REPORT ON THE REVIEW OF THE POLICE COMPLAINT PROCESS IN BRITISH COLUMBIA

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The Honourable John Les
Minister of Public Safety and Solicitor General
Room 236, Parliament Buildings
PO Box 9053, Stn Prov Gov
Victoria, BC V8W 9E2

Re: Police Complaint Process Review

Dear Minister:

I am pleased to submit my report following a review of Part IX of the *Police Act*.

Thank you for the opportunity to participate in this process.

Yours very truly,

Josiah Wood, Q.C.

JOW/dxb
Encl.

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I. INTRODUCTION

1. In July of 2005 the Minister of Public Safety and Solicitor General instructed the Director of Police Services to conduct a review of the Police Complaint Process, under the authority of s. 42(1) of the *Police Act*.[1]

2. On August 11th I was appointed by the Director of Police Services Division to assist his staff in the conduct of the review, following which I was to prepare a report in which the substance of that review was to be referenced in support of recommendations which I might make for the improvement of Part IX of the *Act*.

3. At the outset I must acknowledge, and express my gratitude for, the contribution made to the review by all the stakeholders of the complaint process. The municipal chief constables facilitated access to their departments' complaint files and provided strong support for the conduct of the review. Executive members of the unions ensured that we were given a valuable insight into their important perspective. In addition to providing full access to the files of his office, the police complaint commissioner and his staff were particularly generous with their time in giving us the benefit of their experience. The thoughtful analysis of the issues and submissions made by the executive members of both the British Columbia Civil Liberties Association and the Pivot Legal Society provided for a balanced outcome. The complainants and respondents, together with counsel and other interested parties, who took time from their busy schedule to meet with us, ensured that all possible perspectives were represented. The collective input of all proved invaluable to the ultimate success of the review.

4. The conduct of the review itself was a cooperative effort of a team consisting of myself, Lynne McInally, Senior Program Manager, Jenni Bard, Program Manager, Tanya Allen, Program Manager, Christal Engleder, Research Analyst and Rachel Graham, Program Administrator, all staff members of Police Services Division. In addition, consistent with the final Review Plan, Staff Sergeant Deborah Chisholm of the RCMP and Peter Juk, of the Ministry of Attorney General, were retained to assist with the conduct of the investigative audit.

5. It has been a privilege for me to have worked with all of these talented and dedicated members of the team, without whose assistance this report would not have been possible. In my view, this review process represents the most comprehensive analysis that has been undertaken to date of an existing Canadian police complaint and civilian oversight process, and the results of the review have provided

[1] *Police Act*, R.S.B.C. 1996, c. 367 and amendments thereto. (Hereinafter, the "*Act*").

a far greater insight to the workings of that process than any of the theoretical writings on the subject available today. The credit for that belongs to my colleagues on the team.

6. The report, on the other hand, is mine and mine alone and I take full responsibility for any shortcomings or errors that may be found to reside within it. I have no expectation that all of the stakeholders will be satisfied with my recommendations. Indeed, I fully expect that each stakeholder will be dissatisfied with some of the recommendations I have made. At the end of the day, I have sought to improve those areas where Part IX seemed obviously to be lacking and to leave undisturbed those parts which seemed to have escaped consistent criticism.

II. THE METHODOLOGY OF THE REVIEW

7. A draft Review Plan was discussed with the Stakeholder Advisory Committee on September 13, 2005.[2] The review undertaken followed this plan very closely with one exception. Once into designing the Public Awareness Survey, it became apparent that we should consider contracting out a survey dedicated to the core areas of Vancouver, New Westminster and Victoria which, by all accounts, were areas where the indigenous populations were likely to have more frequent contact with the police. Accordingly, the Strathcona Research Group was retained to prepare and report on the Core Area Awareness Survey. That survey was undertaken in the early part of 2006 and the report was concluded and delivered on May 1, 2006. The Core Area Awareness Survey is to be found at Appendix F.

