

ICAC

OPEN HEARING

BEFORE THE HON. BRUCE LANDER QC
INDEPENDENT COMMISSIONER AGAINST CORRUPTION

MR. M. RICHES Counsel Assisting

Courtroom 3
Level 7, Riverside Centre Building
North Terrace, Adelaide

THURSDAY, 23 APRIL 2015 at 12:00pm

Witnesses:

LINES, WAYNE, Ombudsman SA

STRICKLAND, EMILY, Deputy Ombudsman

THE COMMISSIONER:

Good afternoon, Mr. Lines.

MR. LINES:

Good afternoon, sir.

THE COMMISSIONER:

Ms Strickland. Thank you very much for attending this afternoon. And I'm keen to hear whatever you want to say in relation to the matters into which I am inquiring.

MR. LINES:

Thank you, Commissioner. You have before you my written submission from the 25th of March.

THE COMMISSIONER:

Yes, thank you.

MR. LINES:

And in addition to that, this morning I provided through Mr. Riches a schedule of the legislative provisions that I would recommend be amended in some form to assist with reducing duplication and increase efficiencies. I can speak to that at a later time within my submission this morning.

THE COMMISSIONER:

Right.

MR. LINES:

Mr. Riches provided a brief summary of my written submission –

THE COMMISSIONER:

Yes.

MR. LINES:

– and because you have it before you in any event, I don't intend to labour over it in detail.

THE COMMISSIONER:

Yes.

MR. LINES:

I do want to elaborate on a few points.

THE COMMISSIONER:

Of course.

MR. LINES:

In regard to the question of oversight and management of police complaints, my main contention there is that the police should not be ultimately responsible for investigating themselves in regard to serious misconduct complaints. That's a statement of principle rather than any commentary on the quality of the work that the Police Ombudsman's office does, but the issue of the independence of the Police Ombudsman's office in relation to their functions under the Police (Complaints and Disciplinary Proceedings) Act has been an issue of long standing and that is noted by the Police Ombudsman in her, the former Police Ombudsman's final Annual Report.

And my submission is that it may now be time for a new approach to be taken whereby the serious misconduct complaints are handled completely independently of the police. If you look at the Annual Report of the Police Ombudsman, you will see that at every level of involvement of the office, it's the police that have been doing the work, whether it's

conciliation, informal investigation, preliminary investigation or full investigation. And the Police Ombudsman's role has been predominantly to assess –

THE COMMISSIONER:

Yes.

MR. LINES:

– the reports that emanate from those activities. I do note that on page 34 of the Annual Report there is a reference to four matters that were investigated by the Police Ombudsman pursuant to the powers under section 23, although there doesn't seem to be any detail about those particular matters. So, the Police Ombudsman under that section 23 can investigate matters where, in limited circumstances, where the complaint involves members of the Internal Investigation Section or an officer of higher rank than the officers of the Internal Investigation Section. And in a couple of other instances, but obviously it is not a matter that has involved the Police Ombudsman very much and it has only been very limited occasions when this Ombudsman has done that.

THE COMMISSIONER:

Well, the Police Ombudsman has been constrained, of course, by the absence of any skilled investigators in her –

MR. LINES:

Yes.

THE COMMISSIONER:

– and now the Acting Police Ombudsman's service.

MR. LINES:

Yes. That's correct. So I'm not sure how those four investigations were conducted, whether

by some other person brought in for the special purpose or whether one of the legal officers perhaps conducted it themselves. It will be interesting to hear from the Police Ombudsman or Acting Police Ombudsman about that.

THE COMMISSIONER:

Yes.

MR. LINES:

But the point that I make is that by and large all of the investigation of complaints and the resolution of the complaints are conducted by the police themselves.

THE COMMISSIONER:

I think that's common throughout Australia. I think as far as my researches show, the only jurisdiction where all complaints are investigated – all complaints of police officers are investigated independently of the Police Force is in Ireland, I think.

MR. LINES:

Your research is more extensive than mine, sir.

THE COMMISSIONER:

Well, I have had some assistance. But, I think probably what would be put against you by – by others might be the cost of employing a new force to investigate the Police Force and to have that new force obtain the necessary expertise to carry out investigations of that kind.

MR. LINES:

Yeah. My comment in response to that, Commissioner, is that from the Police Ombudsman's Annual Report, it was only a matter of 46 matters that were considered serious enough to require full investigation.

THE COMMISSIONER:

Yes.

