

TRANSCRIPT

CLOSED PROCEEDINGS

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

Inquiry into the external oversight of police corruption and misconduct in Victoria

Melbourne — 7 May 2018

Members

Mr Kim Wells — Chair

Ms Marsha Thomson — Deputy Chair

Mr Sam Hibbins

Mr Danny O'Brien

Mr Simon Ramsay

Mr Tim Richardson

Ms Jaclyn Symes

Witnesses

Mr Robert Redlich, Commissioner,

Mr Robert Sutton, Director, Operations, and

Ms Christine Howlett, Director, Prevention and Communication, Independent Broad-based Anti-corruption Commission.

The CHAIR — Welcome to this closed hearing of the Independent Broad-based Anti-corruption Commission Committee. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and, where applicable, the provisions of reciprocal legislation in other Australian states and territories. However, it is important that you note that any comments you make outside the hearing, including effective repetition of what you have said in evidence, may not be afforded such privilege.

This hearing is closed to the public. However, it will be transcribed by Hansard and the transcripts will be published when the committee tables its report in Parliament. Have you received and read the guide for witnesses presenting evidence to parliamentary committees? It is important to note that any action which seeks to impede or hinder a witness or threaten a witness for the evidence they would give or have given may constitute and be punishable as contempt of Parliament. We are recording the evidence and will provide a proof version of the Hansard transcript at the earliest opportunity so you can correct it as appropriate.

Commissioner, I would like you to invite you to make a verbal submission, and we will ask questions as appropriate. I understand that during your submission we will need to go in camera. If you would like to indicate to me as Chair when you want to go in camera, then I can do the appropriate read so Hansard is accurate. Thank you for your time.

Mr REDLICH — Thank you, Mr Chairman. Ladies and gentlemen, I think the primary purpose of today is to go through the investigative powers that we would like to see the committee recommend to Parliament should be given to IBAC. You have two documents. One is an up-to-date spreadsheet and the second is a memorandum which seeks to explain in some detail why each of those powers is sought. Some of them are so self-explanatory I will spend very little time on them. I will go through those in particular which require some additional explanation.

The CHAIR — Sure.

Mr REDLICH — The first item, 2.1 on the memorandum, concerns the amending of both the IBAC act and the Victoria Police Act to really address the fact that we have inconsistent definitions of misconduct in each of those acts which, as the secretariat have recognised, makes it difficult for anyone, let alone those that do not have legal expertise, in deciphering how the acts are meant to work together. But in substance what is proposed by this particular amendment is that we bring into alignment the misconduct which the chief commissioner would refer to us, the misconduct which we can investigate or refer back to Victoria Police, and the misconduct about which we can make findings.

We have a definition of misconduct in the IBAC act, we have a definition of police personnel conduct in the IBAC act, and when you go to the Protected Disclosure Act it does not talk about either of those things — it talks about improper conduct — and the definitions are different. What we are proposing is that whatever in the end the committee resolves should be the obligation of the chief commissioner in terms of referring matters to us, the definition should reflect the fact that what comes to us should be anything that we might have the ability to investigate, and it should be mirrored in the definitions of the Protected Disclosure Act.

I do not want to say any more about that, but self-evidently the present situation is that the chief commissioner has to decide when determining whether to refer something to us ‘Could this be a protected disclosure’ — this section 167(3) of the police act. Then the commissioner has to go to the Protected Disclosure Act and look at the definitions and so on, and yet that is not what the IBAC act talks about; it talks about either misconduct or police personnel conduct — different definitions. So that needs to be sorted out. Hopefully that can be done with legal assistance, but there needs to be a proper alignment of the three.

The second thing that we have suggested under 2.1 is section 15 of the IBAC act deals with our functions, and if you look at 15(2) it enumerates the functions but it does not actually say in terms that IBAC should have an investigative function in relation to police personnel conduct. To remove any doubt about that, we would submit that that should be included under section 15(2). You do find thereafter that the act talks about IBAC’s investigative function in relation to police personnel conduct, but it is not actually enumerated in the section which purports to identify what the functions are.