8. The Public Awareness Survey, to be found in Appendix E, was designed by members of the team and, in November 2006, a total of 1,024 residents from the 11 municipalities concerned were surveyed via telephone in one of four languages: English, Cantonese, Mandarin or Punjabi. The sample of respondents was selected through random digit dialling, and was designed to match the British Columbia population in regard to gender, age and ethnic or racial origin. Police Services Division members of the team also designed the Police Awareness Survey, which is to be found at Appendix D, which was initially e-mailed to every sworn member of the 11 municipal police departments (2,245) on October 20, 2005. Between that date and February 24, 2006, an overall response rate of 57 percent (1,270) was achieved at which point the survey was closed.

9. The administrative audit was conducted, again by Police Services Division members of the team. This audit focused on a randomly selected sample of 294 lodged police complaint files that were closed between June 2003 and June 2005. The detailed results of this audit are to be found in the administrative audit report set forth in Appendix B.

10. In addition to the administrative audit, as previously noted, the investigative audit team of Staff Sergeant Deborah Chisholm and Peter Juk reviewed the investigations conducted in each of the 294 randomly selected closed files. This portion of the audit involved a prodigious amount of work as, in most cases, detailed notes were made in response to the 22 questions contained in the audit template. In addition to the 294 closed lodged complaint files, a decision was made early in the review process to obtain a sample of non-lodged complaints from each of the municipal police departments. As it turned out, not all departments had accessible records of such complaints. However, 105 such complaint "files" were obtained from seven of the police services in question. Finally, as a result of the low number of

[2] See: Appendix H.

substantiated complaints in the randomly selected audit sample of lodged complaint files, for which corrective and/or disciplinary measures were imposed, a request was made of the office of the police complaint commissioner to provide 30 such examples from their closed files. Because these files did not have a corresponding or matching police service file, which would have provided detailed information on the nature of the investigation conducted, the investigative audit team were limited in terms of the observations they could make and the conclusions they could draw from these files. The investigative audit report is to be found at Appendix C.

11. Commencing in February 2006 and continuing through to October, a total of 141 interviews were conducted with chief and deputy chief constables, other discipline authorities, professional standards officers, union representatives, office of the police complaint commissioner personnel, including the police complaint commissioner himself and other interested parties. In addition, each of the respondents named in the 294 randomly selected audit files were invited to participate in an interview if they wished and virtually all complainants named in those same files were sent a similar invitation. I found the interview portion of the review extremely valuable from the point of view of ascertaining the views of representatives of all of the stakeholders in the system. It was a condition of all interviews conducted that, unless express permission was granted to disclose the content of what was said, the substance of the interview itself would be used for information purposes only with the result that the identity, and any details that might identify the identity of the interviewee would not be disclosed. By this means, those who we interviewed were encouraged to speak frankly without fear that they might later be confronted with any criticisms they might have with the process itself.

12. Finally, as part of my responsibility, I undertook a review of the police complaint processes in other Canadian jurisdictions and reviewed vast amounts of material which had previously been accumulated both with respect to Part IX itself and with respect to police complaint processes generally. While these sources of information proved interesting, and in some cases useful, I found the practical results of the administrative and investigative audits, and the interviews, to be the most useful from the point of view of proposing recommended changes to Part IX of the *Act*.

III. AN OVERVIEW

13. No attempt has been made in this report to document the substance of every survey, the audit results or all the interviews conducted. For those who wish to delve into that substance, the survey results and audit reports are attached to this report as Appendices. However, the interviews were conducted on a confidential basis, with each interviewee being assured that their comments would be used for information purposes only. By that means they were encouraged to speak frankly, which most did, and for that reason the notes of their interviews will remain confidential.