MR. LINES:

So, we are not looking at many matters that would require the in depth investigation that might be in the public mind. And my view is that it would be a better use of resources for an existing body with investigators to have the function of undertaking those types of investigations. And I have suggested, in my submission, that your office may well be able to do that with your current investigation team. And in terms of the requirements for expertise, well a number of the investigators that your office has, and other offices have, are former police officers and –

THE COMMISSIONER:

Yes.

MR. LINES:

– have that inside knowledge in any event.

THE COMMISSIONER:

Yes.

MR. LINES:

So, I don't see it as an overly expensive issue to convey the function of an investigation of serious police misconduct to another body.

THE COMMISSIONER:

I suppose that raises another question too, if that were to be the scheme to be implemented; what is serious misconduct –

MR. LINES:

Yes.

THE COMMISSIONER:

– and where does serious misconduct start?

MR. LINES:

Yes. I would say that I'm probably not qualified to provide you some –

THE COMMISSIONER:

No.

MR. LINES:

– advice on that, sir. But, you already have, in a sense, the function of assessing what is serious misconduct in –

THE COMMISSIONER:

We do, we do.

MR. LINES:

– in the public administration arena. So, I'm sure that with that function it would not be a huge leap to apply those types of principles that you're utilising for that purpose to police misconduct.

THE COMMISSIONER:

Do you mean by that that serious misconduct is of the kind that has been identified by the Office for Public Integrity as serious misconduct?

MR. LINES:

Yes, I mean, that's correct, sir.

THE COMMISSIONER:

I see.

MR. LINES:

It should almost go without saying though that if your – if your functions included investigation of police misconduct, you should have the power to impose sanctions for that misconduct with there being a right of appeal from any sanction that you impose. And I understand that the Acting Police Ombudsman has suggested that in terms of the disciplinary framework that it should move away from the internal police tribunal to –

THE COMMISSIONER:

Yes.

MR. LINES:

– the external SACAT.

THE COMMISSIONER:

SACAT, yeah. Do you support that?

MR. LINES:

I do support that.

THE COMMISSIONER:

And are you talking then with the right of appeal being to SACAT?

MR. LINES:

Yes.

THE COMMISSIONER:

Yeah. And who would have the right of appeal, both the police officer and the Police Force or the oversight agency?

MR. LINES:

Well, the right of appeal would be from the police officer who's the subject to the sanction.

THE COMMISSIONER:

And only the police officers have the right of appeal?

MR. LINES:

To my mind, that makes perfect sense. I don't think the Commissioner should have any individual right.

THE COMMISSIONER:

Okay.

MR. LINES:

Yep. Finally, in respect of the oversight and management of police complaints, I have made a comment about the role of the Police Ombudsman in reviewing Freedom of Information matters. And I have put forward the view that there doesn't seem to be any good reason why that should remain with the Police Ombudsman. And given that my office conducts external reviews for all of government and local government FOI decisions, it could easily be accommodated within my own office.

I noticed from the former Police Ombudsman's Annual Report that there were 32 Freedom of Information reviews received by the office, and 12 were completed in the last financial year. In the same year my office completed 116 reviews. So, in terms of economy of scale it does seem to make sense for that function to be within my office.

THE COMMISSIONER:

Is it only FOI requests in relation to police that you don't have jurisdiction over?

MR. LINES:

That's correct.

THE COMMISSIONER:

Yeah.

MR. LINES:

If I may Commissioner, I'll move to the submission I've made in regard to complaints and reports about public administration.

THE COMMISSIONER:

Just before you do, if you don't mind. There are some other activities of the police that might require some sort of auditing, for example, telephone intercepts, listening device applications and the application of listening devices and forensic procedures. Who would you see would be the appropriate agency to audit those types of processes?

MR. LINES:

Yes, I noted that and, again, my view would be that whoever has the oversight of the complaints of misconduct would be well situated to do that. And if that comes to you, sir, then it should be your staff that are engaged in that.

THE COMMISSIONER:

Another possibility might be, because my agency is also subject to an audit, and that's by the person appointed under the ICAC Act to review the policies and procedures of my office, which is this year, Mr. Duggan, and was last year. He might be the appropriate person to conduct a

review of those types of matters, because he is conducting a review of those types of matters in relation to my office.

MR. LINES:

I wasn't aware of that, sir, but that does make sense. Yeah.

THE COMMISSIONER:

Yeah.

MR. LINES:

In regard to whether the OPI should be the central body for the receipt and assessment of complaints and reports about public administration, I've presented my position that I don't think that's the most effective way forward and I've given a number of reasons for that. But in summary –

THE COMMISSIONER:

I think your submission has been made public, has it not?

