Deputy Ombudsman Taylor. The evidence suggests that Sir Ken was likely [to be] aware of the then confidential the (sic) Victorian Ombudsman's report into the October 2010 crime statistics, or at the very least, was aware of Deputy Ombudsman Taylor's support of him, and his position in relation to Mr Overland'. Thus it is argued in the OPI report that Sir Ken was in effect taking steps to ensure that no media criticism of Mr Taylor emerged.

Finally in this Part of the OPI report, reliance is had on Sir Ken's knowledge of a leak of a review into the Security Intelligence Group (SIG)[28]. Before commencing his role as a ministerial adviser, Mr Weston had worked with the SIG. Subsequent to commencing that role a review of the SIG was undertaken and a report prepared which recommended closure of the SIG and redeployment of its staff. Mr Weston told OPI investigators that he received a copy of the report in the mail from an anonymous source. On 8 May 2011, Mr Weston telephoned Sir Ken to discuss the contents of the report and its recommendations. Sir Ken told Mr Weston that he had not seen the report. Mr Weston read relevant excerpts to him.

In the weeks following that conversation with Sir Ken, Mr Weston engaged in detailed discussion with a journalist from *The Age*, Mr David Welch, and either provided or showed the report to him. On 17 May 2011 an article written by Mr Welch was published in *The Age* headed 'Anti-terror squad to be axed'. The article contained details of the proposed closure of the unit and stated further that 'The closure may also bear upon the strained relationship between Mr Overland and Sir Ken, who resigned as Deputy Commissioner earlier this month. Deputy Commissioner signed off on an initial review of the SIG, but sources have said he was not made aware of the subsequent decision by Assistant Commissioner Jeff Pope to close the unit'.

On the morning that article was published, Sir Ken sent an SMS to Assistant Commissioner Pope stating that he fully supported Assistant Commissioner Pope and the 'intell structure changes'. After receiving a reply from Assistant Commissioner Pope, Sir Ken sent a further SMS telling him that he would write to the editor of *The Age* and that 'that might deter mischief makers'.

The response provided by his legal advisers to the draft of this report encloses a copy of an email sent by Sir Ken to *The Age* on 17 May 2011 whereby he expressed his support for the reforms being implemented by Assistant Commissioner Pope as being 'right for Victoria'. It would appear that the content of the email correcting the article in question was not published in *The Age.*

[27] The OPI report does not set out the whole of the transcript of the telephone conversation and accordingly the response of Sir Ken to this statement is not known to the reader of the report.

[28] This matter is discussed in detail in *Crossing the Line*, OPI, October 2011.

Part 4 of the OPI Report – other disclosures of confidential Victoria Police information

OPI conclusions to Part 4

The OPI report is highly critical of the conduct of Sir Ken in relation to the information imparted to him by Mr Weston.

> *'Deputy Commissioner Jones knew that Mr Weston had a copy of Covert Support Department's report that had been unlawfully disclosed to* The Age*. He also knew that the views being expressed in* The Age *were effectively a restatement of the views Mr Weston had shared with him. Adding to the weight of evidence against Mr Weston was the obvious pro-Deputy Commissioner Jones and anti-Mr Overland flavour. For these reasons, Deputy Commissioner Jones had a professional obligation to alert Assistant Commissioner Pope to the conversation he'd had with Mr Weston a week earlier, and to alert Assistant Commissioner Pope or the PSC that Mr Weston (as a sworn member of Victoria Police, on leave) had received a leaked copy of the report from Victoria Police and to the media (the leaking of a report from Victoria Police and to the media both constituting serious misconduct and a criminal offence under section 127A of the* Police Regulation Act 1958*)*[29]*. By neglecting to do so, Deputy Commissioner Jones failed to satisfy his statutory obligation to report serious misconduct by another member.'*

The OPI report concludes that Sir Ken was a valuable source of information to Mr Weston which had the effect of 'tacit endorsement' of Mr Weston's campaign against Mr Overland, conducted primarily through the media. It argues that:

> *'Given the many hours Deputy Commissioner Jones spent talking with Mr Weston, and his avid interest in the media campaign against Mr Overland, it is inconceivable that Deputy Commissioner Jones was not aware that he had become a valuable source in Mr Weston's media campaign. There is no evidence that Deputy Commissioner Jones challenged or questioned the apparent modus operandi of Mr Weston. There is also no evidence that he sought to intervene or discourage Mr Weston from his engagement with the media. Deputy Commissioner Jones's ongoing airing of confidential Victoria Police information to Mr Weston, and his failure to require Mr Weston to desist from engaging with the media in respect of these issues, tends to suggest at a minimum tacit endorsement of Mr Weston's actions. Factoring in Deputy Commissioner Jones' own dealings with personalities like Mr Munro and Ms Maksimovic, his knowledge and tolerance of Mr Weston's campaign has the appearance of moving beyond tacit endorsement to complicity.'*

The response of Sir Ken to Part 4

The response provided on behalf of Sir Ken deals in detail with the other alleged disclosures referred to in Part 4 of the OPI report. Insofar as the OPI report relies upon the intercepted conversations between him and Mr Munro on 7 May 2011, the response notes that only excerpts of transcript have been presented in the OPI report, but that nothing in the portion of transcript presented reveals him to be the source of the material or to have made comments on the material that appeared in the *Sunday Age* on 8 May 2011.

The response argues that nothing turns on the fact that Sir Ken is said to have known Ms Lisa Maksimovic, as he was in charge of the media department within VicPol and its relationships with the media from November 2010. The response concedes that the transcript of the text message exchanges demonstrate that he was 'understandably upset' after his 'constructive sacking' on 6 May 2011 but does not reveal that any confidential information passed from him to Ms Maksimovic. The response contends that to 'surmise' that because 'Jones knew Maksimovic, he is the source of leaked material … amounts to fundamentally flawed inferential reasoning'.

[29] *Police Regulation Act 1958*, section 86L(2A).

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In relation to the reliance of the OPI report on the relationship between Sir Ken and Mr Weston it is stated that at all times Sir Ken believed that Mr Weston was 'an emissary of Government'. Attached to the response is a copy of the earlier response provided to OPI by the legal advisers on 14 October 2011 in relation to the draft *Crossing the Line* report, which earlier response spells out in detail the basis upon which Sir Ken held such a belief.

The response to the draft OPI report with which I am concerned, rebuts the OPI conclusion that Mr Weston acted as a conduit and facilitator for him. The response notes that the OPI report asserts that Mr Weston had provided a 'detailed account' to OPI concerning his first meeting with Sir Ken on 12 April 2011. It observes that no detailed account has been set out in the draft report and that instead the report sets out a series of bullet points which are not 'possible to meaningfully analyse' as to whether they represent a 'fair and complete picture of Weston's recollection of that meeting'.

Complaint is made that the failure to provide Mr Weston's full account of what he asserts represents 'a profound denial of natural justice'. There is some weight in this complaint. No detailed account of the first meeting is set out in the OPI report. It is true that the OPI *Crossing the Line* report contains a paragraph which was said to be a direct quotation from the evidence of Mr Weston given to OPI[30]. However the OPI report with which I am concerned contains a summary of 'a broad range of issues of concern' raised by Sir Ken which were said to 'include' a number of matters set out in bullet point form.

On the other hand, the OPI report contends that 'irrespective of how the material was presented to Sir Ken, there was nothing to prevent the Deputy Commissioner from providing his own recollections of the content of his meeting with Mr Weston to OPI'. There is also some weight in this statement. The response to the OPI report provided by the legal advisers to Sir Ken states that 'Jones made the Ombudsman aware of all contacts he had with Weston and believes that the Ombudsman interviewed Weston…'.

Whatever detail Sir Ken provided to the VO was not provided by the VO to OPI and accordingly neither OPI had then, nor do I now have, access to what it is that Sir Ken says he actually said in the course of such 'contacts'. The response notes further that the findings in the OPI draft report are inconsistent with the findings made by OPI in its *Crossing the Line* report in that none of the other matters arising in the latter report 'support a finding of conspiracy between Weston and Jones to undermine the Chief Commissioner, nor was such a conclusion drawn by the OPI at the time of writing that report'.

In relation to the SIG matter, the response notes that it is not alleged in the draft OPI report that Mr Weston informed Sir Ken in the conversation of 8 May 2011 that he had received the SIG review by improper means. It is argued that the issue of the strategic re-organisation of intelligence function within VicPol was already a controversial industrial relations issue and thus it is reasonable to assume that the Minister would want to remain informed of developments, and therefore the fact that the Minister's Police Adviser was aware of the issue did not suggest that he had received the material inappropriately.

The response deals specifically with the assertion made in the draft OPI report that Sir Ken used Inspector Gawne (as well as others) as a confidant whom he 'wittingly or unwittingly engaged in furthering his agenda' to disseminate his views to those who would assist in ventilating those views publicly. The response rejects the suggestion that Sir Ken did any such thing. It argues that the allegations, insofar as they involve Inspector Gawne, appear to be based on the premise that they knew each other and that Inspector Gawne knew Inspector Robertson and that she knew the adviser and Mr McKenzie, and thus Sir Ken knew he had access to Mr McKenzie and used that access for a public ventilation of his concerns.

The response contends that this logic is flawed, as there is no evidence that Sir Ken was aware of either Inspector Gawne's connection with Inspector Robertson or her connection with Mr McKenzie.

[30] Page 32, *Crossing the Line,* OPI, October 2011.