14. Before setting forth some general comments and conclusions which flow from the vast bulk of material accumulated and studied during this review, it is important to reiterate what I made clear to the stakeholders when we met in September 2005 to discuss the Review Plan. The purpose of this review was not to pass judgment on the public complaint practices of any particular municipal police department or to grade those departments in terms of their handling of such complaints. The purpose of the review was to address the shortcomings in Part IX of the *Act*, with the ultimate object being recommendations for improvement. Everyone associated with the complaint process, virtually since its inception in 1998, has realized there were problems with Part IX, problems which made it difficult for the police to discharge their responsibility to thoroughly investigate and properly process complaints and problems that made it difficult for the police complaint commissioner to discharge the oversight functions of that office in an effective manner. Thus, wherever possible, the facts accumulated during this review have been reported and will remain anonymous. That is particularly so with respect to the audit results, both administrative and investigative. The purpose in looking back, and examining complaint files closed between June 2003 and June of 2005, was solely to enable me to see what improvements could be made in the process going forward. The audit and interview process did reveal shortcomings in the way public complaints of police misconduct are handled in this province, most of which are documented in the pages of this report solely for the purpose of illustrating the reasons for my recommendations, and it would be wrong for anyone reading this report to attribute those shortcomings to any particular department.

15. One issue that complicates the police complaint process in this province has to do with the fact that Part IX applies to just over one quarter of the total number of peace officers employed within in its borders. Mine is not the first voice to be raised in support of harmonizing the complaint process for at least all police services, both municipal and provincial, in the province. In the report of the Commission of Inquiry into Policing in British Columbia,[3] the Honourable Justice Wallace T. Oppal (as he then was)

[3] Oppal, the Hon. Wallace T. (1994). *Closing the Gap, Policing and the Community*, Vol 2: pp. I-59 J-23ff. (Hereinafter the "Oppal Commission").

called for such an initiative, as did the Special Committee to Review the Police Complaint Process, in its second report.[4] While any recommendation from me would fall outside the mandate of this review, it is a fact that the current situation creates at least a perception, if not the reality, that complaints about police misconduct are treated differently in municipal and RCMP jurisdictions, raising the spectre of inequality affecting all stakeholders. This problem becomes particularly evident when a complaint is made against the conduct of two or more members of one of the dozen or more joint police units operating within the province where one of the respondents has been seconded from a municipal police department and another from an RCMP detachment. From a purely practical point of view, the narrow application of Part IX necessarily imposes economic constraints on the effectiveness of both the complaint and oversight processes it contains, leaving little or no scope for either process to benefit from the economies of scale.

16. I turn then to some general observations that hopefully will establish context for the substance of the report and the recommendations it contains.

17. The Public Awareness Survey demonstrates that the efforts of the office of the police complaint commissioner, under s. 50(2)(e) of the *Act*, to inform the public regarding both the complaint process and the functions and duties of that office, have so far not met with much success. While only 18 percent of those surveyed expressed a lack of confidence in the complaint process, the reality is that only 55 percent expressed confidence, suggesting that there is room for improvement in both the way in which complaints are handled and the extent to which that process is made known to the general public. The results of the Core Area Survey produced few surprises to those who have had any experience with the social and policing issues in those areas. The numbers, for those who felt that complaints against the police are handled fairly, are essentially the reverse of those gathered in the Public Awareness Survey. One surprise that did emerge from that survey was the extent of the ignorance of the complaint process generally among those employed by the social agencies dedicated to providing assistance to the marginalized groups indigenous to those areas who tend to encounter more frequent contact with the police. These findings provide further evidence of the need for a concentrated public education program by the office of the police complaint commissioner.

18. One interesting result from both the Public Awareness and the Core Area Surveys was that relating to the issue of who should investigate police complaints. In the Public Awareness Survey, less than nine percent of those surveyed were of the view that the police should not be investigating themselves. Even amongst those who were not confident with the current complaint process, only 24 percent expressed that view. These small percentages are supported by the fact that 78 percent of those surveyed in the Public Awareness Survey were of the view that complaints against the police are conducted fairly, notwithstanding that those complaints are investigated exclusively by the police. The Core Area Survey revealed, surprisingly, that only 33 percent of those surveyed, who were not confident in the existing complaint process, were of that view because they believed there was an inherent bias resulting from the police investigating themselves. If one were to take the number who expressed that view (42) as a percentage of the total surveyed (299), the result is a mere 14 percent. While there are obviously limitations on the conclusions that can be drawn from these numbers in both surveys, it is clear that they do not offer support for the argument that the general public is of the view that the only transparent and credible complaint process is one in which so-called civilian investigators, independent of any police service, investigate public complaints of police misconduct.