The next matter that I would pass to is the obligation to refer complaints. We touched on this on the last occasion I was here. You will recall that section 73 of the IBAC act says that if IBAC comes to the conclusion

that it is more appropriate that some other body investigate something, which would include Victoria Police, it must refer it to that other body. I think someone suggested on the last occasion I was here that that should plainly be altered to give IBAC a discretion rather than an obligation to refer something back because they might more appropriately investigate it. That problem may not be so acute in the event that IBAC has the additional investigative powers that we are seeking — then the fact that it says ‘must’ or ‘may’ may not matter so much. But at present there are many types of crimes where IBAC simply does not have the same powers as a police officer and it remains the regrettable fact then that one would conclude it is more appropriate for the police to investigate that — for example, a sexual offence committed by a police officer or a serious assault involving forensic questions at the scene of a crime. We do not have powers that police officers have. That needs to be addressed and then we would not need to conclude that it is more appropriate for that issue to be referred back to Victoria Police. Seventy-three is merely to address the fact that at the moment it is mandatory that we pass it back to Victoria Police if they are the more appropriate body to investigate it, and that largely turns on the difference currently between the powers an IBAC investigator has and a normal police officer.

Then the third matter, 3.1, the definition of ‘relevant offence’. In the definitions section ‘relevant offence’ is defined. It identifies various crimes, including four common-law offences that are indictable, but it does not include, for example, the common-law offence of conspiracy to defraud. A large number of the cases that IBAC looks at do involve a conspiracy to defraud, and so again to put the matter beyond doubt in terms of potential legal argument what we recommend is that the definition of ‘relevant offence’ be altered so as to include any indictable common-law offence. I am assuming that if anyone has questions they will interrupt me. Please do.

The CHAIR — Yes. Absolutely.

Mr REDLICH — Yes. Thank you. ‘3.2 Privileges and preliminary inquiries’ — as the committee would be aware, the act was not long ago amended to give IBAC the ability to conduct a preliminary inquiry. A preliminary inquiry does not permit IBAC to exercise any coercive powers, other than to issue a summons requiring someone to produce documents or material, the purpose behind that being we are then able to get access to material which might give us a better idea about whether or not there is something which ought to be investigated. The problem at the moment is that, by contrast to the examination process once we are investigating where the act abrogates all of the privileges against self-incrimination and other privileges that might be invoked, there is no abrogation of the privilege when someone is asked to produce documents at a preliminary examination.

We have already had examples of where someone has come, faced with a subpoena, and has refused to produce material because the material, it is said, might incriminate them. So that stifles the purpose of the preliminary examination at the very outset. What we are asking for is that the act be amended to provide, as it does in the case of an investigation where a private or public examination is taking place, that the person cannot rely on privilege for the purpose of producing documents.

The next is 3.3. We have not actually encountered a problem where there is an investigation being run by Victoria Police and IBAC determines that it should investigate and tells Victoria Police that it intends to investigate, that the police have then stopped their investigation. It has not been quite so straightforward in relation to other public sector bodies, particularly Corrections. We have had occasions where it has become known that IBAC wishes to investigate a matter and nonetheless Corrections has proceeded on with an investigation, creating the risk of the quality of the investigative material being affected. So we are seeking a provision that puts beyond doubt that once IBAC has determined to investigate something any investigation being conducted by a public sector body or Victoria Police cease at that point in time.

The next is 3.4, and the committee might recall that I gave the committee an example of the problem that arises if we do not have a power to search a person on the execution of a search warrant or the ability to search police premises. The amendment we are seeking is set out in 3.4.1 to amend two of the provisions in the IBAC act to ensure that the investigator has the power to search a person during an authorised search of premises. We had the problem where, for example, they wanted the mobile phone of the police officer. He had it in his possession but would not produce it and knew that we had no power to ask him to produce it.

The CHAIR — When you say ‘police premises’, are you talking about not only a police station but also the home of a police officer?

Mr REDLICH — Yes. Again, another example would be if we were investigating a serious assault and the police officer had blood on his shoes. We would have no power to require him to take his shoes off and take the shoes into custody for the purpose of a forensic examination. These are things that are so fundamental and basic to any proper investigation we need to have that investigative power.

Mr RAMSAY — Can I just ask a question?

Mr REDLICH — Yes, certainly.