MR. LINES:

It has, yes.

THE COMMISSIONER:

Yes.

MR. LINES:

In summary, I reached that position on the basis that my office already has a very established position in the marketplace of complaints handling in regard to public administration. And when I look at the volume of the approaches from members of the public that we receive, it's in the order of 10,000 a year, that would be more than what the OPI and the other inquiry

agencies would receive put together, as I understand it.

THE COMMISSIONER:

It would certainly be significantly more than the Office for Public Integrity receives. But as I understand it, a lot of the approaches to your office are from people who are approaching the wrong office.

MR. LINES:

Correct, yes.

THE COMMISSIONER:

About 70 per cent of them?

MR. LINES:

Almost 70 per cent, yes.

THE COMMISSIONER:

Which office should they be approaching, most of those people?

MR. LINES:

Well, that – there's such a variety, whether it is to do with telecommunications or financial issues, with the banks, and insurance companies, health insurance, all these range of issues do come to our office.

THE COMMISSIONER:

So your title is attracting too much work.

MR. LINES:

It seems that way. But even if you discount that 70 per cent, we are still dealing with 3,000

matters that are within jurisdiction.

THE COMMISSIONER:

Quite. Which, again, is probably twice what the Office for Public Integrity is receiving.

MR. LINES:

Yes. And in that light it does seem to me a pity to have to re-educate, redirect the public to go to another agency when there's this established pattern and understanding within the public of where to at least make enquiries and to have some guidance with respect to issues relating to public administration. And the Ombudsman's office is more aligned in that area of public administration and issues relating to the way government departments and local government function, whereas the OPI, from its inception, has been associated with your office, obviously, and is seen to be part of your anti-corruption role.

THE COMMISSIONER:

I think before the establishment of the OPI – and before the creation of my position – there was no one who was given jurisdiction to receive complaints of misconduct and maladministration. That wasn't a historical part of your role.

MR. LINES:

That's correct.

THE COMMISSIONER:

And so complaints of that kind – or complainants of that type of conduct had nowhere to go. Now that there is such a route available through the Office for Public Integrity, what would be the advantage of rerouting it? Because your office doesn't have experience in misconduct – you would have had some experience in maladministration but not in misconduct. Your office is limited to administrative acts. What would be the advantage now of rerouting misconduct to your office?

MR. LINES:

Well, quite often the allegations or complaints about administrative error involve individual actions of public officers and often our investigations are actually looking at that personal conduct of a public officer in the cause of the complaint. So it is not a large step to take to be moving from an allegation of administrative error to misconduct. And, in fact, under the Ombudsman Act legislation I have to report misconduct on the part of public officers to their principal officer. So, it's envisaged in the Act, as it currently stands, that in the course of investigating administrative error I will come across misconduct, breaches of codes of ethics or standards by individual public officers and these need to be recorded to the principal officer for perhaps disciplinary action. So, it wouldn't be a big step to take for more of that work to come to my office. We're set up to investigate that type of activity in any event. Also –

THE COMMISSIONER:

When you say that, do you have any investigators?

MR. LINES:

Yes, sir. We have, well four people with the title of investigation officer, plus several others who are performing investigation officer functions and have legal degrees and so forth that enable them to do that.

THE COMMISSIONER:

Right. I follow.

MR. LINES:

But part of my submission, ultimately, is that the Ombudsman Act be amended to include definitions of maladministration and misconduct in line with the ICAC Act, so that members of the public can come directly to my office to deal with those range of matters.

THE COMMISSIONER:

I follow that. But would that mean that they can't go to OPI in relation to those matters?

MR. LINES:

No, not under the – not if we maintain the existing structure.

THE COMMISSIONER:

I see.

MR. LINES:

But the role of OPI in that instance would be, once it identifies that it is a matter of maladministration and/or misconduct without a component of corruption or criminal behaviour, that the matter is simply referred to my office to deal with rather than requiring another assessment by yourself. In the current arrangements, as you would appreciate, there is quite a bit of double handling that is happening here.

THE COMMISSIONER:

Yes, I understand that.

