REFORM OF THE POLICE COMPLAINT PROCESS: SUPPLEMENTARY REPORT OF THE POLICE COMPLAINT COMMISSIONER (THE GREEN PAPER)

I. Introduction

My Annual Reports to the Legislature for 2003, 2004 and 2005 made urgent calls for reform of what is now Part 9 of the *Police Act*. I do so again today.

On March 2005, I published a *White Paper* and draft *Police Complaint Act* for review by stakeholders and informed persons for review and comment. The *White Paper* recommended several reforms to Part 9, and outlined the rationale for proposed amendments. The March 2005 *White Paper* was slightly revised following the receipt of some initial comments, and resulted in a June 2005 *White Paper* and draft *Police Complaint Act* which were released in June 2005, attached to my 2004 Annual Report to the Legislature.

The *White Paper* recommendations arose directly from my experience exercising the legislative responsibility conferred upon me following my appointment as Police Complaint Commissioner in February 2003. They were also informed by a review of the difficulties experienced by my predecessors in administering Part 9 of the *Police Act*, by ongoing feedback from stakeholders and the public, by detailed submissions presented to the Special Legislative Committee that reviewed Part 9 in 2001-02, and by the Special Committee's final report issued in August 2002. As I noted in the *White Paper*:

> It is unfortunate that the Special Committee's recommendations have not yet been made a legislative priority. This reality does however provide an excellent opportunity to further update, refine and augment the Special Committee's recommendations regarding Part 9 of the *Police Act* based on the ensuring 2 ½ years of experience and deliberation of this Office.

II. Process since issuance of the White Paper

The *White Paper* asked interested persons to respond to my proposals by August 15, 2005, "following which I will prepare a supplementary report, which summarizes all key stakeholders comments on the *White Paper*, and my response to them."

Several individuals and organizations required time beyond August 15, 2005 to develop considered responses to my proposals (Appendix 1). The BC Association of Municipal Chiefs of Police ("the Police Chiefs"), for example, took seriously the task of responding to the *White Paper*. A sub-committee of chiefs met together and developed their response over several months, providing me with their collective views on April 26, 2006. Other organizations and persons, such as the Vancouver Police Union, the BC Federation of Police Officers and Dr. John Hogarth, preferred to meet in person rather than provide formal written submissions. The scheduling of convenient meeting times was at times challenging, but I nonetheless benefited greatly from all submissions and meetings. A complete listing of the persons who took the time to provide written or oral comments in response to my White Paper can be found in Appendix 1. I would like to express my gratitude to each and every person who has taken the time to comment on the White Paper. Whether or not I have agreed with a particular point of view, each has been carefully considered, and has helped inform the views expressed in this Final Report.

The wisdom of taking more time before issuing this Final Report was commended by other factors as well. One was the desirability of monitoring the progress of ongoing reforms to statutes governing civilian oversight of police in other provinces. On April 22, 2005 the Honourable Patrick LeSage Q.C. issued his *Report on the Police Complaints System in Ontario*. One year later, on April 19, 2006, the Attorney General of Ontario introduced Bill 103, *An Act to establish an Independent Police Review Director and create a new complaints process by amending the Police Services Act*. Meanwhile, in December 2005, the Alberta Ministry of Solicitor General issued a Discussion Paper on the *Police Service Regulation.* Each of these processes has helped me develop and crystallize my own thinking about the appropriate direction for the scheme in British Columbia.

III. A principled realism

Before turning to the discussion section of this Report, I wish to acknowledge a point made by both police groups and complainant groups alike – namely, that for the system to operate, there must be a measure of "buy in" from affected constituencies. There is

considerable merit in pursuing consultation and consensus, and indeed those considerations have been at the forefront of this *White Paper* process. But I feel it necessary to emphasize as well that the concern for "buy in" must not be allowed to transform the reform process into a negotiated settlement. Indeed, I would go so far as to say that many of the most serious difficulties with the existing *Police Act* arise from the very fact that the present *Act* placed negotiation over the pursuit of principle.

One must be realistic, but principled. Civilian oversight of police raises hard questions. As any fair-minded person will see after reviewing the Special Committee's proceedings, or the present process, the answers to certain key questions cannot be the product of compromise. In a statutory context such as this, the pursuit of compromise can result in the worst of both worlds. The only way forward is to ensure that any reform package is fully principled, realistically grounded, and transparently reasoned. This will ensure both legitimacy and public confidence even if one group or another is unhappy with a particular policy choice.

IV. Discussion

This paper will not repeat the rationale for each and every recommendation contained in the *White Paper*. It will focus only on issues respecting which I received comments. To avoid undue repetition, this Report is to be read with, and not in substitution for, the *White Paper*.

1. Structural Independence of Commissioner

No stakeholder questioned the necessity and rationale for the Police Complaint Commissioner being an officer of the Legislature, and thus structurally independent from police, complainants, police boards, advocacy groups, municipalities and Ministers of the Crown.

There was however a suggestion by the BC Association of Municipal Chiefs of Police ("the Police Chiefs"), made under this heading, on which I would like to comment. The Police Chiefs stated that "strong working relationships with the policy centres of

government are vital meeting the complexities of today's public safety environment", and cautioned legislators against "an outmoded and overly legalistic paradigm concerning independence".