Mr RAMSAY — A question that has been running through my mind is that, with the request for powers that the actual investigators themselves would require — and this might be a question for Mr Sutton — their powers if this legislation was supported and approved would be almost over and above a sworn police officer or Australian Federal Police or anyone else who has gone through significant training and has the sorts of credentials of a police investigator. Search and seizure, search and investigation of a home — all these things seem to me to increase the responsibility of the IBAC investigator.

Mr REDLICH — That is true.

Mr RAMSAY — I was just wondering, is there a requirement then to train IBAC investigators to a standard where they are as trained as a sworn police officer or someone who has all those powers themselves?

Mr REDLICH — Well, the authorised officer is only approved by IBAC either if they come from a police force or already have the recognised expertise, the equivalent of a police officer. In some cases where they do not, then they are trained, and until they have been adequately trained and approved, they are not authorised. But once they are authorised — they have no — what was being submitted by IBAC — they have no more powers than a police officer would have in the same setting. They would be subject to the same obligations and safeguards as are imposed on a police officer. I would not want to give the impression that we are suggesting in any way that investigative powers extend beyond those of a police officer or that any of the safeguards that apply to a police officer should not apply to an IBAC investigator. Quite the contrary.

We simply want the investigator at IBAC to be able to mirror the capacity of a police officer, particularly if it is being said that IBAC should investigate more offending by police officers and should have a greater capacity to investigate matters that would ordinarily be investigated by a police officer. It would make no sense of course to say, ‘Yes, do that, but not with the same powers as a police officer’.

Mr RAMSAY — No, I appreciate that. I was just thinking that with the potential increase in resources you may well be more reliant on civilian investigators rather than ex-police officers who have had that training.

Mr REDLICH — There is a real difficulty in recruiting investigators. We still have not completely filled the positions of our fourth investigative team and we are going to have to look at different ways to recruit people. As you rightly say, if they come from a civilian background then they will have to be trained so that they have the expertise, to the point where they have the necessary expertise of an investigator that matches that of a police officer.

Ms HOWLETT — It might just be worth noting that the powers that we are seeking are commensurate with equivalent agencies in other jurisdictions. We have provided the secretariat with details of the provisions that other agencies in other states have, so it is nothing over and above what our counterparts have in other jurisdictions.

Mr REDLICH — At 3.4.2 is a request that the obligation on IBAC in relation to a search warrant simply mirror that of Victoria Police, that it not be necessary to nominate on the warrant the names of every individual officer who is attending the search, which can create logistic problems. For example, if, between the date that the warrant is actually issued and the date that it is executed, one of the officers becomes ill and has to be replaced by another officer, their name is not then on the warrant. It is really just to ensure that as with police it is enough that whoever attends to execute a search warrant be an authorised officer.

At 3.4.3, passwords and access to documents on computer, we seek the same power that police have to require an individual to provide a password to a computer if access is sought to a computer, and that the provision be broad enough to remove any legal argument that one cannot have access to the data held on, say, the cloud — in other words, it is not sitting in the computer but via the computer enables access to the cloud. We have already

had experience of an argument being raised that the warrant cannot extend that far because the information is not actually in the computer on the premises. So what we are seeking is an amendment which mirrors that that currently exists in the Crimes Act for Victoria Police.

At 3.4.4, require names and addresses: if in the course of executing the search warrant there are other persons on the premises and there is reason to believe that that persons has or is likely to commit an offence or that the person on the premises is likely to assist in the investigation, that like a police officer the IBAC investigator have the power to ask for the name and address of that person.

Then 3.4.5 is the absence presently of an IBAC investigator's capacity to arrest the person. Towards the conclusion of an investigation, if the decision has been made that the evidence demonstrates that the person has probably committed the offence under investigation, IBAC has no power to arrest. IBAC must go to the police, must brief police officers, must get their concurrence that the material is sufficient to generate, as we know, the minimum requirement for an arrest — namely, that the police officer have a reasonable suspicion that the person has committed the offence. Then it is a matter for getting the cooperation of the police officer as to whether or not the person would be arrested.