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The response is critical of the failure of OPI to provide to Sir Ken the transcript of the testimony of Inspector Gawne or of Mr McKenzie. In the absence of this material, it is argued that the fact that Inspector Gawne has said that a number of matters, including the cell placement of Mr Williams, the Driver Taskforce investigation and the involvement of Corrections Victoria, were the subject of discussion with Mr McKenzie, may have been as a result of Mr McKenzie posing questions on these subjects but not necessarily receiving helpful answers. It argues further that the OPI report overlooks the fact that Inspector Gawne would have been seized of much of this information in the ordinary course of his activities as a former staff officer to Sir Ken. I would add that the same argument applies to the fact that Inspector Gawne was for a period of time the minute taker of the Driver Taskforce meetings.

The facts that are established about other disclosures of confidential Victoria Police information

It is apparent that Sir Ken was acquainted with a number of the journalists who were in touch with him after 6 May 2011.

I do not consider that any adverse inference can be drawn from that fact, taking into account the fact that he had been in charge of the media department of VicPol and responsible for its relationship with the media. Whilst one inference that is open from both the telephone conversation, and the surreptitious nature of it, referred to in the OPI report between Sir Ken and Mr Munro on 7 May 2011 is that he had had an 'off the record' telephone conversation with Mr Munro the day before, the content of such conversation is not established.

The fact that in the course of the conversation in question Mr Munro said he would use a phrase such as 'senior police source' and the fact that his article of 8 May 2011 used the same phrase does not establish that Sir Ken was the source in question. Indeed the conversation of 7 May 2011 which is quoted in the OPI report suggests that the conversation of the previous day was about 'various offers coming… the IBAC role…'.

It is clear from the excerpt relied upon by OPI that Sir Ken considered there was a risk that his telephone was being monitored and no doubt that is why he used his wife's telephone to call Mr Munro, but there is no evidence of the transfer of any confidential information to Mr Munro by Sir Ken.

At the highest the evidence is that Sir Ken had at least two telephone conversations with Mr Munro and that subsequently on 9 May 2011 an article written partly by Mr Munro stated that a 'senior police source' had stated that Sir Ken was 'dismayed by serious problems at Victoria police, including a failure to communicate child protection concerns, a $100 million blowout for replacing a crime database and flaws in the existing database which failed to identify parole violators'. Whilst some may consider that to be suspicious, but taking into account the fact that Sir Ken had made no secret of his concerns to many in VicPol, and to others such as Mr Davies and Mr Weston, it is no more than speculation to conclude that he, rather than someone else, was the source.

The content of the exchange of SMS messages between Ms Maksimovic and Sir Ken does him little credit, but it took place in the context of the trauma of his being sent 'on leave' the day before and more importantly provides no evidence of the transfer of any confidential material to her. It is fair to observe that in the response of Sir Ken's legal advisers to the draft *Crossing the Line* report it is stated that:

> *'…our client was asked to leave his place of work in circumstances which caused him and his wife significant anger, distress and public controversy. Mr Jones freely admits that in the weeks that followed he was very distressed over his treatment and the impact it had upon him and his wife.'*

The relationship between Sir Ken and Mr Weston is however more equivocal. However, before turning to the evidence which relates to that relationship it is appropriate to note that the response of the legal advisers to Sir Ken refers to a submission they made to OPI in October 2011 in response to the draft *Crossing the Line* report.

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That response contained a detailed argument to the effect that '…throughout, our client believed he was dealing with government, a government reaching out in our attempt to stabilise a difficult and volatile situation'. The submission noted that Mr Weston's job description encompassed a number of strategic responsibilities including providing policy advice to a range of members on a wide range of issues, high-level media interaction on matters that have significant impact on Government or political processes, briefing stakeholders, advising on legislation and regulations, preparing complex portfolio correspondence, liaising with the Chief Commissioner's office and other relevant stakeholders including the TPA, state and federal ministers and state parliamentarians on portfolio matters. Thus the submission argued that 'Mr Weston held a powerful and influential role at the heart of government'.

It argued that:

> *'Given Mr Weston's senior position as adviser to Deputy Premier Ryan as Minister for Police in a newly elected government, it would be both expected and proper for any senior ranking police officer (including a Deputy Commissioner of Police) to deal with that adviser and take his representations that he is acting with the authority of both his Minister and the government at face value, an approach taken by our client. Moreover, the knowledge that Mr Weston had once served within Victoria Police's Security Intelligence Group and had been vetted to a high level only served to reinforce our client's impression of Mr Weston's bona fides. Mr Jones was also influenced by the knowledge that Mr Weston had been, for some time, an active Liberal politician even to the point of running for elected office in 2010. In our client's professional opinion, Mr Weston had been long lost to policing and had, for a considerable time, been operating wholly in the political world.'*

The submission argued that the draft *Crossing the Line* report was incorrect in concluding that the relationship between Sir Ken and Mr Weston began in 'questionable circumstances'.

The submission stated:

> *'…the first substantive approach made by Mr Weston to our client occurred on 12 April 2011, when Mr Weston sought a meeting with our client to discuss a possible IBACC role. The possibility of an IBACC role was met favourably by Mr Jones as he had already signalled to government his intention to resign from Victoria Police, had significant anti-corruption experience during his time in Hong Kong and had considered applying for a role within IBACC in any event. That meeting occurred with Minister McIntosh on 15 April 2011. Both meetings were entirely appropriate. We fail to see how this can be characterised as questionable. Our client had decided to resign his position with Victoria Police as far back as June 2010 and had first flagged his intensions to do so with Mr Overland in July 2010. Our client came to this view as he had significant concerns over the way the force was structured. He and Mr Overland had spoken about the issue. Mr Jones felt that a different structure and approach would be better for Victorians and its police members. This matter was brought to the attention of government and the services of a consultant were engaged with attempts made to better understand the differences of view.*
>
> *The consultant's intervention proved to be unsuccessful and Mr Jones, in October 2010, confirmed his intention to resign. All this was known to government and a handful of senior public servants. Following discussions with Mr Overland, our client agreed to delay the date of his resignation until after the November 2010 State Election (and subsequently until 5 August 2011 after a period of leave to begin at the end of June). Our client publicly announced his resignation from Victoria Police on 2 May 2011, effective from 5 August 2011. Government and certain public servants at the highest levels within it had been aware of the issues as they developed through late 2010 and early 2011. Thus, when Mr Weston approached Mr Jones to discuss a possible IBACC role it seemed entirely consistent with the actions of a new government which had been briefed on the signalled resignation. Here was government, aware that Mr Jones had resigned, exploring the possibility that Mr Jones might be tempted by a role within IBACC. During the first*

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meeting with Mr Weston, Mr Jones took the view that he was being approached by the Deputy Premier. He thus asked for, and was given, categorical assurances to that effect. It was clear that, beyond the rumours that had appeared in the media, Mr Weston did not appear to know what had led to the resignation decision. Mr Jones advised Mr Weston to speak to Helen Silva on the issue as she was aware of the detail and had been instrumental in engaging the consultant. (To be clear: Mr Jones had no direct contact with Ms Silva, he was reporting what he had been told by Penny Armytage, Secretary of the Department of Justice as Mr Weston said he had a direct responsibility to liaise with the Department of Justice.) Our client recalls that their discussions were focused on publicly known and reported issues affecting a number of justice agencies. Our client felt he was being confidentially sounded out by a new government on the justice issues which had concerned them in opposition. In his long experience he had been approached like this before as had other senior figures in policing. He took Mr Weston at face value along with his assurances that he was there at the behest of the Deputy Premier. If, as appears from your report, Mr Weston was misrepresenting the Deputy Premier, our client did not know. He had not reason to question Mr Weston's bona fides. Our client does recall saying that he felt unable to serve with integrity, having come to the firm view that the force structure should be changed to improve justice outcomes. In this early encounter our client felt that Mr Weston appeared to be strategically aware, across the main issues, and he seemed to be a good fit for his political role. Mr Weston assured our client that he would brief the Deputy Premier and arrange the meeting with Minister McIntosh. Mr Weston went on to initiate further contacts. In all of these he made it clear he was representing the Deputy Premier and would brief him.'

Accordingly the submission made on behalf of Sir Ken in October 2011, is that at all times his dealings with Mr Weston were appropriate and based on his belief that Mr Weston was the authorised representative of the Deputy Premier the Hon Peter Ryan.

I turn now to the evidence contained in the OPI report which is relevant to the issue in question.

There can be no doubt that Sir Ken discussed a number of confidential matters with Mr Weston at their first meeting on 12 April 2012. Also, there is no doubt, as he has conceded to OPI investigators, that Mr Weston was the source of numerous articles appearing in the media from 13 April 2011 until at least early June 2011, which were critical of Mr Overland and the general administration of VicPol. There can be no doubt that Mr Weston at all material times harboured animosity towards Mr Overland as CCP. In the course of giving evidence to OPI in relation to the *Crossing the Line* investigation Mr Weston stated that the actions he took in providing stories to the media were 'all aimed at exposing Mr Overland's duplicity...'.

The OPI report contains evidence of a number of telephone conversations that took place between Mr Weston and Sir Ken. One such conversation, to which I have already referred, took place on 8 May 2011. The OPI report states that on that day:

'Mr Weston telephoned Deputy Commissioner Jones to discuss the review recommendations (of the SIG report). Deputy Commissioner Jones told Mr Weston that he had not seen the report, so Mr Weston proceeded to read him relevant excerpts. In a lengthy discussion, Mr Weston voiced strong opposition to the recommendations, alleging that the review team had been given explicit instructions about the desired outcome'.

The OPI report, despite noting that the conversation was lengthy, does not contain either the detailed transcript or any significant detail of the conversation. Such summary as there is, refers in substance to things said by Mr Weston and not to anything said by Sir Ken other than the fact that Sir Ken told Mr Weston that he had not seen the report. I do not consider that this conversation reveals any evidence of impropriety on the part of Sir Ken. The OPI report states that 'there is no evidence to suggest that Deputy Commissioner Jones questioned Mr Weston's access to this confidential Victoria Police Report…'.