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[4] British Columbia, Legislative Assembly, Special Committee to Review the Police Complaint Process. (August 2002) *Special Committee to Review the Police Complaint Process*, Second Report. (August 2002). pp. 22-23. See also Special Committee recommendation 42.

19. Of course, those who participated in the Public Awareness and Core Area Surveys did not have the benefit, as we did, of actually assessing the integrity of the complaint process through the audit results. The administrative audit revealed what was confirmed by many to whom we spoke during the interview process, namely that the process takes too long to unfold. A review of the police complaint files conducted between 1992 and 1994, for the Oppal Commission, found that the average length of time between the filing of a complaint, and the letter to the complainant setting forth the conclusions of the investigation, was 127 days.[5] This was the subject of "recurring complaints" by those who appeared before that commission more than a decade ago. The administrative audit performed during the review, found that the average length of time between the day the complaint was lodged and the date of the final investigation report was 190 days or 2 months longer than the same time frame revealed to the Oppal Commission. While that time period is just outside the statutory limit provided for in s. 56(7) of the *Act*, it must be kept in mind that it is an average which means that there were many investigations that took longer to reach that point. When the average time of 105 days it takes for the office of the police complaint commissioner to review the final investigation report and conclude the complaint is added, the result is a complaint process that by all accounts takes far too long to reach a final conclusion. Thus, I have made a number of recommendations which I hope will have the effect of moving the complaint process along more quickly.

20. The investigative audit results are perhaps best summarized by the investigative audit team themselves:

> The majority of the complaint files we reviewed demonstrated to us, on the whole, the departments are investigating and concluding public complaints in a manner that is both reasonable and appropriate. We saw many fine examples of professionalism, thoroughness and objectivity in the handling of police complaints ….[6]

It is, of course, the minority of the complaint files, which were not concluded in a manner that was both reasonable and appropriate, that must necessarily be the focus of my concern when it comes to making recommendations for change. Thus, what follows will concentrate on the negative rather than the positive findings that emerged from our review. The careful reader will want to keep that in mind before drawing conclusions about the integrity of the police services performed by the 11 municipal police departments in this province. Nothing said in this report is intended to detract from the fact that the members of the public in those 11 municipalities are privileged to be served by well trained, highly professional and competent police officers.

21. It is particularly important to keep this in mind when considering the results of the investigative audit, which will be discussed in greater detail later in this report. As will be seen, that audit revealed that there were material flaws in the investigations conducted in 48 out of the 288[7] files in the audit sample of lodged complaints which were subject to processing under Part IX. In addition, there were eight files in which, notwithstanding a relatively complete investigation, the ultimate conclusions were wrong in that the complaints, which should have been, were not concluded as substantiated. Thus, 56 or 19 percent of the complaint files in the audit sample did not meet the reasonable and appropriate standard imposed by the investigative audit team. When one adds the further fact that, of the 56 complaints in question, all but four were serious abuse of authority complaints, these results have to be considered

[5] Supra note 3, p. I-31.

[6] See: Appendix C, section 2.5.

[7] Six files in the audit sample were reviewed and closed without any further action under Part IX. See: Administrative Audit Report, Appendix B, s. 2.5, p. 8.

unacceptable. These audit results are the driving force behind many of my recommendations, and are therefore necessarily the focus of much of the discussion in this report. Thus, when reading that discussion, reasonable and right thinking members of the public, including the media, will want to keep in mind the important fact that fully 80% of all public trust complaints reviewed in the audit sample were investigated and concluded in a manner that was both reasonable and appropriate.

22. When the results of the review as a whole are considered, it is clear that there is no single explanation for these 56 files. Rather there are a number of factors involved. To begin with, it is apparent that there is a greater risk of such a result when the complaint alleges a serious public trust default. That is just a simple statistical conclusion that can be drawn from the numbers. Thus, for example, of the total of 56 unsatisfactorily concluded files, 36, or 64 percent, involved allegations of excess force. Of the balance, 13 involved allegations of wrongful arrest (5) and wrongful search and/or seizure of property (8).