The Police Chiefs' comments on this point may be read as being directed to the question of a separate statute.[1] Even so, I wish to leave no doubt of my profound disagreement with any suggestion that Justice Oppal (as he then was) was being "outmoded and overly legalistic" when he fashioned the Police Complaint Commissioner as an independent officer of the Legislature. Without structural independence, the legitimacy and credibility of this office would be compromised in perception and in fact. Structural independence is not legalism in the context of police oversight in British Columbia. It is a necessity.

The Police Chiefs' suggestion that such independence is "outmoded" may be contrasted with the Legislature's recent creation of a new officer of the legislature, flowing from a recent report by Ted Hughes, Q.C. in connection with oversight of the child welfare system. I find it convenient to quote from my recently issued Annual Report, which referred to the recommendations of Ted Hughes Q.C. (April 2006). Mr. Hughes, whose position was accepted by the Government, commented on the inadequacy of the previous youth officer model, in which the officer reported to a Minister of the Government rather than to the Legislature:

> The maelstrom of conflicting interests in which my office necessarily operates in its task of serving the public interest underlines the vital importance of the Commissioner's independence. As Members will be aware, the Police Complaint Commissioner's status as an officer of the legislature was legislated in 1998, and was a fundamental pillar of the *Oppal Report's* recommendations in 1994 that police should be allowed to continue to investigate incidents of police misconduct. I underlined the critical importance of this independence in my 2005 *White Paper* recommending legislative reform. In his recent *B.C. Children and Youth Final Report* (April 7, 2006), Ted Hughes, Q.C. recognized yet again the increased public confidence and legitimacy conferred on independent officers of the legislature:
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> > The current office for Children and Youth has performed its duties independently, but if public confidence in the child welfare system is to be

[1] The "separate statute" issue will be discussed further below

> restored, the independent body that speaks for children and youth must have a status that puts that independence beyond question. That is why I am recommending that the new Representative for Children and Youth by an independent officer of the legislature…. (p. 21)[2]

Mr. Hughes was not being outmoded and legalistic. His findings recognize the enhanced public confidence properly placed in independent officers of the legislature. It would, to say the least, be a bizarre turn of events for the government to undermine the Oppal model of independence for police complaints oversight in favour of a model it has just rejected in the child welfare system.

If there is to be public confidence in civilian oversight of police, the independence of the body that provides that oversight must be beyond question. In addition to public confidence, independent officers of the legislature enjoy democratic accountability, as their appointment, rations and quarters are determined directly and transparently by elected representative rather than through a private Cabinet process. Such independence is also the ultimate guarantee that the Commissioner can speak freely and effectively when required to interact with what the Police Chiefs describe as "the policy centres of government".

2. Public trust vs internal discipline complaints

The present *Police Act* allows discipline authorities to process certain categories of public trust complaints as if they were internal discipline complaints. The police unions have long objected to this on the basis that all complaints meeting the definition of "public trust" must be processed as such. The *White Paper* recommended that "there ought to be a presumption that matters meeting the definition of public trust should be subject to the public trust process unless the commissioner orders otherwise".

In discussions with me, the Unions have maintained their position, while the Police Chiefs' written submission, by contrast, indicates a preference for having the Police Chief rather than the Commissioner exercise any discretion to process a public trust complaint as an internal discipline complaint.

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[2] Annual Report (2005), Police Complaint Commissioner, pp. 2-3.

I have not been persuaded to change my position on this issue. If a complaint meeting the definition of "public trust" is to be processed in a stream other than as a public trust complaint, that separate stream should be approved by the civilian overseer as being in the public interest in all the circumstances. It should not be a decision made in-house by a discipline authority.

3. Clarifying the Act's application to officers

The Saanich Police Department (Saanich) and the British Columbia Civil Liberties Association (BCCLA) have expressed their agreement with the *White Paper*'s position that the application of the police complaint process to the many classes of law enforcement officers envisioned by the *Police Act* needs to be clarified and made more consistent. The *White Paper* pointed to the "anomaly that exists where there is no public complaint process available, especially given a functional analysis of the duties of many of these classes of officers".

Saanich's submission recognizes that there are many conflicting opinions as to which classes of officers should be subject to the complaint process. Saanich suggests that while the complaint process should apply to reserve and auxiliary officers, it should not apply to by-law enforcement officers or civilian employees who have special constable status for administrative purposes. BCCLA has advanced the strong position that the complaint process should apply fully to all state regulated agents who exercise police powers, including special constables, corrections officers, sheriffs and provincially licenced security guards. Of special concern to BCCLA are civilian employees of jails whose mandate includes use of force and strip-searching prisoners.

Two elements are necessary to resolving this issue. The first, set out in the *White Paper*, is that there must be a clearer legal mechanism by which to extend the complaint process to other classes of officers. The second is to actually decide what are the additional classes of officers to which the process should apply. Clearly, the governing principle for such decision-making must be the functions carried out by a particular official, rather

than his or her title or label. I would welcome the opportunity to work with the Director of Police Services to develop a sound analysis on which a regulation might be developed to clarify which officers are subject to the complaint process.

4. Term of office of Police Complaint Commissioner

No party took issue with making the Police Complaint Commissioner's term renewable, as is the case with the Ombudsman, the Information and Privacy Commissioner and the Auditor General. However, the BCCLA and one private commenter did suggest that, despite these other offices, a renewable 6 year term might be too long a period given the realities of this office. The suggestion was that a second term, renewable for three or four additional years at the Legislature's discretion, would be appropriate, and consistent with other similar appointment terms across the country.