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Whilst that might be so it ignores the fact that Mr Weston was the adviser to the Police Minister and may well have had proper access to the report. Further telephone conversations which took place on 14 May 2011 are referred to in the OPI report. The first of those is that Mr Weston telephoned Sir Ken to discuss a rumour that he had heard that Mr Overland had not been the first choice of the selection committee for the post of CCP.

Mr Weston advised Sir Ken that he had received information that another person was rated 'higher' by the selection panel than Mr Overland, describing the 'order of finish' as Sir Ken, the other person and Mr Overland. Sir Ken commented, 'Yeah, that's about right'. The OPI report states that as the 'conversation progressed, Sir Ken advised Mr Weston of the selection panel composition during the first and second interviews'[31].

The OPI report refers to a further conversation which took place between Mr Weston and Sir Ken on the morning of 14 May 2011. Mr Weston telephoned Sir Ken to discuss a 'connection' that existed between Mr Taylor and Mr Overland. Mr Weston commented that publication of that 'connection' may be a good thing for 'ensuring [the Victorian Ombudsman's] accountability'.

Mr Weston went into detail about the alleged connection and the evidence he had been able to collect in support of the allegation. Later that same day, Mr Weston again telephoned Sir Ken. Mr Weston re-introduced the issue of a connection that existed between Mr Taylor and Mr Overland: '...did I talk to you about – I can't remember if I talked to you about the Ombudsman's investigation – the Commonwealth Ombudsman's investigation ...'.

Sir Ken said that he was 'aware of the connections between certain players, and that there was an allegation that their wings were clipped a bit – but there again, it was just something that wasn't followed through at the time'.

Mr Weston told Sir Ken that 'this is the sort of thing if it – you know, if it appears in the media and they say, "Well, clearly here we have Overland leaning on the Ombudsman's office to provide an outcome"'.

In a subsequent conversation with Mr Davies, on 16 May 2011, Sir Ken told Mr Davies that the so-called connection between Mr Overland and Mr Taylor was 'completely baseless and wrong'. As a result of this Mr Davies immediately thereafter telephoned Mr Weston directing him to 'go cold on the Taylor story' and to 'pull it if it had already gone to a journalist'.

The OPI report concludes that this was evidence of Sir Ken seeking to protect Mr Taylor. Sir Ken's position is that he was doing no more than correcting the falsehood of the allegation. Accepting the explanation of Sir Ken, it still must be said that the conversation he had with Mr Weston was inappropriate and went far beyond what might be considered to be consistent with his stated belief that his relationship with Mr Weston was entirely appropriate taking into account his belief that Mr Weston was an authorised representative of the Deputy Premier[32].

Furthermore, and even though it would have been better for the whole of the conversation between Mr Weston and Sir Ken to have been reproduced in the OPI report it appears clear that Sir Ken did nothing to deter Mr Weston from alerting the media to the so called connection.

[31] The response of Sir Ken's legal advisers to this report dated 30 January 2014 asserts that had the transcript of their conversation been produced it would have shown that Sir Ken told Mr Weston that he, Weston, from within government, could easily look at the files and see for himself who had been on the panel. The transcript of an intercepted telephone conversation between Sir Ken and Mr Weston on 14 May 2011 at 2:29pm however does not support this.

[32] As is clear from the response to the OPI report by those advising Sir Ken this conclusion is not accepted by them.

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8. Part 5 of the OPI report – Sir Ken's relationship with the Police Association

The OPI investigation considered the relationship between Sir Ken and Mr Greg Davies, the Secretary of TPA. Mr Davies was examined in the course of the investigation. He stated that he and Sir Ken had a 'friendly relationship' which arose out of Mr Davies' view that Sir Ken and his wife were isolated from family and friends. In the evidence given to OPI by Mr Davies the subject of discussions between Sir Ken and Mr Davies was said to include the parolees issue, the Sex Offenders Register, money wastage and poor administration of IT projects, and a meeting had between Sir Ken and Mr Michael Kapel, the Premier's Chief of Staff on 16 February 2011 as well as a discussion about an email Mr Davies had received regarding an allegation against Mr Taylor and Mr Overland.

However the OPI report states that the OPI investigation 'revealed the discussion between Mr Davies and Sir Ken in respect of the above issues was more detailed than Mr Davies revealed'. The OPI report states that those discussions included the topics of the crime statistics investigation being conducted by the VO, the investigation into the death of Carl Williams, a vote of no confidence in Mr Overland, obtaining the assistance of Sir Ken in preparing the wording of Mr Davies' public statement calling for a Royal Commission, and financial membership of Sir Ken in TPA. However, the OPI report does not set out the content of the actual discussions, nor does it identify specifically what was said by Sir Ken in such conversations. An example of this is demonstrated by the following paragraph appearing in the OPI report:

> *'On 9 May 2011, Mr Davies asked Deputy Commissioner Jones for assistance in preparing the wording of Mr Davies' public statement calling for a Royal Commission. Deputy Commissioner Jones' contribution included the failure of Victoria Police's systems that led to the murder of the State's most important witnesses (presumably Carl Williams, Terrence Hodson and Christine Hodson) and that the issues would go on forever if Mr Overland did not get out of office.'*

The above extract is a summary of what is said to be a conversation between Mr Davies and Sir Ken. It identifies to some degree what Mr Davies said, but to summarise what Sir Ken is alleged to have said in the course of the conversation by use of the word 'contribution' is most unsatisfactory. The failure of the OPI report to identify specifically the things actually said by Sir Ken is glaring in this Part but is a failure which is repeated consistently in other Parts of the OPI report.

The OPI report also states that a telephone conversation between Mr Davies and Sir Ken was intercepted, which conversation included a discussion about whether Sir Ken was the VO's whistleblower. Sir Ken is said to have 'denied he was the whistleblower and nominated another senior member of the VicPol Executive as the whistleblower'[33].

The OPI report did not set out the actual words used by Sir Ken. In the response provided by the legal advisers to Sir Ken to this report on 30 January 2014 it was stated that the OPI report had 'incorrectly characterised Mr Jones' actions as "nominating a senior member of Victoria Police". This inference was, and is, untrue and unfair'. By reason of this submission, I considered it necessary to examine the transcript of an intercepted telephone conversation between Sir Ken and Mr Davies which took place in the evening of 12 May 2012. That examination made it clear that Sir Ken and Mr Davies had a discussion about who the whistleblower might be and that in the course of that discussion Sir Ken said 'I've heard it was [a named member of the VicPol Executive]'. It reflects poorly on Sir Ken that he would engage in such a discussion with Mr Davies.

These latter conversations would appear to have all taken place after 6 May 2011. The OPI report states that the discussions about the vote of no confidence, the call for a Royal Commission and the financial membership question all took place on 9 May 2011.

As stated above, the discussion whereby Sir Ken named a member of the VicPol Executive to Mr Davies took place on 12 May 2012.

[33] See footnote 32.

Part 5 of the OPI report – Sir Ken's relationship with the Police Association

The OPI report refers to evidence given to OPI by Mr Davies that Sir Ken had telephoned him shortly after his meeting with Mr Kapel on 16 February 2011, and stated that he had some unease about the meeting and that Mr Kapel had said to him that '...if it all turns bad we'll simply say that it was you who contacted us'.

Mr Davies gave evidence that he had telephoned the Minister immediately, and informed him that he would defend Sir Ken publicly if it were suggested that he (Sir Ken) had initiated contact with Mr Kapel. It is appropriate to observe that the evidence given to the OPI enquiry *Crossing the Line* was that Mr Kapel stated that he had no contact with Sir Ken prior to receiving an unsolicited text message from him requesting to 'catch up'. Mr Kapel's evidence in this regard is consistent with the evidence later given to OPI investigators by both Inspector Gawne and by Inspector Robertson.

OPI conclusions to Part 5

The OPI report acknowledges that the role of a Secretary of TPA requires such a person to have extensive networks in both media and political spheres. However, the OPI report in essence concludes that the relationship between Sir Ken and Mr Davies went well beyond that which would fairly be expected in their respective circumstances and that Mr Davies in effect became an advocate for Sir Ken and that he worked directly to feed information to the media that would be damaging to VicPol and to the office of the CCP. The report states:

> *'The fact that Deputy Commissioner Jones felt at liberty to discuss sensitive details of Victoria Police business with Mr Davies is testament to the close dynamic between them. It is also evidence that Deputy Commissioner Jones felt he had a sympathetic ear in Mr Davies. Indeed, Deputy Commissioner Jones and Mr Davies shared a mutual interest in changing the shape of the Victoria Police Executive. Deputy Commissioner Jones' repeated assurance that the issue was not 'him versus Mr Overland', and Mr Davies' circumspect public commentary regarding Mr Overland, are both contradicted by the substantial volume of their private commentary relating to the specific agenda of removing Mr Overland from office.'*

Despite this latter conclusion it is appropriate to observe that the OPI report does not set out in any detail any specific evidence of a 'substantial volume' of such 'private commentary relating to the specific agenda of removing Mr Overland from office'.

Mr Davies' response to Part 5

Mr Davies' response to the draft OPI report states that he had at all times acted in a manner which was consistent with TPA objectives. Although acknowledging his public stance against Mr Overland he states that '. . .It is consistent with the objects of the Association for it to take a public stance against a serving Chief Commissioner of Police in the event that the Association considers, on reasonable grounds that he or she is incompetent or incapable of fulfilling the duties expected of a Chief Commissioner, is generally acting to the detriment to the standing of its members or the organisation as a whole, or in any way is perceived to have acted corruptly'.