MR. LINES:

When the Office for Public Integrity receives a complaint, it will assess that information and then make a recommendation to you. I assume that you have to do some sort of assessment of that material as well. And then if you decide that it would be appropriately – should be appropriately referred to one of the public – one of the inquiry agencies such as my office, you will write to that agency and ask for their view. In our instance, when that request comes to my office we would do an assessment of the material that's provided with that letter and form a view and then advise you of that by separate correspondence. You then weigh up that view and then if you proceed with your referral that's another letter that comes to my office – and there may be some more material that comes with that than what we originally had, and so

another assessment occurs within my office as to all of that material, all of the issues and how we will deal with that matter. So, in that process, before we have actually launched into an investigation or an attempt to resolve the matter, there have been I think four assessments. If I add it up correctly.

So, my strong submission is that we need to reduce that level of handling of a matter and if a matter is assessed by the Office for Public Integrity as purely maladministration or misconduct, then I see no reason why it couldn't just be referred directly to my office to deal with in the ordinary way that my office deals with them.

THE COMMISSIONER:

Well, I suppose you could achieve that by repealing the obligation on me and the Office for Public Integrity to seek your views before a matter is referred to you. That would get rid of a couple of the assessments.

MR. LINES:

Yes.

THE COMMISSIONER:

But I think that section is in there sort of as an administrative decision politeness so that matters aren't imposed upon you without you first having an opportunity of –

MR. LINES:

Yeah.

THE COMMISSIONER:

– providing argument why that shouldn't happen.

MR. LINES:

Yeah.

THE COMMISSIONER:

And I think that provision is there for the further reason of you providing information as to why a matter should not be investigated at all.

As Mr. Riches said in his opening, I think about 900 of the 1500 complaints or reports have already been made to the Office for Public Integrity are not investigated. So more than 60 per cent or about 60 per cent never see the light of day and are never imposed upon anyone because the office assesses them as not requiring any investigation at all. If that situation were to be removed, that would increase your work.

MR. LINES:

Well, not necessarily, because we have to make an assessment of each matter that comes to us in any event. And if we are able to dismiss the matter, that can be done very quickly. And – certainly it would increase that initial stage of assessment work.

THE COMMISSIONER:

It would. It would. It would mean that you would now be – you or perhaps the Police Ombudsman – would have to be assessing 900 matters that are never seen by you or the Police Ombudsman. So, the work that the Office for Public Integrity does would fall upon you.

MR. LINES:

Yes. 900 amongst 10,000 is not a huge increase, if I may say.

THE COMMISSIONER:

No. If 10,000 were the matters you assessed. But I think you don't.

MR. LINES:

Well –

THE COMMISSIONER:

Because 70 per cent are outside jurisdiction.

MR. LINES:

Sure, but there is still an assessment that occurs with each of those to some extent.

THE COMMISSIONER:

An assessment – it wouldn't take long to assess a complaint about a telecommunications matter that –

MR. LINES:

That's right.

THE COMMISSIONER:

– that need not be investigated.

MR. LINES:

But I do stress the point that our office is well situated to do that assessment and early resolution that is so important to efficient complaint handling.

THE COMMISSIONER:

Yeah.

MR. LINES:

And that's one of the reasons why I say that in the area of public administration and misconduct of a low level, we would be well suited to – to be the central body –

THE COMMISSIONER:

Yeah.

MR. LINES:

– for receiving those types of complaints.

THE COMMISSIONER:

Yeah.

MR. LINES:

Also, it should be mentioned that my office has the advantage over the Office for Public Integrity, as it is currently constituted, to publish the reports of our investigations. And in my view, that's – that's a vital element in improvement or engendering improvement in public administration, to have this openness in and explaining to the public the results of our investigations so that there are learnings that occur from that. So I think that's an advantage that my office has in this area.

THE COMMISSIONER:

Yeah. I'm not sure how I see that as an advantage, because nobody is suggesting that should be removed because ordinarily my office doesn't investigate misconduct or maladministration. It might if I decide to exercise your powers, for example. But ordinarily we don't. So, in the usual case, if a matter is referred to you by my office, you will still publish that report.

MR. LINES:

Yes.

THE COMMISSIONER:

So –

MR. LINES:

So, but if – I suppose we're talking at cross-purposes here, but if the OPI becomes a central body there's a question mark still over what does it do with all of those incoming complaints. Is it meant to handle those complaints in some way or is it simply just to refer them out again to other bodies?

THE COMMISSIONER:

Well, that has to be considered, I think. If there was to be a one-stop-shop, as was suggested when the legislation was introduced, the question is what would the one-stop-shop do? Would it carry out any preliminary investigation to determine whether, first, it's in – within jurisdiction and secondly, whose jurisdiction, or would it simply refer the matters to the appropriate jurisdiction?

MR. LINES:

Yes.