The nature of this office relies on the Legislature being able to attract senior and experienced candidates who necessarily have to give up other opportunities. There are disadvantages every time a new commissioner is appointed and must come "up to speed". And there are costs involved in losing the accumulated experience and expertise that comes with having served a first term. Thus, while I have no strong position regarding how long a second appointment term ought to be, I confirm my view that renewability ought to be permissible with bi-partisan legislative review and approval.

5. Binding directives

Saanich and the Police Chiefs both oppose replacing the Commissioner's present power to issue guidelines with the power to issue binding directives on matters relating to practice and procedure governing the complaint process. Saanich argues that the non-binding nature of "guidelines" is their strength; that their purpose is to act as a device for "education" or "best practices". The Police Chiefs argue that binding directives by the Police Complaint Commissioner would undermine their authority.

The purpose of binding directives is not to fetter the substantive decision-making of Police Chiefs, but rather to govern procedure and process pertaining to a complaint

process that is premised on the necessity of civilian oversight. It is entirely consistent with this premise for the civilian overseer to issue directives regarding, for example, the process to be followed by a person receiving a public complaint, or the process to be followed when statements are taken in the course of an investigation. It has been my experience, especially in the more important and difficult cases on which I have publicly reported, that guidelines have little or no value where police departments feel free to rely on or disregard them at their discretion.

I agree that the Commissioner should not issue directives without first consulting with stakeholders. I also agree that directives can, where appropriate, accommodate local realities. But I do not agree that they should be optional, and as such, I maintain my original proposal.

6. Commissioner's power to replace the discipline authority

Saanich and the Police Chiefs both oppose a legislative power in the Commissioner to replace a discipline authority. Saanich goes so far as to argue that if such power were ever exercised: "that single act will do more to undermine the public's confidence in departments than anything the officer may have done". With all respect, I think that is a significant overstatement.

As set out in my proposal, the Commissioner's power would only be triggered: "where the Commissioner is satisfied that the actions, statements or relationship of the proposed discipline authority to a respondent have so tainted the necessary perception of fairness and impartiality as to require an external discipline authority to be appointed." The very purpose of this power, which would only exist in exceptional circumstances, would be to protect the integrity of the complaint process and thus the police department.

7. Duty to cooperate / compellability

The *White Paper* contains an extended discussion of the basis for a statutory duty on police officers to cooperate during a *Police Act* investigation, and a statutory power to ensure that those officers are compellable during the process. I stated then, and continue

to remain strongly of the view that "of all the reforms proposed in this paper, compellability is foundational." The Police Chiefs and the BC Civil Liberties Association have both written in support of these proposals. As noted by the latter, "the issue before us is professional responsibility, not criminal responsibility".

The only concerns I received to this proposal come from the police union perspective. The BC Federation of Police Officers has noted that police officers are not the same as other professionals in that there is a greater risk of compelled statements leading to officers being forced to make statements under stress, thus leading to possible inconsistent statements later being used against them. The Vancouver Police Union does not object to compellability in principle, but wishes to ensure a proper set of procedural safeguards before statements are taken, and proper safeguards on the use of such statements, especially in the context of a parallel criminal investigation. Saanich's submission states that: "while most agree that it is critical to get to the truth of a matter, many are cautious of the negative impact this change will have on police acceptance of the Act."

The Police Chiefs support this proposal and wish to ensure that it is clear and applicable at all stages of an investigation. The British Columbia Civil Liberties Association has stated that it also supports compellability.

I would maintain that by virtue of their office, responsibility and power, police officers have an equal, if not greater duty to the truth than other professionals. A police officer not prepared to tell the truth about what happened on the job should not be a police officer. Part of a police officer's job involves making observations under stress, and reporting those observations accurately. The notion that compellability should depend on "police acceptance" of a duty to tell the truth is wholly unacceptable.

I agree with the Vancouver Police Union that safeguards should be fashioned to ensure that statements are taken in a way that is fair to individual officers. I would propose to issue a binding directive to address precisely this issue. The other concern - about

guaranteeing officer "use immunity" for statements compelled in a *Police Act* investigation - has already been addressed in the White Paper.

Without compellability and a duty to cooperate, meaningful reform will not be possible. I strongly maintain my original position on this issue.

8. Eliminating the Form 1 and expanding points of access to make a complaint

The *White Paper* supported the Special Committee's recommendation to eliminate the Form 1, making it sufficient to submit a complaint in writing with the necessary information. The *White Paper* also proposed a power to enable the Police Complaint Commissioner to designate persons and agencies, apart from the police, who could receive complaints.

Both Saanich and the Police Chiefs have expressed concerns about these proposals. Saanich says that allowing a written complaint without a Form 1 would tremendously increase the complaints workload. The Police Chiefs state that filling out and signing the appropriate Form 1 underscores the seriousness of the matter and assists in reducing potentially frivolous complaints. With respect to expanding the points of contact to make a complaint, Saanich's concern is to ensure proper training, while the Chiefs emphasize that this proposal might undermine their ability to resolve matters informally through direct contact with the public: "In the vast majority of these circumstances, the matter is minor and may be satisfactorily addressed with the member of the public through open communication and dialogue in the first instance (usually with the senior non-commissioned officer).