Mr Davies states in his response that in his discussions with Sir Ken he (Sir Ken) had 'disclose(d) a concern that Overland was involved in corrupt behaviour'. Accordingly, Mr Davies argues that it was incumbent upon him to express his concerns regarding the direction of VicPol under the leadership of Mr Overland.

Part 5 of the OPI report – Sir Ken's relationship with the Police Association

The response of Sir Ken to Part 5

In their response to the draft OPI report the legal advisers to Sir Ken state that 'as a matter of good leadership he had actively sought to develop strong, trusting relationships with leaders of staff associations'. They said further:

> *'There is nothing inappropriate about senior police officers being members of TPA. Indeed, there is a long history within Victoria Police of senior officers including Assistant, Deputy and Chief Commissioners maintaining their memberships with TPA. Members of TPA have the right to communicate freely with the Association in pursuit of legitimate industrial objectives, including questions of their own treatment by Victoria (Police) as in (his) case. This principle underpins the communications that (he) had with Mr Davies following his constructive dismissal on 6 May 2011'.*

The response asserts that a number of matters relied upon in the OPI report in Part 5 as demonstrating that Sir Ken 'acted in a manner inconsistent with his responsibilities as a senior officer of police' reflect bias on the part of OPI. Dealing with the issue of the alleged discussion about the proposed TPA vote of no confidence in the CCP the response states:

> *'The draft report contains no allegation of any disclosure flowing from Jones. Again, Jones has been denied the opportunity to consider the entirety of the alleged intercepted conversation. The statement appears to be there to poison the mind of the reader and further evidences the bias shown by the OPI in the conduct of its investigation.'*

Likewise, the response deals with the conversation between Sir Ken and Mr Davies said to have been related to the TPA press release calling for a Royal Commission in the following terms:

> *'The alleged communication on 9 May 2011 in respect of the TPA call for a Royal Commission has not been provided. The allegation leads the reader to believe that Jones's alleged contribution was incorporated into the TPA's press release of 9 May 2011 when, in fact, the relevant TPA press release for 9 May 2011 does not include the matters attributed to Jones. The call for a Royal Commission in the 9 May 2011 press release related to a call for an investigation into the structure of senior police command which was incorporated into the terms of reference of the Rush enquiry. In the circumstances, the allegation is mischievous.'*

The facts which are established about the relationship between Sir Ken and Mr Davies

First of all it is appropriate to first say that I consider that Part 5 of the OPI report is seriously deficient in that the actual words stated by Sir Ken are not set out. In this regard the complaints made by the legal advisers to Sir Ken have considerable weight. It is simply not sufficient for the OPI report to summarise alleged conversations by stating (as it does) that 'Mr Davies said…' or 'Mr Davies asked…' or 'Mr Davies told Sir Ken…'. What is relevant are the actual words used by Sir Ken. This is a deficiency that was pointed out to OPI in the response to the draft report provided on behalf of Sir Ken and yet it is clear that no change was made to the final report. I find that to be surprising.

Part 5 of the OPI report – Sir Ken's relationship with the Police Association

That said, it is clear that Sir Ken and Mr Davies had an amicable relationship and it is clear that Mr Davies trusted and respected him and at the same time did not have a similar trust and respect for Mr Overland. It is reasonable to accept that as a matter of good leadership it was appropriate for Sir Ken to have sought to develop a strong trusting relationship with the Secretary of the TPA. I accept the argument advanced on behalf of Sir Ken that there is no impropriety in senior officers of VicPol being members of TPA. Furthermore I accept that Sir Ken was entitled to communicate freely with the TPA in 'pursuit of legitimate industrial objectives' including, in his case, obtaining advice in relation to his own treatment by VicPol.

However, notwithstanding the failure of the OPI report to set out the evidence given to OPI by Mr Davies in a verbatim manner, a number of topics said by Mr Davies to have been discussed between them go beyond the ambit of what was otherwise appropriate for discussion between Sir Ken and Mr Davies. In particular it is difficult to see what justification there could be for discussions to take place between them as to the VO crime statistics investigation, as to the identity of a whistleblower, and in particular the ongoing investigation into the death of Carl Williams[34]. However, in the absence of the OPI report setting out the transcripts of the relevant conversations in detail, I am unable to conclude that the discussions went beyond being unwise, indiscreet, and at times inappropriate conduct on the part of Sir Ken. I am not able to reach the conclusion that such conduct was part of an orchestrated plan by Sir Ken to have Mr Overland removed from office.

[34] See footnote 32.

9. Part 6 of the OPI report – the Rush Inquiry

On 9 May 2011 the then Premier of Victoria announced a special inquiry into the command, management and functions of the senior structure of VicPol. Mr Jack Rush QC, as he then was, was appointed to conduct the Inquiry. The terms of reference for the Inquiry were that Mr Rush was to inquire into the effectiveness and functions of the senior structure of VicPol command, the extent to which the senior command structure of VicPol provide the future capabilities to deliver best practice policing and the extent to which VicPol has the command management structures to deliver major IT and administrative functions.

On 6 September 2011 Mr Rush interviewed Sir Ken. The OPI investigation had access to the transcript of the interview conducted between Mr Rush and Sir Ken. The OPI report sets out in some detail a number of the responses to questions asked of Sir Ken.

OPI conclusions to Part 6

The OPI report concludes as follows:

> *'The Rush Inquiry presented itself as an official opportunity for Deputy Commissioner Jones to provide tangible examples of the types of conduct and mismanagement he had been disclosing to others in an unofficial capacity. A review of the transcript of interview with Deputy Commissioner Jones however reveals that he did not articulate the concerns that he had shared on an unsanctioned basis with individuals like Mr Davies, Mr Weston, Inspector Gawne, other senior members of the Victorian public sector, and journalists…Deputy Commissioner Jones had before him an opportunity to fully outline his concerns to an official mechanism responsible for inquiring into the structure, operations and administration of the senior command of Victoria Police but elected not to or was otherwise incapable of doing so.'*

The response of Sir Ken to Part 6

The response provided on behalf of Sir Ken to this aspect of the OPI report is in effect that it is unfair to be critical of his failure to provide the Rush Inquiry with examples of the misconduct and mismanagement that he had disclosed to others. The response notes that the Rush Inquiry report stated that:

> *'At the time of the establishment of the Inquiry there was speculation as to the matters the Inquiry may investigate. At an early stage, the Inquiry consulted with the Ombudsman… the Director of the Office of Police Integrity…. and the Auditor-General… to ensure, as far as possible, there was no overlap in investigations. The Terms of Reference of the Inquiry, although wide, focus on the structure and effectiveness of the senior command of Victoria Police and its ability to administer the organisation. This has been the focus of the Inquiry.'*

Taking into account the fact that some of the matters about which Sir Ken had expressed concerns were already the subject of a separate investigation by the VO it is argued that no adverse inference can be drawn from the fact that Sir Ken did not raise all of the matters about which he had expressed concern to others to the Rush Inquiry.

Part 6 of the OPI report – the Rush Inquiry

The facts established in relation to the Rush Inquiry

Sir Ken gave evidence to the Rush Inquiry. As mentioned above, the terms of reference required the Inquiry to inquire into the effectiveness and functions of the senior structure of VicPol's Command as well as the extent to which the Senior Command structure of VicPol provided for future capacity to deliver best practice policing. Sir Ken provided information to the Inquiry in relation to the type of structure he thought VicPol should possess.

The evidence is that Sir Ken did not give any detailed information to the Inquiry of the nature that he had disclosed to others such as Mr Davies, Mr Weston and Inspector Gawne. That said he did refer to 'stuff up after stuff up… failed project after failed project…' and noted that '...we had some pretty embarrassing reports come out of Ombudsman (which) were about major-major-collapses of projects, millions of dollars wasted…'.

Having read the report of the Rush Inquiry it is clear that the focus of the Inquiry was on the structure of the Senior Command of VicPol and the effectiveness of that structure. Whilst it can be argued, as the OPI report does, that the Inquiry 'presented itself as an official opportunity for Sir Ken to provide tangible examples all the types of conduct and mismanagement he had disclosed to others in an unofficial capacity', I consider that the explanation provided by Sir Ken in his response to the draft OPI report is plausible. In any event any failure on his part to use the Inquiry as an 'official opportunity' for him to report on the record his concerns about VicPol does not add any weight in support of the allegations that he was directly or indirectly involved in the leaking of confidential material to the media.

10. Part 7 of the OPI report – the Victorian Ombudsman's inquiries and conduct

This Part of the OPI report reflects the serious conflict and distrust which developed between OPI and the VO during the relevant period, much of which can be ascribed to the division of legislative responsibility between the two offices which was caused by the ambiguity and complexity of the WP Act. It, and the response of the VO to it, also unfortunately reflects the level of distrust between the two organisations which had developed, at least partly by reason of that bifurcation of legislative responsibility and the potential conflict of such responsibilities thus created.

The OPI report is critical of the actions of the office of the VO and in particular of Mr Taylor. The OPI report focuses upon a number of matters including what it describes as a failure to manage conflict of interest by the VO, the compromise of the OPI investigation by disclosure of its investigations and assistance provided to Sir Ken, the seeking of information about the OPI investigation from a member of VicPol, leaks to the media and the investigation of OPI by the VO. The OPI report alleges that in addition the VO failed to provide OPI with relevant information that would have assisted the investigation. Both the VO and Mr Taylor reject all criticism of their actions contained in the OPI report and do so in strong terms.