THE COMMISSIONER:

That's a question of the triaging, I think of the –

MR. LINES:

That's right.

THE COMMISSIONER:

– complaints and reports.

MR. LINES:

Yeah. And my point is that that's probably not the most efficient way of handling these types of complaints, because then there's still that second level of operation that has to occur after the initial receipt of the complaint by the OPI where, if it came very quickly or directly to my

office, we would be doing the assessment and resolution and referral if necessary very quickly. Of all the matters that we receive that don't require investigation we are able to finalise them within four days, on average.

THE COMMISSIONER:

Well, perhaps if I can ask for two figures: The first is how many matters have been referred to you by my office since September 2013? And how many matters do you investigate apart from those referred by my office?

MR. LINES:

Yes. When I last looked at the figure, towards the end of March, we had received 60 referrals from your office for the period since the – September 2013.

THE COMMISSIONER:

So that's 60 referrals in 18 months, yes?

MR. LINES:

Yes, that's right. It's true to say that we didn't receive many from your office in the first financial year of your operation. But it has picked up since this financial – current financial year.

THE COMMISSIONER:

Yeah. And how many matters are investigated by your office each year?

MR. LINES:

If I just refer to the annual report. As I said, we assess – of the matters that we received in the last financial year, we assessed 3,000 of them to be complaints within our jurisdiction. And I haven't quite got the figure at my fingertips, but it was approximately around – it was over 200 that we investigated, with – resulting in approximately 50 reports –

MS. STRICKLAND:

Finding error.

MR. LINES:

– finding error.

THE COMMISSIONER:

And the other 150 is – are dealt with how?

MR. LINES:

Either finding no error –

THE COMMISSIONER:

I see.

MR. LINES:

Yep. Or some other form of resolution.

THE COMMISSIONER:

Right, ok. Mr. Riches said in his opening this morning that there had been 1500 or so complaints and reports and 290 or thereabouts had been assessed as misconduct or maladministration. That would mean that of all of the complaints and the reports that are coming to the Office for Public Integrity you are receiving .6 of a per cent; so 99.4 per cent are dealt with without you having any involvement. Would that not be to your advantage, the advantage of your office?

MR. LINES:

To have –

THE COMMISSIONER:

60 out of 1500.

MR. LINES:

Yep.

THE COMMISSIONER:

4 and a half per cent, sorry. Shouldn't try and do mathematics [inaudible] – we'll say at 5 per cent. You're receiving by reference 5 per cent of those complaints and reports that are made to the Office for Public Integrity, which means you're not receiving 95 per cent. Isn't that to your office's advantage?

MR. LINES:

Certainly. I assume that some of those matters are being referred to other inquiry agencies as well.

THE COMMISSIONER:

I think it must follow that if you receive 60, and there has been 290 assessments of misconduct and maladministration, apart from those that are held within my office, which are only a few, about 220 or 210, 220 are being sent to other public authorities –

MR. LINES:

Yes.

THE COMMISSIONER:

– apart from your office –

MR. LINES:

Yes.

THE COMMISSIONER:

– to investigate. Again wouldn't that be to the advantage of your office?

MR. LINES:

Yes, I accept that.

THE COMMISSIONER:

Yes. So the Office for Public Integrity actually acts as a filter as far as you're concerned, so that you only receive the matters which require any investigation.

MR. LINES:

Yes. And that's acknowledged, sir.

THE COMMISSIONER:

Yep.

MR. LINES:

However, my submission is that we would prefer to be doing the filtering rather than an external body.

THE COMMISSIONER:

What would you do with the other 220?

MR. LINES:

Well we would assess them according to our own criteria.

THE COMMISSIONER:

But, say the criteria is the same and the assessment in due course is the same. And you have an assessment of 290 out of 1500 you think that you should deal with 60, who deals with the rest?

MR. LINES:

Yep. We can refer them back to the public authorities that are involved and –

THE COMMISSIONER:

That would be doing the same work as the Office for Public Integrity.

MR. LINES:

Yes, but the added advantage of my office is that if the public authority deals with the matter in a way that is unsatisfactory we would have power to review what that public authority has done and undertake our own investigation.

THE COMMISSIONER:

So can I. I can require them to do the investigation again and if I am not satisfied I can have the Minister intervene to have it done appropriately. And if I am still not satisfied I can report to Parliament.

MR. LINES:

Sure. However, Commissioner, you yourself can't under – cannot undertake another investigation.

THE COMMISSIONER:

Yes, I could. I could reassess it and – under section 24(7) – and investigate it for myself, exercising your powers.