At present what IBAC must do is it has got to issue a summons to the person, returnable three weeks later, and during that time of course the person may decide to abscond, the person may dispose of incriminating evidence. That is not how it works within the criminal justice system. The police officer arrests once the evidence has reached that state of satisfaction where the police are satisfied that there is a reasonable suspicion. They are arrested. They then have the opportunity to participate in a record of interview. They are cautioned. They are told their rights, of course, that they do not have to answer questions. But very often we find that in the course of a record of interview people make admissions or they provide an exculpatory account, which makes clear that they have not committed the offence. But because IBAC has no power to arrest it is not able to then engage in what is normally a fundamental part of the investigative process — namely, conducting a record of interview, (a) for the purpose of seeing whether or not admissions will be made, or an exculpatory account given.

Ms SYMES — Would you propose that the power of arrest is identical —

Mr REDLICH — With Victoria Police.

Ms SYMES — No.

Mr REDLICH — I am sorry.

Ms SYMES — Regardless of whether you are wanting to arrest a serving police officer versus a civilian — any difference between the two powers of arrest?

Mr REDLICH — No. It should be the same.

Ms SYMES — Just to clarify, under an IBAC record of interview, you would have the right to legal representation after the arrest was executed?

Mr REDLICH — Yes. One of the things that is generally asked of the offender or suspect, particularly if they are young or have some disability, is whether or not they want representation. The safeguards which normally operate in respect of a police officer who wants to interview the civilian would operate here. What we have not done, of course, with each of these proposals is drawn attention to the raft of safeguards which exist within the legislation when any of these investigative powers are exercised by a police officer. But we assume and would support the view that whatever those safeguards are they must apply equally in the case of an IBAC investigator.

Mr D. O'BRIEN — I recall asking your predecessor about the ability of IBAC to lay charges, which you have — you can already do that on summons, is what you are saying.

Mr REDLICH — Yes.

Mr D. O'BRIEN — Has IBAC done that much at all?

Mr SUTTON — Yes, quite a number of times. I am guessing we have had 50 or 60 prosecutions that have either been finalised or are ongoing.

Mr D. O'BRIEN — And charges laid by IBAC, rather than by police?

Mr SUTTON — All charges have been laid by IBAC.

Mr D. O'BRIEN — And if you have the power to arrest, does that change the staffing profile you need? Do you need to then have some muscle, if I can put it that way?

Mr REDLICH — I doubt it.

Mr D. O'BRIEN — Not really.

Mr SUTTON — Not to any great extent, no.

Mr HIBBINS — Just to clarify on a previous point, IBAC normally in its own investigations has got special powers that are not available, obviously, to the courts and other forms?

Mr REDLICH — The coercive powers, yes.

Mr HIBBINS — Yes, but if you arrest someone and question someone under arrest, those powers would not apply; it would just be the normal powers that a normal police officer would have?

Mr REDLICH — That is right. It is interesting you raise that, though, because it has been the subject of judicial debate. There have been a couple of cases that have gone to the Court of Appeal and the High Court where a commission — the Australian Crime Commission, for example — sought to exercise coercive powers at a point of time after a suspect had refused to participate in a record of interview. It has been said that that would be an improper exercise of the coercive power. So we are more than conscious of the fact that if one commences the process of seeking to arrest and interview, that is the end of any possibility of the exercise of coercive powers.

Mr RICHARDSON — Commissioner, just to the point of power of arrest, do you have a record of how many instances or investigations have been compromised due to the fact that that arrest has not been able to be forthcoming? Given that the suspect would probably know that the investigation is ongoing if IBAC has made inquiries, how many instances is it where that has fallen down or compromised IBAC investigations?

Mr REDLICH — I am not sure that they can be easily answered. What we do know is that it is commonly the case that, notwithstanding confidentiality notices that are issued in the course of conducting private examinations, for example, that they are breached. That is, people who have been told that they are not able to communicate the nature of the inquiry still do so. I am not sure in the context of police investigations and prosecution in how many cases. Could I have Mr Sutton answer that?

Mr SUTTON — I do not have numbers — I could probably get those for you — but a good recent example was an investigation where we were witnessing a course of conduct on the part of a person that we thought presented a danger to the public. We could not arrest that person immediately, so we could not put an immediate stop to that behaviour. In that case we had to go through a primary process of applying for a warrant before the court but then going to the police, because we have no powers to execute an arrest warrant. So we had to then go to the police, present our case to the police regarding the need for arrest and then persuade them.

Mr RICHARDSON — So are we saying that we do not trust police to execute the arrest, once given a brief of evidence from IBAC? Is that what we are saying?