That said however, I do not intend to deal with the matters raised by Part 7 of the OPI report in this report. The first reason for this is that the jurisdiction for the OPI investigation arises partly under the PI Act and partly under the WP Act, as earlier explained. It will be recalled that the investigation into the intelligence brief leak was commenced by OPI on 8 March 2011 after Assistant Commissioner Dunne referred the matter to OPI by way of complaint. Under section 40(a) of the PI Act, OPI was required to investigate the complaint if it related to the conduct of the CCP or of a Deputy Commissioner. It will be recalled that on 6 May 2011 OPI received *The Age* leak complaint and on 9 May 2011 OPI received the parolee apology leak complaint. As stated above and by letter dated 20 June 2011, the VO advised the Director of OPI that he considered the above complaints to have been subject to section 39(2) of the PI Act.

It will be recalled that the Director of OPI concluded that the complaints were 'public interest disclosures' and referred them to the VO. Subsequently and by reason of section 43(1) of the WP Act, the VO referred the matters to OPI for investigation. The functions and powers of OPI at the time of the investigation were those set out in section 6 of the PI Act. It is clear that the jurisdiction of OPI was confined by the PI Act to investigations relating to the conduct of members of VicPol, or into police corruption or misconduct, or into VicPol policies, practices or procedures.

There is nothing in either the PI Act or the WP Act which gave OPI jurisdiction to investigate or to report upon the conduct of persons other than members of VicPol, unless such conduct was related directly to misconduct of a member of VicPol. Part 7 of the OPI report is headed *'The Victorian Ombudsman's Enquires (sic) and Conduct'*. The second paragraph of Part 7 sets out seven actions of the VO about which the OPI report makes complaint.

I make no comment as to whether or not those complaints have substance. I do not intend to make any comment because I am of the firm view that OPI had no jurisdiction to investigate or to report upon 'actions of the Victorian Ombudsman personnel'. Secondly, and even if Part 7 of the OPI report could somehow be seen to be within the remit of OPI, an appropriately considered analysis of the matters raised by the OPI report and the matters raised in response by the VO is not possible by reason of section 22 of the WP Act.

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11. The OPI report's final conclusion

The OPI report contains the following conclusion in relation to the central issue of the investigation, that is whether 'Deputy Commissioner Jones, and others independently or on his behalf, misused and disclosed confidential information about the operations of Victoria Police.':

> *'The evidence gathered by OPI demonstrates Deputy Commissioner Jones became particularly dissatisfied with the leadership of Chief Commissioner Simon Overland and despondent about what he perceived to be his lack of influence over the direction of Victoria Police. His claims about serious corruption issues appear to have been the vehicle for his broader agenda, and the agenda of others, to achieve a change of management at the very top of Victoria Police. To achieve this end and preserve a veneer of separation from the issues occurring around him, Deputy Commissioner Jones appears to have employed a specific methodology: encouraging individuals outside Victoria Police, and junior officers inside Victoria Police, to act on his behalf to broker meetings with political staffers and journalists, and arrange for the unauthorised and unlawful dissemination of information for the purposes of publication in news media. Additionally, Deputy Commissioner Jones' relationships with journalists, such as Mr Nick McKenzie, reveal a number of undisclosed and intentionally secretive dealings including the use of intermediaries and technological methodologies designed to limit detection and avoid accountability. The secrecy Deputy Commissioner Jones would employ around a meeting with Mr McKenzie even extended to directly misinforming colleagues about the contact he had with the journalist. Relying on loyalty and through a process of delegation and facilitation, Deputy Commissioner Jones was able to quarantine himself from any suspicion that he was directly responsible for the dissemination of information to journalists and others outside Victoria Police.'*

The VO's response to the OPI report

As stated above the VO responded to the OPI report by letter dated 1 March 2013, which letter enclosed a report entitled 'Investigation into allegations of unauthorised release of information by former Deputy Commissioner of Police' which report bore the date of February 2012. The report is brief by comparison with the OPI report, consisting of 30 pages together with 35 footnotes.

In both the letter and the report the VO was highly critical of the OPI investigation. Indeed the letter stated that 'the scant "evidence" in the OPI report, combined with the omissions, exaggerations, misunderstandings and misrepresentations in that report prevent any finding being made relating to the actions and conduct of Sir Ken Jones, Inspector Gawne and Inspector Robertson'. The letter also expressed the view that it would be '… most inappropriate to report such a defective and unbalanced report to the Parliament because of the unjustified damage that the report would do to the individuals named in the report'.

Before turning in any detail to the concerns raised by the VO in the report it should be observed that the VO report made six recommendations that are necessary for IBAC to consider.

The first recommendation is that 'no further investigation be made into the allegations that Mr Jones was the source of leaks'. For reasons which appear below, IBAC should accept that recommendation.

The second recommendation is that IBAC take no further action regarding the OPI report until such time as the VI has conducted any investigation that the Inspector considers appropriate regarding Mr Gawne's concerns. IBAC complied with this recommendation. Until such time as the VI determined it had no jurisdiction in relation to those matters, no further action was taken by IBAC.

The OPI report's final conclusion

The third recommendation of the VO is that subject to the 'Inspectorate's consideration and investigation of Inspector Gawne's complaint, the IBAC Commissioner consider referring this report and the relevant Parts of the attached OPI report to the Chief Commissioner (of Police) for his consideration as to whether disciplinary action is appropriate regarding Inspectors Gawne and Robertson'. Again for the reasons which appear below, IBAC should accept that recommendation, and in addition should forward this report to the CCP.

The fourth recommendation is that 'in view of the defective nature of the OPI report, it would not be in the public interest to provide it to the Parliament because of the unjustified damage and injury that the report could potentially do to individuals named in the report'. For reasons which appear below I agree that IBAC should not provide the report to Parliament although I do consider that for reasons of transparency and in the interests of bringing this long drawn out matter to some final determination, the thrust of the report and the responses to it need to be referred to in the manner as set out by me above.

The fifth and sixth recommendations relate to criticism of the conduct of Mr Taylor by the OPI report.

Recommendation five is that subject to:

> *'the result of the Victorian Inspectorate's consideration and investigation of Inspector Gawne's complaint (that the OPI investigation was conducted with a "predestined position" and information had been released unlawfully) that IBAC refer this and relevant parts of the OPI report (concerning Deputy Ombudsman Taylor and Ombudsman Victoria) to the Inspectorate for consideration as to whether the Inspectorate has jurisdiction and, if so, whether the matter warrants investigation'.*

As mentioned above, the VI has determined to take no further action on the complaint made by Inspector Gawne to the VO on the basis partly that it had no jurisdiction to do so and partly on the basis that the complaint lacked particularity and clarity and contained mere assertions rather than allegations of specific conduct that was capable of being investigated. Furthermore the VI has concluded that it has no jurisdiction in any other of the matters the subject of referral to it by IBAC.

Recommendation six is that:

> *I. 'if the Inspectorate does not consider that it has jurisdiction, the IBAC Commissioner: consider whether, in view of the inadequacies of the OPI Report, the issues concerning Ombudsman Victoria and Mr Taylor warrant investigation and whether IBAC has jurisdiction to conduct such an investigation and, if so to;*
>
> *II. conduct such an investigation solely using staff with no OPI background'.*

For the reasons that appear below, I consider that IBAC should not conduct any further investigation into the matter. Furthermore, taking into account the recommendations of the VO, it is appropriate to note that the consideration of both the OPI report and the response to it by the VO, has been undertaken entirely by me and no staff of IBAC who may have had a past connection with OPI have been associated in any way with the matter.

It is appropriate at this point in the light of the question of jurisdiction raised by the VO to observe that I do not consider that there is any doubt that IBAC has jurisdiction to investigate the Ombudsman, Deputy Ombudsman and/or a member of the staff of the VO in the event of a credible allegation of serious corrupt conduct by such persons[35]. However, for the same reasons that I consider that I should not deal with Part 7 of the OPI report I do not consider there is any public interest to be served in the conduct of an investigation into the matters alleged by OPI in Part 7 of its report.

[35] See the definition of 'public body and public officer' contained in section 6 of the IBAC Act.

The OPI report's final conclusion

The response of the VO to the OPI report deals first with the findings regarding Sir Ken. The response observes that during the period under which the OPI report was being prepared the VO prepared two reports being *Investigation into the OPI's handling of a Complaint* (October 2011) and *Investigation into allegations of detrimental action concerning Victoria Police* (June 2012). The VO notes that as to the first of those reports no evidence was found that OPI officers influenced or directed the OPI's assessment or investigation wrongly or that the OPI acted detrimentally to any person believed to be a whistleblower.

The second of those reports 'concerned allegations of detrimental action taken by the then Chief Commissioner of Police, Mr Overland against Mr Jones because it was believed that Mr Jones was a whistleblower'. The VO states that this latter report concluded that Mr Overland took some of the actions alleged and that one of those actions had a detrimental effect on Sir Ken, but those actions were not taken in reprisal for Sir Ken having been believed to be a whistleblower with the result that those actions did not constitute detrimental action under the WP Act.

The VO argues that the OPI report needs to be considered 'in the context of these two reports as well as two other VO reports being the investigation into the allegation relating to alleged manipulation of crime statistics (referred to above) and the *Investigation into allegations of improper conduct involving Victoria Police*, October 2012'.

The VO response to the OPI report states that the report is 'flawed'. The VO complains that OPI seems not to have 'appreciated the role, purpose and function of its report' and points out that the 'function of the report is to inform me so that I can make a report on the results of the investigation' to IBAC.

The VO is critical of the OPI report in that 'it fails to include a consideration of the nature of the Deputy Commissioner's duties and obligations which are fundamental to many of the report's conclusions regarding Mr Jones'. The VO report points out that unlike most members of VicPol, Deputy Commissioners of Police, like the Chief Commissioner, are appointed by the Governor in Council pursuant to section 4(2) of the PR Act. Furthermore, the VO argues that section 6 of that Act provides that Deputy Commissioners have all of the statutory powers of the Chief Commissioner other than the power to dismiss or suspend.