MR. LINES:

All right. That's slightly different to what I had understood you to say to me previously in another context, but –

THE COMMISSIONER:

I think that's within my power. It wouldn't happen often because I think it's important in public administration to teach public authorities how to investigate appropriately, and to ensure that they do, so that persons who make complaints and reports can be satisfied that the investigation that's been carried out is transparent and has been carried out with the honest intention of determining what occurred.

MR. LINES:

I agree wholeheartedly with that, Commissioner. As I look at section 24(7) of your Act –

THE COMMISSIONER:

Yeah.

MR. LINES:

– part of the issue has been that it gives you an absolute discretion to – to modify an assessment –

THE COMMISSIONER:

That's right.

MR. LINES:

– but it doesn't give you the discretion to resume or intervene in an investigation once it's been referred.

THE COMMISSIONER:

Not sure that I agree with that because the subsection talks about the making of an

assessment, whether action is taken, and what action is taken. Now, it might be that that would – this hasn't happened yet – it might be that that would allow me to reassess and to take action for myself, using your powers under section 24(2)(ab) but anyway, we don't need to debate the law about that too much.

MR. LINES:

Yep.

THE COMMISSIONER:

It's a question of what is the best way to deal with complaints of this – complaints and reports of this kind.

MR. LINES:

Yes. So, they were probably the only submissions I wish to make on that area of your –

THE COMMISSIONER:

Thank you.

MR. LINES:

– review. The final section was to do with proposals for change to improve the current handling of matters.

THE COMMISSIONER:

Yes.

MR. LINES:

And I have made submissions there about some legislative changes –

THE COMMISSIONER:

Yes.

MR. LINES:

– and the schedule summarises or perhaps elaborates on that submission for your benefit. We’ve already touched on a few of those issues already.

THE COMMISSIONER:

Yes.

MR. LINES:

But, primarily, my submission is that there should be three key integrity agencies at the state level. One is your office, one is mine, and one is – the other is the Auditor General. And the three cover –

THE COMMISSIONER:

Sorry, what was the third one?

MR. LINES:

Auditor General.

THE COMMISSIONER:

Yes, yes. Yep.

MR. LINES:

So ICAC should be devoted and focused on corruption matters. My office should be focused on administrative improvement and the Auditor General’s focused on financial economic diligence. So the three would cover honesty in public administration, that’s your office, fairness in public administration, which is my office, and diligence in public administration, which is the Auditor General’s function. And for that to work best my submission is that each

needs to be bolstered and maintained as having very distinct areas. And in my submission the overlap that your office has into public administration improvement is not helpful, and my considered opinion is that it would work better if your office was bolstered and reinforced in its role in anticorruption – stamping out corruption – and my office bolstered and perhaps developed in terms of the maladministration and misconduct areas that we have talked about. And that’s not to say that we don’t have interaction and support for each other. But in having very clearly defined functions and roles that do not overlap I think would be better for the public in understanding who does what and respect for each – the integrity of each office as well.

So that’s my primary submission in that regard. But if the current structure and arrangements are to continue, then I have listed some legislative changes that would help efficiencies in the way that we operate. And we have spoken about the role of subsection 24(7) of your Act.

THE COMMISSIONER:

Yes.

MR. LINES:

I would submit that it needs to be made clearer that you can take, or resume control of a referral once it’s made.

THE COMMISSIONER:

Yes.

MR. LINES:

That would be helpful. In terms of section 37, I submit that it would be helpful if that section is amended to clarify that in dealing with a matter on referral from your office, an inquiry agency may exercise the powers, procedures and discretions available to it under the Act that that inquiry agency is established by.

THE COMMISSIONER:

I think that probably is implicit in the referral, but it might be better to spell it out.

MR. LINES:

Yes. I also submit that there should be a new section that stipulates that a referral under section 37 is subject to the jurisdictional limits set out for the inquiry agency under its own Act.

THE COMMISSIONER:

That could be tricky.

MR. LINES:

I understand that, yes. But it does – there is a dilemma in the current arrangement where, in a sense – the jurisdiction of my office is determined by your referral. And that could have some unintended consequences. I give the example of the – I'm not sure whether, Commissioner, you have looked at the Judicial Conduct Commissioner's Bill?

THE COMMISSIONER:

Yes, I have.