If a potentially "tremendous" number of complaints are not going forward because of the lack of a Form 1, one has to ask whether the Form 1 has become, directly or indirectly, a barrier to a significant number of persons whose complaints should legitimately be investigated. I agree with the Special Committee that a complaint ought to be considered complete if and when it is written, signed and contains all the information that is otherwise required on the Form 1. Nothing prevents a complaint being withdrawn or

informally resolved after it is lodged, and summary dismissal will continue to exist. Section 16(9) of our proposed *Police Complaint Act* contemplates the power to terminate a complaint prior to being characterized if the Commissioner determines *inter alia* the complaint has no air of reality, or has been made for a frivolous, vexatious or other improper purpose.

I accept Saanich's argument that if points of contact for accepting complaints are expanded beyond the home police force and my office, those receiving complaints should be fully and properly trained. I would not exercise the discretion to designate a person or agency as a lawful receiver of complaints unless and until I was satisfied that such training had taken place and the receiver was fully qualified to exercise the function.

For these reasons, I maintain my original position on this issue.

9. Complaints by police officers

The Police Chiefs have queried why police officers have, in my proposed draft, been excluded from making "public complaints". The answer is set out at p. 14 of the White Paper, which explanation I repeat below:

> Draft s. 15(1) clarifies that this section is intended to be a public complaints provision, while another section (draft s. 48) is intended to apply to complaints made by police officers, which give rise to different considerations, some of which relate to confidentiality and some of which relate to the impropriety of granting complaining officers "complainant" rights.

10. Third party complainants

Third party complainants – complainants who are not personally adversely affected by the conduct complained of - have no participatory rights in respect of public trust complaints, beyond the right to file a complaint and receive notice of the outcome in limited circumstances. The *White Paper* recommended that third party complainants only be allowed to participate in the public trust process if the Commissioner or an Adjudicator so orders "on being satisfied that good cause exists and that conferring such rights would not unduly prejudice a respondent or the public complaint process in this Part." Further, "a third party complainant may not be granted greater rights … than a

complainant may be entitled to under the Act" (in other words, the right to make submissions after all the evidence is heard). This proposal largely codifies the *status quo*, at least at a public hearing, where an adjudicator, as master of his own procedure, may grant limited standing to third party complainants.

The Police Chiefs argue that the legal test for third party participation should be more onerous than is set out in the White Paper. They further argue that corporate persons or associations should be excluded from inclusion as a third party. By contrast, the British Columbia Civil Liberties Association argues that third party complainants should have the same participatory rights as first party complainants.

I have not been persuaded to change my original proposal. In my view, the test I have set out is balanced and appropriate, keeping in mind that, for the reasons set out in the *White Paper*, the only standing that a third party complainant would ever be granted relates to making submissions after all the evidence is heard, as no third party complainant should be permitted to participate in the evidentiary stage of a public hearing.[3]
As to the proposal to exclude corporations or associations from participating in public hearings, I see no reason in principle why, subject to the test and limitations set out above, a police department, a civil liberties organization, or a union might not properly participate in the submissions stage of a public hearing.

11. Retirement, resignation, transfer

No responder took issue with my recommendation to clarify that the complaint process can continue to investigate and address misconduct alleged against officers who, since the complaint was filed, have resigned, retired or transferred.

The Police Chiefs wish to confirm that these amendments would not preclude the making of arrangements where a member agrees to resign in exchange for not facing discipline proceedings. I confirm that, under my proposals, such arrangements would continue to

[3] Where a "first party complainant" makes such an application, the proper test, as noted by the Court of Appeal in the recent case of *Berg v. Ryneveld*, 2006 BCCA 225, should be that of necessity, keeping in mind the serious consequences to having another party involved in the evidentiary phase of the process.

be permissible provided such arrangements are reviewed by the Commissioner and meet the test of the public interest. As properly recognized by the Police Chiefs "Clearly, there are occasions where the conduct or facts of the matter are such that it is clearly in the public interest that the matter be fully completed."

12. Mandatory Mediation and settlements

My *White Paper* stated as follows with regard to mandatory mediation:

> While I agree that mandatory mediation is not appropriate for certain types of disputes, the great success of such programs in other contexts (including the success of my Quebec counterpart in instituting such a process) has persuaded me of the many benefits – in terms of communication, satisfaction, efficiency and cost-effectiveness – that would attend such a reform, as recommended by the Special Committee. The BC Association of Municipal Chiefs of Police advocated such a reform before the Special Committee, and Justice Oppal supported it in his testimony. [footnotes omitted]

Saanich has expressed the concern that complainants may not comply with mandatory mediation orders, resulting either in the termination of complaints, or a continuation of complaints without a complainant. The Police Chiefs now suggest that instead of providing for a mediation order, it would be better to simply advise the parties that the discipline process will not proceed unless they attend an informal resolution process. The Civil Liberties Association cautions that if an informal resolution process is forced on the parties, those resolutions should be conducted by a trained mediator. The Police Chiefs also suggest that where informal resolution is being required by the Commissioner, it should be paid for by the Commissioner.

I agree with the Police Chiefs and Saanich that there is a subtle but important difference between seeking to compel two parties to attend for mediation (as my earlier proposal suggests), and advising a complainant that if he or she does not attend, there will be consequence for the process. I accept the argument that complainants cannot and should not be forced into a room to mediate a dispute. But where the Commissioner has determined that a case is proper and suitable for informal resolution, it should be open to the Commissioner in the public interest to advise the complainant that the complaint process will not continue unless and until the complaint attends a mediation process with the respondent (and with appropriate supports where necessary) before a trained

mediator. I think it is right, in the end, to leave the complainant with the choice whether he wishes to attend, and where appropriate, to convince the Commissioner that such informal resolution is not appropriate in the circumstances.