The VO report points out that the OPI report made no reference to that matter and accordingly 'the assumption on which the report lies (that the Deputy Commissioner was subject to the same responsibilities to the Chief Commissioner as other members of the force), seems questionable and required consideration in the report.' The VO states that this issue was drawn to the attention of OPI by lawyers acting for Sir Ken and furthermore was the subject of consideration by the Rush Inquiry, but neither of those matters was 'alluded to in the OPI report'.

The VO considers that this issue was 'fundamental to the OPI's conclusions as to the Deputy Commissioner's breach of his obligations' and states that 'without consideration of this issue, I find it not possible to accept the broad and highly critical conclusions and criticisms of Mr Jones'.

It is appropriate to observe at this point that whilst the issue of the role, responsibility and accountability of a Deputy Commissioner of VicPol was not the subject of analysis by the OPI report, I do not regard that matter as being 'fundamental to OPI's conclusions' as does the VO. It is certainly correct, as the Rush Inquiry observed, that the fact of the appointment of a Deputy Commissioner by the Governor in Council did create some confusion as to where a Deputy Commissioner's accountability lay.

The OPI report's final conclusion

It is also clear that that issue was a matter of concern to Sir Ken. He gave evidence to the Rush Inquiry that he had a concern that he 'as a Deputy Commissioner appointed by the Governor in Council under the *Police Regulation Act 1958*, did not have sway over the whole of the organisation'[36]. However, that matter is not relevant to the central issue which was meant to be the subject of the OPI investigation. That is, is there evidence to support the allegations made by the complainants that Sir Ken unlawfully disclosed confidential information to the media? Put another way, the fact that he was a Governor in Council appointment would not entitle him to disclose confidential information to the media in an underhand way.

The VO response to the OPI report is also critical of the fact that a number of persons 'who were alleged to be the recipients of leaks from Mr Jones or of having improper relationships with him' were not compelled to give evidence 'bearing in mind their alleged roles in relation to Mr Jones'. The response names five journalists who it argued fell into this category. In addition to those persons the VO response is critical of the OPI investigation for failing to invite Mr Taylor to be interviewed. The response refers to a statement made by Mr Taylor in response to the draft OPI report provided to him whereby Mr Taylor said it was 'incumbent' for OPI to have interviewed him to have allowed him 'to address all the false assumptions reflected in the report'.

The VO response is also critical of the OPI report in that it failed to consider the standard of proof required in such reports. The VO response argues, and I consider correctly, that the standard of proof that should be applied is the balance of probabilities. As the VO points out the weight of evidence is important and although the balance of probabilities is the appropriate standard, in cases where the finding may result in serious consequences that standard should be applied in accordance with the principles established in *Briginshaw v Briginshaw*[37].

In this context, the VO response is critical of the use of language in the OPI report such as 'the evidence obtained by OPI tends to indicate' on page 116, and on page 117 a reference to material 'tending to indicate, or make more probable' Mr Jones' 'involvement in unlawful dissemination' to journalist Mr McKenzie and on page 138 the use of the phrase that 'on balance' to argue that Mr Jones was the 'most likely individual responsible' for providing the intelligence brief to 3AW.

In addition the VO response refers to the use of the term 'some evidence to suggest' in another Part of the OPI report in order to argue that the conclusions reached by the OPI report were of a 'varying and low standard of proof that the OPI seems to have regarded as appropriate'. On this basis, the VO response finds it 'not possible to accept the conclusions in the report regarding Mr Jones'.

In addition, the VO response deals with what it describes as being 'an unfortunate tendency to include unsubstantiated conclusions.., and the use of exaggerated and tendentious propositions as well as misrepresentations and omissions of evidence to support its conclusions'. Furthermore, the VO response refers to what is described in it as being 'omissions from and minimisations' in the OPI report and gives what are said to be examples of the same.

[36] Page 60, *Inquiry into the command, management and functions of the senior structure of Victoria Police,* State Services Authority, November 2011 (the 'Rush Inquiry report')

[37] (1930) 60 CLR 336 at 361-62.

The OPI report's final conclusion

Finally the VO response concludes that the OPI report, insofar as it concerns Sir Ken, does not contain 'nearly enough substantiation' to justify the conclusions 'recommended' by the OPI report. The VO response raises the question of whether any additional investigation is necessary to deal with what the VO considers to be 'the numerous errors in the OPI report'.

The response expresses the following opinion: '…given the numerous investigation reports that Ombudsman Victoria has prepared in relation to related issues, and the length of time that OPI has taken to prepare its flawed report, there is little point in further plowing this well plowed ground. This is particularly the case as the report primarily concerns two individuals (both of whom are) no longer Victorian public offices and who now reside in different jurisdictions'. Accordingly, the VO states 'I consider that there would be no public benefit in further investigating this matter'. For the reasons which appear below, I agree that no public interest is served by IBAC further investigating this matter.

The VO response also deals with Part 7 of the OPI report which relates to some of the activities of VO of which OPI is critical. As I have come to the conclusion that Part 7 of the OPI report should not be considered by me on the basis that I am of the view that OPI did not have jurisdiction to investigate or report upon the conduct of the VO, I do not intend to refer to the response of the VO and of Mr Taylor other than to say that they reject any suggestion that any conduct of theirs was in any way inappropriate.

However, it is appropriate for me to refer to that part of the response of the VO which deals with the leak of the OPI report. As stated above, upon the report being delivered to the VO on 6 February 2013, OPI issued a media release advising that the report had been delivered to the VO. I agree that this was not appropriate. However of more significance, on 7 February 2013 media reports were published in relation to the OPI report. I consider that these reports reveal that some sections of the media had access to at least part of the contents of the report.

Whoever was responsible for the leak behaved in a reprehensible manner and in breach of the secrecy provisions of the WP Act. It is apparent that at least 20 persons, some former employees of OPI, and some not, had access to either part, or all, of the report. Some of those persons had such access for natural justice reasons. Any future investigation into the leak would require the application of major resources by IBAC and at this distance of time may well prove to be futile. Accordingly, disgraceful as I consider the conduct to be, I see no public or other benefit to be served in an investigation now being commenced into the matter.

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12. Conclusion

The letter containing the VO's response to the OPI report stated that 'it would be preferable for the matters concerning Ombudsman Victoria to be referred to the Victorian Inspectorate so as to allow the matters to be examined by fresh, non-blinkered eyes'. Furthermore the VO report itself states that '…any consideration given to this matter by IBAC should be made by fresh and untainted eyes'. What is set out above is my endeavour through such 'non-blinkered eyes' to summarise the principal (relevant) matters appearing in the OPI report together with the principal basis upon which the whole of the report is rejected by the VO.

As noted previously, I consider that much of the difficulty that arose in the past between OPI and the VO was caused by the complex and convoluted nature of the WP Act and the processes created by it. That matter and the divided responsibilities the legislation so created are at the root of the division that a reading of the OPI report and the VO response makes clear existed in relation to investigations conducted by both agencies under the WP Act.

Fortunately the complications of the past have been resolved substantially by the passage of the IBAC Act and the PD Act. Such conflicts as may arise in the future will continue to require careful management by IBAC and the quarantining of the consideration of such matters (as has happened in the circumstances now under consideration by me), but the problems that have arisen in the past should be resolved substantially by the fact that the responsibility of dealing with, and investigating the complaints and protection of whistleblowers will now be with the one integrity agency, IBAC.

On the evidence before me it is appropriate to observe that during the period of 2009 up until early 2013 some unidentified people have engaged in the 'leaking' of material which was at the time confidential to VicPol, and/or to OPI and/or to the VO.

Clearly this 'culture of leaking' did harm to the reputation of individuals, but in my opinion, in addition, posed a significant risk of bringing the three institutions into disrepute with the public. This culture must be brought to an end and systems developed and introduced into VicPol and into integrity agencies to better manage information and to lead to the identification of those responsible for such leaks in the future.

I turn now to a consideration of some of the matters raised by the VO in response to the OPI investigation report. As stated above the VO response is highly critical of the OPI report and there is some weight in some of the criticisms made by the VO. However, notwithstanding those criticisms I do not consider it appropriate to dismiss the OPI report entirely by reason thereof. Even accepting that some or all of the 'conclusions' reached by OPI might reasonably be the subject of criticism, the OPI report nevertheless contains reference to a number of undisputed facts and circumstances which I need to consider in order to test the validity of the conclusions reached by the OPI report and/or indeed to consider in order to inform my own conclusions.

As stated above, the VO report has rejected all conclusions drawn by the OPI report. Part of the reason for doing so is the conclusion reached in the VO report that the approach of the report '…in reaching these conclusions is, in effect, an attempt to establish a penumbra based upon a collection of events, circumstances, inferences and beliefs to create the conclusion that Mr Jones must have leaked the police information through intermediaries'. Putting aside for the moment the implication contained in this sentence that the OPI report has deliberately attempted to create a conclusion, the sentence ignores the fact that often such a 'collection of events, circumstances and (reasonable) inferences' can amount to strong circumstantial evidence of the existence of the matter under investigation. The question is, do such facts do so here?

Conclusion

A summary of the facts established by the OPI investigation and other investigations of OPI and the VO

There can be no doubt that at some time between 1 July 2009 when Sir Ken commenced duty with VicPol and 2 May 2011 when he formally announced his decision to resign from VicPol as from 5 August 2011, there was a serious level of dysfunction in the relationship between him and Mr Overland. Witnesses who were interviewed in a VO investigation described '… a breakdown in the working relationship between Mr Jones and senior command'[38]. As early as June 2010, Sir Ken had decided to resign from VicPol and had informed Mr Overland of his intention to do so in July 2010 which intention he confirmed in October 2010 following the unsuccessful mediation by a consultant retained by the then Secretary to the Department of Premier and Cabinet. However, following discussion with Mr Overland, Sir Ken agreed to delay his resignation until after the 2010 State election which took place on 27 November 2010[39].