Mr SUTTON — I am not saying that, no, but the police have other priorities, and of course if the responsibility of arrest goes over to the police, they have to have the requisite satisfaction as to the evidence available, and in practice — that has involved in the past in cases where I know that has happened — the police will want to re-investigate the matter, which delays the arrest and allows the course of conduct to continue.

The CHAIR — And I guess, as you are saying, there is a timing issue, the length of time it takes from when you could arrest immediately to passing it over?

Mr SUTTON — Yes. We also in that same case, once that person was arrested, witnessed behaviour of that person breaching bail conditions. Again, we could not do anything about it. We spoke to the police but were not in a position to fully brief them immediately. When that person next appeared before the courts, we lodged further charges around breach of bail and there was some discussion from the bench as to why we had not acted immediately that we witnessed that conduct.

Mr RICHARDSON — Just one further question. So then who would be responsible for the jurisdiction over which IBAC uses that arrest? Would it be the inspectorate for Victoria that oversees IBAC who would look after that? What would be that process for IBAC executing arrest over police officers or members of the public?

Mr REDLICH — Well, if a police officer wrongfully arrests there is a range of civil remedies available. There is of course the offence of malicious prosecution. I mean, there are numerous safeguards in terms of the improper use of an arrest warrant, and we are not suggesting that any of those should not apply equally to an IBAC investigator.

Mr RICHARDSON — So this need has come about because of the failure of Victoria Police and the timing when the brief goes from IBAC to Victoria Police?

Mr REDLICH — Yes.

Mr RICHARDSON — Okay. Obviously then there is the whole question about when referrals of investigations are made, how many failures along that journey as well and whether this is more systemic?

Mr REDLICH — Yes.

Mr RICHARDSON — That is a question on notice, how many investigations are compromised and whether that is systemic, requiring a power of arrest.

Mr REDLICH — At least my perception is this proposal is not driven by some concern about a systemic failure by Victoria Police to respond appropriately when we say we want to arrest. Rather it is just a peculiar and striking absence of the standard investigative power. I am more concerned about the fact that we then do not have the ability to immediately conduct a record of interview, which is such a fundamental investigative tool — and also gives the offender the opportunity there and then to explain whether or not there is an obvious exculpatory explanation for the matters that have been placed before him or her. We had the embarrassment — we had a magistrate saying in relation to a recent operation, where I think — how many people were charged with Murano?

Mr SUTTON — It was 12, I think.

Mr REDLICH — We had a gentleman intrinsically caught up in the justice system who for a long time had been conducting himself inappropriately and had inveigled a whole lot of other people into criminal offences, and when we engaged in the summons process, the magistrate said, ‘Why haven’t all of these people been brought before me by way of arrest?’ — so that bail conditions could be dealt with then and there. That is something else that we are not able to do, of course. We cannot arrest; we cannot ensure that there are adequate bail conditions in terms of the risk of them fleeing the jurisdiction or concealing property and so on. So really I am just saying it is a matter of great curiosity that in the context where you want to have an investigative body that is able to do the same job as a police officer by making a choice, have IBAC do it rather than the police, that you would not want the investigative officer to have the same limited powers as a police officer has.

Mr RICHARDSON — Does that mirror other jurisdictions as well, bringing them into line?

Mr REDLICH — It does.

Ms HOWLETT — It does, and indeed, as we have pointed out in the document that we have tabled, even some other public bodies like fisheries officers, for example, we have cited here — and PSOs.

The CHAIR — I am mindful of the time. Are there any other discussions around 10? Commissioner?

Mr REDLICH — Thank you. Could I just ask, Mr Chair, how long do I have?

The CHAIR — We have you until 11.45, but how long do you need?

Mr REDLICH — I would think I have got at least a quarter of an hour of matters that I want to raise with the committee, which I suspect will prompt questions.

The CHAIR — Okay. Then we are up to recommendation 11.

Mr REDLICH — Thank you very much, Mr Chair. Forensic procedures, I do not need to say much about that but perhaps to just emphasise the obvious. Again, we are only asking for the same powers as a police officer has and, as Ms Howlett has just said a moment ago, these powers reflect those of other anti-corruption institutions that other states also have.