23. Another matter which must be taken into account is the human factor, which includes matters such as motivation, training and the stress associated with performing what is universally regarded as an unpleasant duty, often under circumstances of inadequate staffing and resources. During the interviews, we met with virtually every present, and a number of past, professional standards officers. Many to whom we spoke were highly motivated to do the job properly. Most of those same individuals told us they took on the job with little or no training in the nuances of either Part IX of the *Act* or internal investigations. The fact is that apart from a stand alone series of courses offered in 1998, when Part IX first came into effect, no course specific to the duties of either professional standards officers or discipline authorities was offered by the Justice Institute of British Columbia until December 2005. Most of the professional standards officers to whom we spoke, both past and present, told us they had no significant investigative experience before being assigned to investigate public complaints of police misconduct. This was a curious revelation, given that the consistent argument advanced as the justification for the police investigating the police is that they, and they alone, have the investigative skills necessary to do the job properly.

24. We also interviewed some past and present professional standards officers who did not have the high degree of motivation that is necessary if one is to perform an unpleasant duty consistently to a high standard of perfection. That too is to be expected on a purely statistical basis.

25. Another factor which accounted for those complaint files that were improperly concluded was the lack of cooperation by respondents. Without the power to force a respondent to give a statement, or submit to an interview, the best professional standards officer is left with little more than a written duty report from which to assess that officer's response to a complaint.

26. As a result of the interviews we conducted, it became apparent that one important factor that tended to influence the outcome of investigations is what is often referred to as the "culture of policing." We heard a lot about the police culture and how it generates a perspective concerning the way in which the police interact with civilians, which is different from, indeed some times opposite to, that which the average citizen holds. Police officers are given extraordinary powers to enable them to perform the duties and functions of policing. Those duties and functions involve not only enforcing the laws and generally maintaining law and order, but also, where possible, preventing crime. Police work is a stressful, complex and often dangerous occupation, which more often than not brings the police officer into contact with those individuals who, for any number of complex reasons, have broken the law and, in the case of some, may reasonably be expected to do so again, possibly with violent consequences. Thus, it is to be expected that there exists a common bond amongst police officers that

leads to a unique perspective on the relationship between the law, which they feel they represent, and the civilian population that they are sworn to serve. That unique perspective shapes not only the way in which they perform their duties, but also the way in which they have a natural inclination to react negatively to complaints about their conduct.

27. Of course, the common bond that effectively results from the unique nature of the police officers' duties and responsibilities is vital to the successful performance of those duties and responsibilities. And, to the extent to which the existence of the police culture can be said to reinforce that common bond, it too is an important factor in effective and responsible policing. However, an exaggerated view of that culture and, in particular, the extent to which it not only explains but is used to justify what the civilian sometimes sees as misconduct, can create a mindset that resists both the thorough investigation of complaints and the existence of civilian oversight. The review we have conducted demonstrates that mindset still exists today among some police officers.

28. That brings me to the civilian oversight process in Part IX. It became obvious early in this review, that the police complaint commissioner had few effective powers with which to ensure that all public complaints were thoroughly investigated and properly concluded. As will be discussed in greater detail later in the report, the power to order a further investigation by an external police department is a poor remedy for an initial investigation that is flawed, and the power to order a public hearing is an equally poor remedy for an erroneous disposition in the case of a complaint that does not raise issues that meet the high public interest standard required to justify engaging that seemingly complex, expensive and generally unsatisfactory process.

29. To that must be added the factor which caused me the greatest concern as this review unfolded, namely the lack of complete acceptance by the police of the concept of full civilian oversight. By this I do not mean to suggest that police officers generally, and police management in particular, reject the concept of "police accountability." All discipline authorities, professional standard officers and union representatives to whom we spoke were genuine in their recognition of the importance of the duty of accountability. What is at issue here is the extent to which that duty of accountability extends, when it comes to the complaint process, and the oversight role of the police complaint commissioner.