I remain convinced that there is, within the police complaint process and consistent with the public interest, a significant untapped potential for complaints to be mediated and informally resolved. I agree that, to ensure that such process has integrity, a roster of trained mediators should be available to undertaken certain more difficult cases, and furthermore that mediation outcomes be subject to review by the Commissioner to protect the public interest. I further agree that, where the Commissioner requires such a more formal mediation process to be used, the costs should come out of the PCC budget, a point I will take up with the legislative finance committee in due course if this proposal is adopted.

On the issue of "settlements" generally, Saanich has proposed another slight modification, which I also accept. Saanich suggests that efficiency and finality would be better served if, instead of requiring my office to formally approve of each and every settlement before it is final, the legislation should provided that a settlement is final and binding unless the Commissioner rejects it in the public interest, within a particular time period. As I will in practice want to promptly review every settlement and its circumstances in any event, I have little difficulty accepting Saanich's proposal on this issue in the interests of timeliness and efficiency.

13. Commissioner's power to investigate

The question whether the Police Complaint Commissioner should have the independent power to investigate complaints has been a significant and controversial issue ever since the Oppal Report. The *Oppal Report* in fact recommended such a power in 1994, but it was excluded when the *Act* was passed in 1998 in favour of the Commissioner's power to order police to conduct new investigations or external investigations.

I reconsidered this question in my *White Paper*, and concluded that my office does not require an independent power to investigate <u>if</u> the following other legislative amendments

are made (a) the enactment of a statutory power to compel officers to give evidence, and a statutory duty to cooperate, and (b) clear legislative direction that external investigation orders must be complied with.

Saanich and the Police Chiefs oppose my office having independent power to investigate complaints. Saanich states that such a power would damage the public's confidence in police. The Police Chiefs also oppose such a power, and even go so far as to oppose Commission Counsel being allowed to conduct investigations in order to properly prepare for a public hearing. The Police Chiefs state: "We suggest the legislature be wary of the inadvertent creation of a quasi-investigational body in the OPCC…. Such a shift in philosophy, it is submitted, requires a much broader public policy debate".

As to the latter point, the public policy debate is now well underway. The question is the right course of action on this point.

The BC Civil Liberties Association, and individual advocates, have taken the position that a "home force" should never be allowed to investigate police misconduct, particularly in cases involving deaths or critical injuries involving a member of that force. BC Civil Liberties Association argues that: "In the case of death or serious injury of a civilian in police custody, we believe that there should always be an independent civilian led investigation". BC Civil Liberties also argues that the PCC should have the discretion to independently investigate a matter where he considers there is good reason to do so. BCCLA argues that an independent investigation power would (1) increase public confidence in the complaint process, (2) act as an incentive to police to be thorough in their internal investigations, (3) act as a safeguard where both an internal and external investigation are unsatisfactory, (4) increase the confidence of complaints in making complaints, and (5) provide a power that is not dependent on the personalities of the particular individuals who happen to run internal investigation departments.

There is much force to the argument that the time has now come for death and serious injury cases to be investigated by an agency other than the home police force.

Who the investigator ought to be is a more difficult question. One option is an external force. A second is my office. A third is a specialized unit of officers, integrated from among municipal police forces and the RCMP, and dedicated to independent *Police Act* investigations, with appropriate protocols governing the exclusion of those members out of whose home force an incident arises. The legislation could easily be crafted to make such a unit automatically responsible for investigations in relation to deaths and critical injuries, and subject to being activated in other cases pursuant to an order of the Commissioner.

As stated in my *White Paper*, I have been pleased with the quality of the investigative work undertaken to date where I have ordered external investigations. However, I have also recognized the hardship of personnel and finances that some individual departments experience when external investigations are ordered. A specialized and integrated unit of police officers, whose creation would involve specially trained team at arm's length from any particular home force, and a measure of cost-sharing and contribution by the province, has much to commend it both in principle and in practice.

If the creation of such a unit is not deemed practicable, the responsibility should fall upon my office, in a fashion akin what has been proposed for Ontario under Bill 103[4], which was drafted as a result of the *LeSage Report* (April 2005). Consistent with that responsibility, provisions will have be added to the statute ensuring that the Commissioner is in a position to retain a proper team of investigators, and is armed with necessary investigative powers.[5]

14. Administrative search and seizure

The *White Paper* proposes a legislative power to authorize an officer investigating a complaint to enter police premises on reasonable grounds and examine records on police premises after first notifying the chief constable. The Police Chiefs believe that a warrantless search power should be rejected and that no administrative search of police

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[4] *An Act to establish an Independent Police Review Director and create a new public complaints process by amending the Police Services Act*, Bill 103 (Ont.), first reading, April 19, 2006. (Bill 103).

[5] See Bill 103, ss. 26.4 – 26.9.

premises should take place without prior order of the Discipline Authority or the Commissioner. I accept the rationale for this proposal, and have no difficulty with this suggested modification.