Ms THOMSON — Can I ask a question? I do not quite understand this. I assume that if a crime has been committed the first you call is the police, and they will take and deal with the forensic evidence as presented. So your ability to actually obtain forensic evidence that is at the point of the crime becomes very restricted anyway, and it is not until there is some allegation of a corrupt process that IBAC comes in.

Mr REDLICH — Yes.

Ms THOMSON — So you could utilise the evidence that has already there that is forensic evidence, but I do not see how it works in a situation where you are already secondary to the incident that has occurred.

Mr REDLICH — The investigative power is intended to address the prospect of us being the secondary incident. In other words, if there were going to be a category of cases that we should investigate —

Ms HOWLETT — For example, like an alleged assault.

Ms THOMSON — On that basis, if there was an assault, you would assume that the assault would originally go to the police and then the complaint arises to IBAC of the assault occurring. Is not that the case? I am sorry; I am really confused by this.

Mr REDLICH — Of course that is how it happens at the moment.

Mr SUTTON — There is a number of circumstances. Say, for instance, that someone makes a complaint of assault to the police and the police initially attend, as you have said, and for some reason — because of the seriousness of the assault or whatever — IBAC takes over the investigation. That might be within a matter of days or even a week. So if we speak to a complainant and they said, ‘Look, he was wearing suede gym boots and that’s what he kicked me with’ and ‘I also know that I scratched him quite significantly down the back’, if we went to someone’s home, we could not —

Ms THOMSON — We are assuming a police officer?

Mr SUTTON — Yes. We could not take those boots, and we could not have that person’s body examined for those scratch marks. That is a very basic example.

Ms THOMSON — That is assuming that the police have not already done that.

Mr SUTTON — Yes.

Mr REDLICH — But if we are to address the current dilemma that the act prescribes — that if it is more appropriate for some other body to investigate, in this case Victoria Police, and if it is an assault and there are questions of forensic procedures and we do not have those powers — then, a fortiori, it is more appropriate for Victoria Police to investigate it. As I understand it, we are seeking to design a system that gives IBAC the capacity to do that at the first instance. So if we had that power, we might strike an arrangement with the chief commissioner, for example, that if it is a serious assault — that is, an assault where someone has sustained serious injury — as a matter of course IBAC will investigate that unless we say otherwise, in which case when the police are notified of that assault an IBAC investigator or investigators will attend from the outset. So this is all designed to remedy the present inequality — that there are so many things the police can do that we cannot do.

Ms SYMES — But it would not create a system where it is repetitive either, would it? So in Mr Sutton's example if the police themselves had made a physical examination of the scratches, for example, would IBAC be proposing to repeat that or take the evidence off the hands of the police and pick it up from there?

Mr SUTTON — Unless we had some reason —

Ms SYMES — To repeat it.

Mr SUTTON — yes — we would not. But another good example is that, as we know, for instance, where there is an assault there is a transfer of DNA, and quite often in assault investigations there are powers that the police currently have access to through an order from court to take DNA samples from a suspected offender. We cannot do that. That is just one of the really basic ones.

The CHAIR — Any others on recommendation 11? Okay. Recommendation 12?

Mr REDLICH — Yes, 3.4.7. The road safety rules provide an exemption for a police officer in certain circumstances to be able to breach the road rules. When IBAC surveillance officers, for example, are following a suspect and there is some particular reason why they need to stay in touch with them, then there is a need for that exemption — bearing in mind, however, that there are considerable safeguards and restrictions in terms of how a police officer can behave in such a context.

We are not talking about reactivating the police scenario of wild chases through the streets; we are talking here about our surveillance capacity to be able to keep in contact with a vehicle. Obviously if someone is driving at 150 kilometres an hour to escape detection, that is not going to be something that our surveillance people can do anything about. In the main we are talking about surveillance where the offender or suspect is completely unaware that they are under surveillance but the surveillance officer needs to be able to stay in contact with them. They might go through a red light or they might speed without it being excessive. But presently the surveillance officer has no protection whatsoever if in the course of surveillance they breach the law. If one looks with scepticism on this sort of proposal, you can do no more than look at it with the same degree of scepticism if one is looking at a police officer who has that power.

Ms SYMES — Do you have lights and sirens?