There is no evidence of anything other than appropriate behaviour on the part of Sir Ken during 2010, notwithstanding the fact that it can be inferred reasonably that the relationship between him and Mr Overland must have been sufficiently difficult to justify the intervention of the then Secretary of the Department of Premier and Cabinet.

As is made clear by the OPI report, there is no evidence that Sir Ken leaked information directly to any journalist or media interest at any time. However it is clear that he 'was not afraid to voice his opinion on policing issues even when his views differed from his colleagues and the Chief Commissioner'[40]. There can be nothing wrong with that if that opinion is expressed in the appropriate forum. A principled contradictor in a leadership group can often be the 'voice of conscience'. Indeed, the ability to set the right 'tone from the top' and create an organisational culture where employees at all levels feel supported in suggesting business improvements or raising concerns is now well recognized as a critical element of ethical leadership and effective corruption prevention.

I consider it to be probable that all of the concerns that Sir Ken expressed to Inspector Gawne, Mr Davies and Mr Weston were genuinely felt by him and indeed it may be that he had a reasonable basis for the expression of such concerns. By way of example, Mr Davies gave evidence to OPI that Sir Ken had spoken to him about his concerns about poor administration of IT projects. The Rush Inquiry identified 'a culture within Victoria Police that cost overruns were acceptable but above all, there was a lack of any form of strategy to define the IT needs and requirements of Victoria Police for the future'[41].

It is clear that Sir Ken held serious concerns about the structure of VicPol. Those concerns were expressed to the Rush Inquiry. The Rush Inquiry report referred to some of those concerns. Sir Ken told the Inquiry that he did not consider the structure was 'sufficiently focused on police service delivery'. The Rush Inquiry report noted that in December 2010 changes were made to the senior command structure of VicPol 'in part (as a) response by Mr Overland to those concerns'[42]. Nevertheless the report observes that Sir Ken 'remained dissatisfied with the structure and confirmed his decision to resign'.

It is clear that from time to time Sir Ken expressed himself in strong terms. By way of example, in giving evidence before the Rush Inquiry and referring to the Corporate Committee of governance employed by former Chief Commissioner Nixon he stated '…it was diffuse, it was – there's a better word, it was bizarre. It was a complete and utter charade at bureaucracy. I've never seen anything like it in my life. I can't be too critical about it, it was just awful'. In addition to his concern about structural matters, it is clear that he had concerns about a number of other matters including the crime statistics report, what the Driver Taskforce was revealing, mismanagement of IT projects and other matters.

[38] These matters are dealt with in more detail in the VO report *Investigation into allegations of detrimental action involving Victoria Police,* June 2012.

[39] *Crossing the Line*, OPI, October 2011.

[40] Paragraph 139, *Investigation into allegations of detrimental action involving Victoria Police,* VO, June 2012.

[41] Page xiii, *Inquiry into the command, management and functions of the senior structure of Victoria Police,* State Services Authority, November 2011.

[42] Page 61, *Inquiry into the command, management and functions of the senior structure of Victoria Police*, State Services Authority, November 2011.

Conclusion

The OPI investigators had evidence that Sir Ken was not the only person who had such concerns. It will be recalled that in giving evidence to OPI, Mr McKenzie stated 'Everybody in Driver had those concerns. Many people in the Crime Department had those concerns'.

There is nothing in the OPI report to demonstrate that any investigation was conducted to establish whether or not any of those other persons may have divulged information relating to those concerns to the media. Rather, the conclusion is reached that Sir Ken was behind the divulging of matters related to the Driver Taskforce and other matters and did so for 'personal ends'. It is difficult to see what those personal ends were. In early 2010 he had determined to resign. Whilst it is true that at a later time, and after some manipulation by Mr Weston and others, he contemplated withdrawing his resignation, there is no evidence that he wished to see Mr Overland removed so that he could replace him.

However, the expression of those concerns to Inspector Gawne, Mr Davies and certainly at a later stage to Mr Weston was inappropriate[43]. Whilst one can accept that during the time up until December 2010 when Inspector Gawne was staff officer to Sir Ken, it might not have been surprising that they would discuss jointly the frustrations that Sir Ken was experiencing, it is difficult to see what justification there was for Inspector Gawne to continue to be informed by Sir Ken of his strong views about what he perceived to be wrong with the management of VicPol thereafter. Likewise, and from the point of view of Sir Ken the discussions had with Mr Davies went well beyond what was appropriate, notwithstanding both their friendship and their professional relationship.

The association between Sir Ken and Mr Weston involved inappropriate and indiscreet behaviour on the part of Sir Ken. The association between them commenced with the meeting between them of 12 April 2011.

Mr Weston has given two accounts of this meeting, the first to the OPI *Crossing the Line* investigation and the second to the OPI investigation now under consideration. The OPI report states that Sir Ken, through legal advisers, responded to the *Crossing the Line* investigation and did not challenge the 'detailed account' given by Mr Weston to OPI of what was discussed at that meeting in any substantial manner.

I have examined the response given by the legal advisers to OPI in response to the draft *Crossing the Line* report provided to OPI at that time and it would appear that the summary of what Mr Weston says he was told by Sir Ken is in fact no more detailed than the summary contained in the report under consideration by me. It is true that through his legal advisers Sir Ken took no exception to that earlier summary, and in fact conceded that he had said that he 'felt unable to serve with integrity, having come to the firm view that the force structure should be changed'.

The draft OPI report sent to Sir Ken summarised in bullet point form the matters said by Mr Weston to have been discussed at that meeting. In the response made on his behalf to the *Crossing the Line* investigation, Sir Ken stated that he believed that the approach to him by Mr Weston was to ascertain his willingness to meet with Minister McIntosh to discuss a possible IBAC role and a 'confidential sounding out' of justice issues that had concerned the new Government in opposition.

I accept that he may well have had that belief at that time, although there are aspects of the meeting that could cause some doubt about that. It was in barristers' chambers and not in either the office of Sir Ken or of Mr Weston. Furthermore, the meeting took place some weeks after the meeting Sir Ken had had with the Premier's Chief of Staff on 16 February 2011.

The circumstances of how that meeting came about is a matter of dispute between Sir Ken and Mr Kapel, but what is relevant is that Sir Ken was clearly of the view that the meeting with Mr Kapel had not gone well and that Minister Ryan was annoyed about it having taken place without his knowledge.

[43] See footnote 32.

Conclusion

I have set out in detail above the response of the legal advisers to Sir Ken to the criticism of him made in the draft *Crossing the Line* report. Accepting that Sir Ken did see the invitation to meet Mr Weston as an informal approach from Government,[44] the extent of his discussion regarding his concerns about VicPol and the detail of matters provided to Mr Weston do suggest a serious lack of discretion on his part. Nevertheless, even if the meeting of 12 April 2011 and the discussion of issues at that meeting was appropriate the continuing association and later passing of confidential information cannot be said to be so.

The response to the OPI report argues that 'at all times Weston presented himself as performing a confidential communications role on behalf of the Minister'. However even if Mr Weston was as persuasive and Sir Ken as gullible and naïve as they each would have had to have been for Sir Ken to consider that 'at all times' Mr Weston was acting on behalf of the Minister, much of what they discussed was wholly inappropriate[45]. I consider that it is fair and sustainable by the evidence to say that the matters discussed by Sir Ken with Mr Weston (certainly at a later stage) were inappropriate and lacking in both discretion and judgement on his part.

It is appropriate to note that the evidence of inappropriate contact with Inspector Gawne, Mr Davies and indeed with Mr Weston, and with some members of the media that existed after 6 May 2011 is more compelling than that which existed prior to that date.

I note that in the response to the OPI report the terms 'constructive dismissal' and 'constructive sacking' are used by those advising Sir Ken to refer to the events of 6 May 2011. Those terms are perhaps a more accurate description of what occurred than the term 'gardening leave' which has been used by others.

It will be recalled that on 2 May 2011 Sir Ken had formally announced his resignation to take effect from 5 August 2011. The OPI report relies upon the fact that he remained as Deputy Commissioner until that later date. Undoubtedly Sir Ken was aggrieved with the events of 6 May 2011, and as likely as not, had some justification for so feeling.

It is appropriate to observe that in each of the responses of Sir Ken's legal advisers to the *Crossing the Line* report, the OPI report now under consideration and this report, detailed reference is made to 'contextual matters which [Sir Ken] feels are vital to a proper understanding of the events the subject of OPI's report'. A number of matters of both a personal and professional nature were referred to in those responses including serious issues relating to the health of his wife and daughter, threats to he and his family, media pressures, the 'growing external and internal perception, fed and watered by the media, that the Chief Commissioner and [he] did not get along' and other matters. I accept that the events in which he became embroiled in 2012 were indeed extraordinary, and I accept that he and his family were subjected to extreme stress.

I return now to the issue that was the principal reason for the OPI investigation to be undertaken, and that is that there had been a disclosure made to OPI to the effect that Sir Ken had unlawfully disclosed confidential information to the media[46].

[44] In support of Sir Ken holding this view is that in fact (unknown to Minister Ryan) he did meet with Minister McIntosh and discuss a role with the forthcoming anti-corruption commission with him.

[45] This conclusion is clearly rejected by those advising Sir Ken in their response to the OPI report.