15. Pre-hearing conference; discipline hearing

The *Police Act* (s. 58) presently provides that after the final investigation report is received, the discipline authority may offer the respondent officer a confidential pre-hearing conference (PHC) for the purpose of determining whether the officer is prepared to admit a default and accept discipline. Unless the Commissioner orders a public hearing, the admission of responsibility and discipline by the officer (approved by the DA) is final. If a PHC is not offered, or does not result in a resolution, the next step is for a formal discipline hearing to be held.

The Vancouver Police Union has maintained its longstanding position that the discipline proceeding should be eliminated entirely. In the Union's view, if the matter cannot be resolved in a pre-hearing conference, little purpose is served in proceeding with a discipline hearing that will in serious cases inevitably lead to a public hearing if its outcome is unsatisfactory.

The Police Chiefs have, by contrast, taken the position that the pre-hearing conference should be eliminated entirely. The Police Chiefs argue that: "It is unnecessary that this procedural step be founded in the statute as, in practice, some dialogue inevitably takes place between and employer and employee (or agent) as to resolution and penalty. Also, we believe that mandatory mediation at the investigational stage offers ample opportunity for respondents to consider their choices and seek resolution".

Dealing with the discipline hearing first, I maintain the view I expressed in the *White Paper* that the discipline hearing should be retained. Other than in special circumstances (discussed above), it would be inappropriate as a matter of principle to remove a chief constable from the process of disciplining those under his command. Further, I do not agree with the Unions' position that serious discipline by a chief constable will inevitably lead to a public hearing.

Moving next to the pre-hearing conference, I also maintain the view that that process should also be retained. While I appreciate the Police Chiefs' point that informal dialogue would often take place even if the PHC were repealed, the legislated pre-hearing conference provisions provide a useful and structured process, as well as protections for the officer that I believe are desirable and useful.

The *White Paper* suggested several reforms to the pre-hearing conference and discipline processes, none of which have been objected to in and of themselves. The only additional suggestion the Police Chiefs have made is that the DA be enabled to proceed on written submissions in cases involving relative minor discipline. I support this suggestion. For its part, Saanich has proposed giving chief constables the power to delegate to senior officers either the PHC or discipline function, a proposal I also support.

16. Public hearings

The only controversy arising from my numerous proposals to reform the public hearing process concerned the subject of the participatory rights of complainants. The Police Chiefs generally supported my proposals, but took issue with the notion that third party complainants might ever have leave from an adjudicator to make submissions as to penalty. BC Civil Liberties Association, and individual advocates, have on the other hand argued for an expanded role for complainants.

I maintain my original position, for the detailed reasons I have given.

I would add only two points to my original position.

First, I believe that the pool of potential public hearing adjudicators should be expanded to include not only retired judges and justices, but also leading members of the Bar as designated by the Chief Justice.

Second, I have, on further reflection in light of the argument and decision in *Berg*, come to the conclusion that complainants ought not to have separate standing to appeal the decision of an adjudicator except insofar as that decision affects their individual rights.

In this respect, the Court of Appeal's interpretation of the present statute is in fact reflective of the proper policy position:

> The complainant … is not charged with protecting the public interest: that duty lies with the Commissioner. Although the complainant is by definition a person adversely affected by the conduct in issue, the subject matter of the hearing does not affect her personal legal rights. A complainant has only limited standing is not a full party to the hearing.[6]

17. No fault inquiry

The Police Chiefs have made a persuasive case that my proposal for a "no fault" inquiry would not add appreciably to the purposes of the *Act*. As the Police Chiefs point out, if a matter does not involve fault, there is no basis to review it under this Act. If it does, the *Act*'s processes should be followed.

The *White Paper* explained the rationale behind this proposal as follows:

> The creation of a no fault inquiry would directly address the concern raised at page 5 of my previous Annual Report about the absence of an "alternative mechanism" to a public hearing where the commissioner considers that there is conduct that deserves review but not necessarily a public hearing.

The no fault inquiry is not the answer to addressing this policy concern. But the policy concern remains. An alternative way of addressing it has been offered by the BC Civil Liberties Association, as discussed in the next section.

18. Commissioner's power to substitute his findings for those of a discipline authority in appropriate cases

The BC Civil Liberties Association has made the following submission:

> In the almost eight years since the creation of the current Part 9 of the *Police Act* governing the police complaint process, there have been approximately 12 public hearings ordered by the Commissioner. If the BCCLA had been asked in 1998 whether we would be satisfied with twelve public hearings in eight years, we would have responded with an emphatic "no".
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> Public hearings have become complicated, time-consuming and expensive procedures. Unsurprisingly, respondent officers are almost always represented by legal counsel, a right the BCCLA would argue to protect. The Commissioner is unlikely to order a public hearing in the public interest except in only the most serious of allegations of misconduct

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[6] *Berg v. Ryneveld*, 2006 BCCA 225 at para. 83.

> due to the cost and time required to undertake a public hearing. Yet, he may believe the Discipline Authority has erred with respect to the conclusion regarding conduct or in the sanctions imposed against an officer who has committed misconduct.
>
> The BCCLA does not perceive a simply remedy to make public hearings more efficient, less time consuming and inexpensive. Partly due to their very public nature and the degree of media attention these hearings attract, we would expect them to continue to be expensive and time consuming.
>
> Instead, we believe that the Commissioner should have a new authority to substitute his own decision for a decision of a Discipline Authority both with respect to a conclusion as to whether an officer has breached professional standards and the appropriateness or the discipline/corrective measures. Such authority should only be exercised where a public hearing is not appropriate in the circumstances and:
>
> (a) the Discipline Authority's decision with respect to conduct or discipline/corrective measures is not reasonable based on the evidence in the record after a satisfactory investigation and that a substituted decision is in the public interest, or
>
> (b) the Discipline Authority has made an error with respect to the proper interpretation of the *Code of Professional Conduct* or other regulation or guideline.