Mr REDLICH — We would not be doing that because, as I say, our sole reason for wanting to have that power is for surveillance purposes. If we discharge a siren or put a light on the vehicle, that is the end of it being discreet surveillance. That is not something —

Ms SYMES — Despite the fact that it would be an inconvenience, what about with a red light camera, if you as commissioner wrote to the police when the fine came in and said, 'Hey, this was in the course of duties'. Is that something that —

Mr REDLICH — Well, that would have to be addressed. It might be a problem.

Mr SUTTON — That would be a problem because our surveillance officers operate under assumed identities. Our vehicles are registered under assumed identities. So we would have to make a declaration as to that officer's real identity, which would reveal one of our surveillance officers, and the vehicle.

Mr REDLICH — Then if I can go to the examinations, as the committee would probably be aware, to have a public examination requires an exceptional circumstance test and under the present bill requires even further limitations. The present bill before Parliament proposes additional limitations, such as 'endemic', 'systemic' and 'serious'. The various forms of the legislation of course have gone through successive governments now, and if I may speak frankly, the only reason I can see why anyone would want to impose this level of limitation is to appease a particular interest group — a powerful interest group — and, with great respect, that ought not be a consideration which influences the committee.

If the bill is passed, there will be provision in the bill to enable IBAC in a public sitting to at any stage go into a private sitting if there is evidence that it is likely to damage individual reputations. That is a powerful additional tool which is being proposed, which I would entirely support and which it appears would go a long way towards affecting the only rationale I can see for why one would want to deter an institution like IBAC from having public hearings. We have had very few public hearings, and one of the criticisms that is made of IBAC is that it

has not really discharged its function in terms of public hearings. Particularly if we can ensure that we are able to protect reputations, we would like to see the act amended to remove the restrictions of it being exceptional circumstance.

The most obvious difficulty: we have a situation, by way of example, where we have multiple councils that are breaching procurement requirements. It is endemic and systemic. It is by definition not exceptional and therefore by definition not something we can look at by way of public examination. That entirely defeats the objective of public examination — to have a public airing and discussion of a process that needs to be much better governed and implemented than it presently is at a local council level. So the exceptional circumstance and the other restrictions proposed under the present bill regrettably significantly handicap our ability to ever hold public examinations, and I would ask the committee to seriously consider that particular restriction.

Regarding 4.2, arrest warrants relating to examinations, at present the act as it is constructed only enables someone to be arrested if they have been served with a summons and failed to appear. What we seek is an amendment to the provision specified there to enable a person to be arrested if on appropriate evidence it is clear that the person does not intend to comply with the summons. In other words, one should not have to wait until the person has actually failed to appear and has disappeared before one can act upon it. Again it is not a power that is absent in other jurisdictions. We have referred, for example, to the provision in the Western Australian act in relation to the same power.

The CHAIR — I am just conscious of the time. We have got about six more to go, so we will need to move through these.

Mr REDLICH — All right; I shall move more quickly. Regarding the offence of 4.3 — of concealing, destroying evidence — there is presently no provision in the IBAC act for that offence. As the comparative chart which you have been supplied with shows, all other state bodies have such an offence. Let me give you an example: there is an operation currently underway which involves very senior members of Victoria Police where their mobile phones were seized. The particular officer I have in mind was approached on the Monday in relation to his mobile phone. He told the investigators that he was aware that the mobile phones of his colleagues had been seized before the weekend — this was a Monday. When asked for his phone he said, ‘I’ve thrown it away’. He paid scant regard to the fact that he had in effect concealed evidence. So there was no offence.

Had he been called to an examination and said that in the course of the examination, that evidence would not have been admissible against him. If you look at the provision, it sets out, as you would expect, that if a person commits perjury or acknowledges the commission of other certain offences in the context of giving evidence, the act provides that that evidence can be used against them. So if we called that officer and he repeated the fact that he had thrown his phone away and it was an offence, then that evidence would be admissible against him. It is quite a significant omission from the current legislative framework.

I think 4.4 is self-explanatory. I do not think I need to say any more about that or 4.5. Let me just say something about 5.1 because I am sure it is a matter that is of interest and concern to the committee.

Ms SYMES — Can I just go back to 4.5?

Mr REDLICH — Yes, certainly.

Ms SYMES — I just was wondering about ‘transferred into the custody of an authorised IBAC officer’. Can’t you conduct interviews with prisoners at prison?