MR. LINES:

That has as part of it an amendment to the Ombudsman Act to, section 5 of the Ombudsman's Act, to exclude my jurisdiction – well, I don't have it currently but – it's to make it clear that I have no jurisdiction over matters that are subject to the Judicial Complaints Commissioner's Act once it is passed. However, there is a provision in that legislation for matters to be referred to you if there is a suspicion of corruption in the nature of the complaint. There is nothing in the legislation that requires you to refer the matter back to the Judicial Conduct Commissioner, if you, having looked at the matter, consider that there is no corruption that you can pursue there. So, theoretically, once it's in your possession, you could refer that matter to me to

investigate, which is quite inconsistent with the intention that has been espoused in the Bill – that I do not have jurisdiction over those sorts of matters.

THE COMMISSIONER:

I doubt if I'd have that power. But, again, we might be here lawyers arguing about that. I doubt very much that if a matter were referred to me I could refer it to somebody else. That would be inconsistent, I would have thought, with the referral, but –

MR. LINES:

Yep.

THE COMMISSIONER:

– but anyhow we needn't debate that.

MR. LINES:

Yep. But I sort of raise that as an example where there could be inadvertently an expansion of my jurisdiction because it rests with you on your referrals or your referral power.

THE COMMISSIONER:

Well, I think the present scheme, after the introduction of the ICAC Act, has had the effect of expanding your jurisdiction because prior to the ICAC Act you had no jurisdiction in relation to misconduct.

MR. LINES:

Correct.

THE COMMISSIONER:

When I refer a matter to you, you are given jurisdiction by the referral into misconduct, so it has had the effect, I think, of expanding your jurisdiction. The powers that you exercise, when

you exercise a jurisdiction which is given to – given by the referral, are yours, I think, under the Ombudsman’s Act. And I don’t see any problem about that. That seems to me to be administratively tidy enough.

MR. LINES:

Yes, and part of my submission in this schedule is that to make that abundantly clear, the Ombudsman Act should be amended to allow me to investigate matters of maladministration and misconduct directly as well.

THE COMMISSIONER:

Well, if you are given that jurisdiction, why would you need the section 37A that you propose? It wouldn’t arise, would it?

MR. LINES:

Well, there are other jurisdictional limits that may be relevant, such as the limit on investigating complaints by an employee of an agency against their manager. So, it is essentially a managerial dispute rather than a matter that the Ombudsman was originally set up to investigate.

THE COMMISSIONER:

A workplace incident, you mean?

MR. LINES:

Yes.

THE COMMISSIONER:

Yeah. Yeah. Well, yeah, the – mm. Yes, well I’ll think about that.

MR. LINES:

Recently, Commissioner, we identified that there may be an issue in the referral of information your investigators have obtained in the course of investigating a potential mis – corruption matter, and what use my office may make of that information. And so I have suggested that section 56A of your Act be amended to make it clear that information that you obtained can be used by an inquiry agency for the purpose of dealing with a matter on referral.

THE COMMISSIONER:

Is that because of the present reference in the Act only to enforcement – law enforcement agencies and prosecution authorities?

MR. LINES:

And public authorities but not inquiry agencies.

THE COMMISSIONER:

Yes. Yes, okay. I understand that. Can I take you back to your first statutory provision that you mentioned, section 4, to amend the definition of inquiry agency to include –

MR. LINES:

Yes. The Auditor General.

THE COMMISSIONER:

Auditor General. I have not raised with the Auditor General whether the Auditor General would wish to be an inquiry agency, because probably not historically the Auditor General's role. But section 39 of my – the ICAC Act does allow me to request the Auditor General to carry out assessments, and to request him to conduct an examination of accounts under the Public Finance Act. Would I need any more power than that?

MR. LINES:

It just struck me, sir, that the Auditor General plays an important role, obviously, in keeping

government agencies to account with the way they handle their resources and finances.

THE COMMISSIONER:

Undoubtedly.

MR. LINES:

And the definition of maladministration includes that type of concern. And it would be, in my submission, more effective if you could directly refer to the Auditor General as an inquiry agency rather than as a, in a sense an external consultant, and then have some oversight of the result of the involvement of the Auditor General.

THE COMMISSIONER:

It's just that auditors don't usually see themselves as inquiry agencies. They see themselves as assessing the work of others to determine whether or not it has been done accurately, rather than inquiring into it to determine how it should have been done.

MR. LINES:

Yes.

THE COMMISSIONER:

It might be a very much expanded role for the Auditor General, upon which the Auditor General would need to comment I think.

MR. LINES:

Certainly. And I wouldn't expect any amendment in that nature to be made –

THE COMMISSIONER:

No.

MR. LINES:

– without consultation with the Auditor General.