[46] I observe that in the VO response to the OPI report it is stated that '…the OPI report has chosen to alter the characterisation of the disclosure to be investigated from being "in essence, that Deputy Commissioner Jones unlawfully disclosed confidential information to the media" to Mr Jones being the likely source of a leak to the media about the content of Nick McKenzie's stories'. The VO notes that this is a 'subtle alteration' but that it 'represents a most unfortunate divergence from the subject matter of the referred disclosure'. Subtle or not I am of the view that the investigation report went well beyond matters involving Mr McKenzie and was an investigation of the disclosure as originally described to the VO by the then Director of OPI.

Conclusion

As stated above the OPI report does not conclude that Sir Ken disclosed material directly to the media. Rather the conclusion of the investigation is that with full knowledge of the importance of information security he 'engaged in clandestine scheming, misusing and disclosing confidential corporate information in a partisan manner for personal ends'.

Whilst I accept that the evidence establishes that Sir Ken divulged confidential material to others (although not directly to the media) and certainly after 6 May 2011 engaged in activity to ensure that telephone and other conversations had by him were not intercepted, I do not consider that the evidence, circumstantial as it is, justifies the conclusion that he did so with the intention that information that he so divulged would be passed to the media.

I do not consider that the evidence is sufficient to conclude that this behaviour formed part of a scheme devised by him to ensure that those he spoke to would divulge what he said to the media. Nor, do I conclude, as the OPI report does, that information was 'disclosed …in a partisan manner for personal ends'.

As made clear above the evidence establishes that Sir Ken had a number of concerns about the direction in which VicPol was heading. There is no reason to believe that those concerns were not held genuinely.

It is apparent that Sir Ken did not 'mince his words' and it is a reasonable conclusion on the evidence before me that, whatever other skills he may have had, diplomacy was not one of them. I consider the most probable scenario is that by reason of his frustration Sir Ken spoke unwisely to people he trusted about those frustrations, and the cause of them. Obviously that lack of discretion was inappropriate for a person of his seniority and obviously there was a possibility that those he spoke to would pass such information as he divulged to others (as is clear in the case of Messrs Davies and Weston) to the media.

Indeed, I consider that the evidence establishes that at least after 6 May 2011, he was indifferent to that possibility occurring[47]. Furthermore, apart from his endeavour to correct an inaccurate report appearing in *The Age* newspaper on 17 May 2011 dealing with the proposed closure of the SIG, there is no evidence that he took any steps to restrain persons to whom he was supplying information when, as it must have it become apparent to him that information he had supplied to them was ending up in the public arena[48].

It is appropriate for me to make clear that any adverse conclusions that I have reached and referred to in this report in relation to Sir Ken's dealings with other persons refer to him alone. His senior role as a Deputy Commissioner of VicPol gives rise to considerations which do not arise in respect of those other persons.

[47] See footnote 32.

[48] See footnote 32.

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13. Final determination

As indicated earlier I agree with the recommendation of the VO that no further investigation should be made into the allegations that Sir Ken was the source of leaks. There is no public interest to be served by further investigation. As the VO has observed both Sir Ken and Mr Overland are no longer public officers or indeed resident in Victoria. The events occurring in 2011 and 2012 were canvassed in the public arena to a substantial degree. Any bias in the past media reporting is unlikely to be corrected by a further investigation. Furthermore it is highly unlikely that all parties would cooperate with a further investigation.

It is time for IBAC to commit its resources to current issues rather than revisit matters of past history, the true facts of which become increasingly difficult to establish as time progresses.

As also indicated, and for the reasons given previously, I agree with the recommendation of the VO that the OPI investigation report not be provided to Parliament.

Accordingly, and acting in accordance with the delegated power of the Commissioner of IBAC pursuant to section 32(5) of the IBAC Act, I determine both that no investigation of this matter be undertaken by IBAC and that the OPI investigation report not be provided to Parliament.

Whilst I agree with the recommendation of the VO that his report together with the relevant Parts of the OPI report and this report should be provided to the current CCP for his consideration as to whether or not any disciplinary action should be taken in respect of the conduct of Inspectors Gawne and Robertson (if they are still serving members of VicPol), I have reservations as to whether in all the circumstances there is any good purpose in such disciplinary action being considered. I determine that IBAC is to refer relevant Parts of the OPI report, the VO report and this report to the current CCP for him to consider whether or not any further action should be taken by him.

As stated above, it is time for Victoria to leave behind what can only be described as a sorry chapter in the history of VicPol. No public interest is to be served by any further investigation. Nor is there any justification in IBAC allocating its resources to investigate a matter that should now be confined to history.

Hopefully, this report will bring some closure to an unhappy period of disruption, mistrust and dysfunction which occurred in the senior ranks of VicPol during 2010 and 2011 and which, in combination with the legislative problems created by the then provisions of the WP Act led to considerable ambiguity, if not conflict, in the relationship between the VO and OPI.

As stated above, to a considerable degree, the repeal of the WP Act and its replacement by the PD Act has resolved much of the uncertainty, ambiguity and potential for conflict created by the WP Act.

However, that does not mean that the management of whistleblower complaints will not be without difficulty in the future. It will continue to be necessary for IBAC to manage such complaints with considerable discretion and no doubt on occasions will require the use of 'Chinese walls' within IBAC. However given mature and impartial consideration by those responsible for such management that task is well capable of being achieved.

I have commented already upon the culture of 'leaking' which developed in VicPol during the period in question. The OPI report and the responses to it reveal that some consider that OPI, and others consider that the VO, might have shared this culture. I have no basis to say that either allegation is correct, although it is clear that some confidential aspects of the OPI investigation did come into the possession of certain parts of the media.

No doubt there are very good operational reasons for a close relationship between VicPol and the media. I can understand why on occasions it will be necessary and completely appropriate for VicPol to provide background and other information to the media (through proper channels).

Final determination

No doubt from time to time, it will be appropriate for the Commissioner of IBAC or for the VO or their delegates to speak to the media to explain the operation of their respective bodies. This may well be particularly appropriate in respect of the educative and preventative function of such bodies. However, in relation to their investigative functions, integrity bodies speak through their reports and through appropriate media releases. I see no basis for such bodies to provide background briefings, or to have private discussions with selected individual journalists in relation to that investigative function.

Finally, if the public is to have respect for the important work done by integrity bodies in Victoria, it is necessary that the conduct of investigations and the reporting of such investigations be transparently fair-minded, unbiased and impartial. Complainants are not clients. Complainants bring to integrity bodies information about matters which may be within the jurisdiction of the integrity body in question to investigate. There may well be circumstances whereby such complainants require protection from those the subject of the complaint or others, but that protection must be provided in a fair minded and principled manner and in a manner which is subject to appropriate scrutiny, whether internal or otherwise.

Appendix A

Instrument of delegation

ibac independent broad-based anti-corruption commission

***INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION ACT 2011* (VIC)**

DECLARATION OF INABILITY TO ACT UNDER SECTION 29 and DELEGATION UNDER SECTION 32(5)

Pursuant to section 29 of the *Independent Broad-based Anti-corruption Commission 2011* (Vic) (the **Act**) I, **STEPHEN O'BRYAN**, Commissioner, Independent Broad-based Anti-corruption Commission (IBAC), for the State of Victoria, hereby declare myself unable to act in respect of IBAC's handling of an investigation by the Office of Police Integrity on behalf of the Victorian Ombudsman into allegations of unauthorised release of information by a former Deputy Commissioner of Police on account of perceived conflict of interest.

Accordingly and pursuant to section 32(5) of the Act, I hereby delegate to The Honourable **MURRAY BRYON KELLAM AO QC**, being a sworn IBAC officer who is qualified under section 20 of the Act to be the Commissioner, all duties, functions and powers of me the Commissioner under the Act (including the duties, functions or powers already delegated to me as Commissioner by IBAC under section 17) and any other Act for the purposes of dealing with the matter.

S. O'Bryan

Stephen O'Bryan
Commissioner, IBAC

Date: 6 August 2013

Appendices

Appendix B

Public reporting requirements in section 162 of the IBAC Act

Nothing in this special report is considered by Mr Kellam to be covered by sections 162(2) and (4) of the IBAC Act which require, respectively, that the principal officer of a public body that is the subject of adverse findings be afforded the opportunity to respond, and that non-adverse comment or opinion about any persons be shown to them in advance.

Mr Kellam otherwise considers that to the extent his conduct is the subject of comment or opinion in this report Sir Ken has, in the course of OPI's investigation and this review, been given a reasonable opportunity to respond to same, including anything that might be regarded as adverse. In accordance with section 162(3), Sir Ken's responses to such comment or opinion are fairly set out in this report.

To the extent that persons are identified in the report and are not the subject of adverse comment or opinion, Mr Kellam is satisfied in accordance with section 1 62(7) that:

- it is desirable to do so in the public interest
- it will not cause unreasonable damage to any such person's reputation, safety or well-being
- each such person is not the subject, nor for that matter intended to be the subject, of any adverse comment or opinion.

Abbreviations

CCP	Chief Commissioner of Police
IBAC	Independent Broad-based Anti-corruption Commission
IBAC Act	*Independent Broad-based Anti-corruption Commission Act 2011*
ICAC	Independent Commission Against Corruption
LEAP	Law Enforcement Assistance Program
OPI	Office of Police Integrity
PD Act	*Protected Disclosure Act 2012*
PI Act	*Police Integrity Act 2008*
PR Act	*Police Regulation Act 1958*
PSC	Professional Standards Command
SIG	Security Intelligence Group
SMS	Short message service (text message)
TPA	The Police Association
VI	Victorian Inspectorate
VicPol	Victoria Police
VO	Victorian Ombudsman
WP Act	*Whistleblowers Protection Act 2001*

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