There is considerable merit to the view that a civilian overseer ought to be able to independently review – on application by a complainant or respondent, or on the Commissioner's motion - a Discipline Authority's findings and decision where a public hearing is not otherwise in the public interest, but the decision is otherwise unsatisfactory and should be reviewed. I would, however, make that power subject to four provisos.

First, I believe that the decision-maker ought to be an adjudicator rather than the Commissioner. Vesting such authority in an adjudicator is more consistent with the existing model, and prevents the complication that would inevitably arise if a formal adjudicative mandate were added to my role.

Second, where the Commissioner believes that a public hearing is not appropriate but there is good cause for an adjudicator to review a discipline authority's decision, the review would be limited to a review of the record that was before the discipline authority. Thus, review would be more in the nature of an appeal rather than the more fulsome "de novo" or "sui generis" review involved in the public hearing process

Third, any such power must be limited to its purpose, and must not be allowed to usurp the public hearing function. I therefore suggest that this power categorically exclude any case involving police conduct leading to the death or critical injury of a person, or any other case where the Commissioner would seek dismissal if the matter proceeded to public hearing. The public hearing would continue to be the only forum for review of those discipline decisions.

Finally, even for these less serious cases, the Commissioner would retain the general discretion to refer the matter to a public hearing if that were necessary in the public interest.

This proposal would respect the public hearing process, while going a long way to ensuring more effective civilian scrutiny of a wider range of discipline decisions.

19. Penalty for harassment

Saanich, and at least one private commenter, state that the *White Paper*'s recommendation to make it an offence to harass or intimidate a complainant is excessive. Saanich suggests instead listing harassment as a discipline default.

While I have no objection to making harassment a default, I think there is value in listing it as separate prohibition, punishable as an offence under the *Act*. Complainants, whether civilian or police, may be thought of as whistleblowers, who should enjoy all the protection the law can offer.

20. Service Record: Expungement

The practice of "expunging" past defaults from the service record of a police officer continues to give rise to controversy and uncertainty. Some take the view that a previous default should never be expunged from a service record, while others take view that, used appropriately, expungement can act as a valid incentive for officers to become better professionals.

I remain of the view, set out in the *White Paper*, that while serious defaults should never be expunged from a service record, but that it would be highly desirable for the legislation to enable a regulation, applicable to all departments, setting out what types of discipline may be expunged and under what schedule.

21. Other issues

Responders raised four issues that, while not addressed directly in the *White Paper*, are worthy of comment here.

A. Role of Police Boards

A member of one of the police boards raised two interesting submissions pertaining to the mandate of police boards in the complaint process. The first was that the Board, rather than the Mayor ought to be discipline authority where misconduct is alleged against the police chief. As noted in the submission:

> Mayors are elected, not appointed, and are effectively only *ex officio* members of Police Boards. I am concerned that political considerations could come into play in some cases especially since the Mayor and the Police Chief typically have a necessary close working relationship – be it a good one or perhaps one that is far from ideal. The Board is the legal entity that employs the Police Chief and, indeed, all municipal police officers, and I am of the view that regulatory authority should be the Board itself (the Board, in turn, may delegate individual Board members to deal with the matter and report back to the Board). I do not think it can be presumed that in all cases a municipal mayor speaks for the Board or, indeed, has the complete confidence of the Board. Mayors may take, or refuse to take, actions that are not supported by the Board and this may create an unnecessary need for the Board to publicly repudiate its own Chair.

The question whether the Mayor or the full Board should be the discipline authority where a complaint is made against a Police Chief is a legitimate public policy question that ought to be addressed in the reform process.

The second issue raised by this member concerns the *White Paper*'s position that in place of the present rule requiring a police board extend a respondent's pay beyond 30 days if an officer is suspended following a complaint, there should be a presumption that that

pay is to continue for the entire period of suspension unless the board orders otherwise. The provision I proposed would read as follows:

> 30(5) The board may, at any time, discontinue the pay and allowances of an officer who is under suspension if the allegation in response to which the suspension was imposed would, if proved, constitute a criminal offence or if the board otherwise concludes that there are strong reasons in the public interest not to do so.

I proposed also that an officer unhappy with a decision to eliminate his pay could apply to the Police Board for a hearing. This proposal elicited the following response:

> The Board's obligation to hold a … hearing could well prove to be a legal and administrative nightmare. I can assure you that most board members in this province have little, if any, appreciation of the finer points of administrative and employment law and these hearings would create, I believe, a potential minefield for Boards and their members. My view – and this is reinforced by the relatively recent SCC decision in *Cabiakman* – is that the Board should either suspend with pay or terminate the officer; the halfway house of suspension without pay (which in any other civil context would undoubtedly be a constructive dismissal) should be eliminated as a Board option.