THE COMMISSIONER:

No.

MR. LINES:

I did want to highlight one matter about the definition of public officer in Schedule 1, and the concern I have about its broadness.

THE COMMISSIONER:

The concern you have about, sorry?

MR. LINES:

Concern about its broadness.

THE COMMISSIONER:

Broadness, yes.

MR. LINES:

Yeah. Currently, a person performing contract work for a public authority or the Crown is a public officer.

THE COMMISSIONER:

Yes.

MR. LINES:

In my view, that is too broad because, notionally, that could cover people that are providing cleaning services or the electrician that comes in for a day to fix up the lighting –

THE COMMISSIONER:

Yes.

MR. LINES:

– in a government department’s office.

THE COMMISSIONER:

Yeah.

MR. LINES:

In my view, I think the intention was that public officers include people who are performing contract work in discharge of the functions of a public authority or the Crown. So, they are actually providing service to the public on behalf of that public authority.

THE COMMISSIONER:

I think there’s good reason for the first class that you identified to be public officers. For example, those people are procured by someone in public administration to carry out the service. It would be important to know that the procurement process was transparent so that you’d investigate the conduct of that person procured, bringing – bring him or her within the Act. And the persons who are assisting to discharge the functions of an Act are covered by the definition of a person to whom a function or power of a public authority is delegated in accordance with an Act. So, I think there’s good reason to include contractors. There are many sorts of contractors who would be caught by the Act who presently don’t understand themselves to be – a lot of medical practitioners, who are providing specialist services to the Department of Health, would be contractors for the purposes of the Act under this. We wouldn’t want to exclude them from the reach of the Act, I think.

MR. LINES:

Certainly.

THE COMMISSIONER:

They may want to but –

MR. LINES:

Yeah.

THE COMMISSIONER:

– we wouldn't.

MR. LINES:

Yeah. Well, considering that, further thought needs to be given about that because as I look at it, it just seems way too broad and we could be investigating the conduct of people that really has no relationship to the functions of government.

THE COMMISSIONER:

Yes. I'm not so sure about that. In a sense I think the definition is somewhat too narrow because at the moment I think, for example, that people who provide a licencing service, directly licensed perhaps by an Act, may not be caught by the Act. And they should be. And there is good reason, I think, to increase the width of the definition of public officer which of course can be done, as you know, by regulation.

MR. LINES:

Yep.

THE COMMISSIONER:

But anyhow, I'll take on board what you say about that.

MR. LINES:

Thank you. Perhaps, just the final recommendation there about the Local Government Act, and it has been a situation where there's been investigation by your office in terms of breach of a Code of Conduct by a council member or an employee of council and you may have exercised my powers even to conduct that investigation. But the Local Government Act under section 264(2) only allows a lodgement of complaint with the District Court if there's a failure to comply with a recommendation.

THE COMMISSIONER:

Of the Ombudsman?

MR. LINES:

That's right, rather than your office. So I'm suggesting that it should be available whether the investigation is conducted by me or you.

THE COMMISSIONER:

I think that's right. I think if the present regime or something like the present regime were to continue that's a lacuna in the Act at the moment and it leads to the unsatisfactory result that if I had carried out the investigation and found misconduct, that councillor couldn't be the subject of proceedings in the District Court, but if you carried it out they could.

MR. LINES:

That's right.

THE COMMISSIONER:

It's an odd result.

MR. LINES:

It is. So, Commissioner –

THE COMMISSIONER:

I think as between ourselves, Mr. Lines, what is important from the public's point of view is that whatever scheme is settled upon is efficient and doesn't lead to inquiry agencies tripping over each other and misunderstand – because they misunderstand or they exceed their jurisdictions. And I think it's important from the public's point of view that the public know who might investigate their complaint or report so that they know where they should report or complain.

MR. LINES:

I agree wholeheartedly with those comments, sir.

THE COMMISSIONER:

Thank you.

MR. LINES:

I have no further submission to make at this point.

THE COMMISSIONER:

I'm very grateful, Mr. Lines, for your assistance and Ms. Strickland's assistance. I'm grateful for the submission you put in and for the time you put in this afternoon in making your submissions. Thank you.

MR. LINES:

Thank you sir.

THE COMMISSIONER:

The next person to make a submission is a member of the public, which is at 3 o'clock, I think, Mr. Riches?

MR. RICHES:

Yes, Commissioner.

THE COMMISSIONER:

I will adjourn the public hearing until 3 o'clock then, this afternoon. Thank you.

ADJOURNED 12:57pm