Mr REDLICH — We can. I think we are dealing rather with the issue of where we want to call them as a witness

Ms SYMES — Right. To a public hearing?

Mr REDLICH — It is a matter of striking an arrangement with correctional services. Normally they would bring the witness via a van from custody, but at present we cannot do that so we have to do this through a police officer.

The CHAIR — So we have 18, 19 and 20.

Mr REDLICH — I just feel I should say something to you about 5.1, which is the issue which I am sure concerns the committee about the extent to which we currently tell complainants what the outcomes of investigations are. The committee will be aware that there are three stages at which IBAC may make a decision which affects a complainant. The first is at the gateway. The complainant or notification comes in. IBAC must decide whether to dismiss, investigate or refer. That is a threshold gateway process. The second point at which a decision might be made is, if there is an investigation, at the outcome of the investigation — when it is completed. The third is where IBAC actually conducts coercive examinations and the complainant and other witnesses may be called to give evidence.

Our preferred position is that we would like to give more reasons, even at the gateway process — at that very first stage — but the difficulty is that if we give reasons and there is no protection in the legislation, then the complainant can immediately go to VCAT and there can be an extended court process about whether or not the reasons for a decision justify the decision made. Similarly at the end of an investigation we tell the complainant the outcome of the investigation. We would like to give more extensive reasons for the outcome of the investigation, but —

Ms SYMES — Would you propose ‘may’ versus ‘must’?

Mr REDLICH — Yes, but we need to have some legislative provision that ensures, a, we are not obliged.

Ms SYMES — End of the line, yes.

Mr REDLICH — And, as I say, I can assure the committee that it is our preferred position to give reasons. But the committee should bear in mind that police do not give reasons. If a complainant goes to the police and says, ‘So and so assaulted me’, the police officer makes a decision about whether they will investigate. They do not have to give explanations. You would hope that they do, but they are not obliged to give explanations, and the absence of an explanation or the quality of the explanation is not reviewable by a court. They then conduct an investigation. If at the end of the investigation they conclude there is nothing in the complaint or there is insufficient evidence, again, they are not obliged to give reasons and, if they do, those reasons are not reviewable. So what we are anxious to ensure is that the committee understand that by saying we would like to give reasons we do not want to create a regime in which every reason that we give can be reviewed. That is the problem.

We do not have the total solution here. It is a matter of exploration between lawyers in terms of what exactly can be the legal construct which would enable us to give reasons freely and without the risk that we are going to have our time tied up in court, because I think the committee would understand that a lot of people that complain are dissatisfied with an outcome.

Ms SYMES — They end up from you to us — or our EOs, frankly.

Mr REDLICH — Of course.

Ms SYMES — And we have had a lot of discussion as a committee about people not being able to move on because they just feel dissatisfied.

Mr REDLICH — And there are a variety of reasons why in the end the outcomes are not satisfactory. In some cases it will be because the investigators do not believe them. In other cases it will be for no reason to disbelieve them but that there is insufficient evidence because it is the complainant’s word against three police officers. So we have to recognise the fact we have a lot of dissatisfied complainants. We would like to give more fulfilling reasons, but we need to have that protection.

Ms SYMES — Would that protection from appeal and review extend to civil or not?

Mr REDLICH — No. But I said there are three stages at which we might be doing something. If we go into coercive examinations in which the complainants can call on other people and we will then normally provide some sort of report, then I think that is a different scenario. I do not think that then there can be any protection for IBAC. If IBAC reaches conclusions about the outcome of an investigation after exercising coercive powers, then the reasons just fall where they do, and if it gives rise to proceedings, so be it. I think it is different when coercive powers have been exercised.

The CHAIR — Okay. Then 19 and 20.

Mr REDLICH — Unless the committee have any questions, I think what we have said about 5.2 and 5.3 again is self-explanatory. The secretariat has provided us with some questions which we are also in the course of answering. I am hopeful that within the next 48 hours we will be able to give you extensive answers to those questions — all of which, if I may say so, are entirely understandable. I mean, the combination of three acts interwoven, it is a very difficult legislative scheme, really difficult — and that is to put it kindly, I think.

The CHAIR — Commissioner, thank you so much for these recommendations.

Committee adjourned.