The above comment raises two separate questions. One is whether, as a matter of policy, it is ever right to suspend a police officer without pay, short of dismissing the officer, while an investigation is underway. The *Police Act* presently answers that question by stopping the payment after 30 days unless the Board extends it. The second is whether Police Boards are institutionally up to the task of holding hearings about revisiting decisions to suspend without pay.

As to the first question, I find it difficult to accept that the public would have confidence in a system that entitled a constable to pay, despite suspension and short of dismissal, no matter how serious his or her alleged conduct and no matter how long the investigation continued. If the Police Boards are not the proper forum to hear a member's plea for relief in the case of a suspension without pay, the answer may be that another forum, such as the Police Complaint Commissioner or an adjudicator, ought to exercise that decision-making function.

B. Commissioner's Duty of Outreach

The BCCLA has recommended that the legislation impose an obligation on the Commissioner to engage in outreach to educate the public about the police complaint process and provide adequate information and assistance to complainants. This is an important function and a priority of my office (see my Annual Report 2005). I fully support codifying that function by way of a duty set out in the governing statute.

C. Requirement for DA to give reasons if a complaint is dismissed as unfounded

The British Columbia Civil Liberties Association has suggested that the discipline authority have a statutory duty to give adequate reasons to explain why a complaint has been dismissed as unfounded. As it presently stands, the *Police Act* contains no such duty.

I agree that adequate reasons are important, not only because complainants who wish to request a public hearing require reasons in order for that right to be fully effective, but also because reasons add a significant measure of legitimacy to any decision-making process.

Reasons do not need to be lengthy. Indeed, in some cases, they may amount to relying expressly on the findings, conclusions and recommendations of the investigating officer which have previously been provided to the complainant under s. 57(1). Some cases, however, call for a greater degree of detail and rationale. Providing a meaningful response to a complainant whose complaint is being dismissed is in my view time well spent.

D. All party review every four years

The British Columbia Civil Liberties Association has recommended that, if a reform statute is enacted in light of the present process, that reform should include a requirement for a comprehensive review by an all-party legislative committee after four years. I support that proposal as being in the interests of accountability, and as identifying the need for further necessary legislative amendments or refinements.

24. Separate Statute

As noted in the *White Paper*, I drafted the proposed *Police Complaint Act* on the premise that a separate statute would be more consistent with the independence of the this office from the Solicitor General's Ministry, since that Ministry is legally connected to police under other parts of the *Police Act*. I suggested that under a new *Police Complaint Act*, the appropriate Minister responsible for speaking to amendments would be the Attorney General or the Premier. The BC Civil Liberties Association has written in support of a separate statute for the following reasons:

> We believe that separate legislation would prevent problems like the current delay in amending the legislation that has occurred since the report of the Special Committee of the legislature made recommendations to amend the *Police Act*. Unfortunately, Part 9, the police complaint process, must compete with other priorities identified by the Solicitor General. With limited time when the legislature is sitting, the police complaint process is likely to get less attention than it deserves because it is part of "policing" generally. A statute whose sole focus is on the police complaint process would enhance the credibility of the process and the Commissioner.
>
> We also believe that it is anomalous for the Police Complaint Commissioner, an independent officer of the Legislature, to have to persuade the Solicitor General to amend the legislation. Given the inherent tensions that may exist between the OPCC and the Ministry of Solicitor General, who has responsibilities for policing generally, we believe that the stand alone statute should be the responsibility of the Attorney General who generally has a more independent status than other ministries.

I concur with this position, and maintain my original position.

V. Conclusion

One of the purposes of writing this Final Report has been to ensure its public dissemination prior to the conclusion of the police complaint review process being undertaken by Josiah Wood, Q.C. The Director of Police Services retained Mr. Wood to lead that review in the summer of 2005 following the release of my June 2, 2005 *Report of the Police Complaint Commissioner: Pivot Complaints Against VPD*. My June 2005 Report reiterated my urgent call for legislative reform, and recommended that the Director appoint a retired judge or other highly regarded person to undertake an independent audit of the Vancouver Police Department's handling of *Police Act*

complaints. Mr. Wood's terms of reference instruct him to undertake a broad audit of the police complaint processes of all municipal departments, and to recommend amendments to Part 9 of the *Police Act*.

I understand that Mr. Wood will be reporting to the Director sometime in September 2006. His recommendations are likely to be highly influential in shaping any legislative reform package ultimately adopted by Government. It is my hope that this Final Report - issued from my perspective as civilian overseer of the complaints process and as an independent officer of the Legislature – will be of some constructive assistance both to Mr. Wood and to members of the legislative assembly as the legislative reform process moves forward.

Dirk Ryneveld, Q.C.
Police Complaint Commissioner

Dated: August 1, 2006 at Victoria, British Columbia

APPENDIX 1

LIST OF RESPONDERS

The Commissioner would like to thank the following persons and organizations who took the time to provide written or oral responses to the White Paper:

- A. Cameron Ward, Barrister and Solicitor
- BC Association of Municipal Chiefs of Police
- BC Federation of Police Officers
- British Columbia Civil Liberties Association
- PIVOT Legal Society
- Carol Baird Ellen, Chief Judge, Provincial Court
- Mr. Donald Clancy, Q.C.
- Dr. John Hogarth
- Kenneth Thornicroft, Ph.D., Barrister and Solicitor
- Saanich Police Department
- Steven Kelliher, Barrister and Solicitor
- Stl'Atl'Imx Tribal Police Board
- Vancouver Police Union
- Peck and Company, Barristers