30. Thus, we heard of instances where the authority of the office of the police complaint commissioner was challenged when requests were made to reconsider decisions or produce investigative files for review. The Police Awareness Survey revealed that less than 20 percent of officers with the rank of corporal or below (74 percent of those surveyed) who were surveyed "expressed confidence" in the performance of the office of the police complaint commissioner. Even within the executive ranks, where 67 percent expressed confidence in the performance of the office of the police complaint commissioner, there is evidence of a certain wariness regarding the powers of the police complaint commissioner, and an anxiety that any increase in those powers will somehow have a negative impact on police independence. Thus, the British Columbia Association of Municipal Chiefs of Police (hereinafter the "BCAMCP") cautions against "unconstrained authority in the OPCC" and expresses concern that an atmosphere of fear will develop in police officers faced with "vexatious complaints buttressed by a discipline process lacking in balance" which, in turn, will create "an environment cool to the resolute investigation of criminality."[8]

31. The creation of a balanced civilian oversight process is an objective I believe to be shared by all of the chiefs and deputy chief constables, as well as those representatives of the unions, the Pivot Legal

[8] BCAMCP. (April 2006). *White Paper on Police Act Reform, Response of the British Columbia Association of Municipal Chiefs of Police.* p. 5.

Society, the British Columbia Civil Liberties Association (hereinafter the "BCCLA") and the office of the police complaint commissioner, to whom we spoke. What brings out the difference among those groups is the perspective from which they view that balance.

32. My role is to set that balance, after having the benefit of their diverse points of view on this most difficult of issues. In doing so I start with the proposition that in 1998 the Legislature adopted a police complaint model that left the responsibility for investigating complaints, and imposing discipline for proven misconduct, with the police and provided for a civilian authority, independent of government, to oversee the discharge of those responsibilities. As will be discussed below, the results of this review have not persuaded me that it is necessary at this time to change the basic structure of that model.

33. That said, I regard freedom from police misconduct as one of the fundamental values that define a free and democratic society, just as surely as I regard freedom from the fear of political interference as a fundamental value that defines the independence of the police who serve and protect our free and democratic society. In that balance, I see no threat to the independence of the police from a vigorous and effective exercise of civilian oversight. What must be kept in mind, in the debate between the many different perspectives on this issue, is that without public confidence in the integrity of the police, their authority is undermined and their independence threatened. It is to the maintenance of public confidence in the integrity of the police, that strong effective oversight of the current complaint process is so essential. Thus, in response to what I perceive to be the inadequate oversight powers presently vested in the office of the police complaint commissioner, I have recommended a substantial shift in the balance presently existing, mindful of the fact that in doing so I am augmenting the powers of an authority as equally independent from the fear of political interference as are the police themselves.

34. There are many other recommendations that flow from the valuable input we receive from all stakeholders in the complaint process. One other matter, that was frequently the subject of comment both during interviews and in written briefs we were provided with, is the ineffective, indeed cumbersome and expensive, public hearing process currently in place. In attempting to provide an alternative form of independent review of decisions made in the complaint process, I have had to recommend changes to the processes by which those decisions are made so as to ensure the existence of an adequate record as the basis for such review.

35. I have not attempted to draft any proposed legislative changes. I leave that task to those with the required talent and skill. Nor have I attempted to identify all of the consequential amendments that will necessarily flow from those of my recommendations that are implemented. However, in that regard, it will be obvious that many, if not most, of my recommendations are dependent upon one another, with the result that care should be taken when deciding which ones to implement so as not to separate those that are clearly dependent on each other if they are to be effective.

36. Finally, I would be remiss if I failed to acknowledge two substantial bodies of work on which I have relied heavily when weighing the evidence accumulated in this review. The first is the work of the previously mentioned Special Committee to Review the Police Complaint Process, which sat from November 2001 to May 2002 and produced a thoughtful Second Report in August 2002, containing some 42 recommendations for changes which they concluded would improve the process. While I have not always acknowledged its influence, many of the recommendations I have made closely parallel ones found in that report, and I have found not only the report itself but the published briefs presented to the Committee and the transcript of its proceedings to be of great assistance to me.

37. I must also mention the other work on which I have relied heavily. In March of 2005, the police complaint commissioner issued a White Paper containing a great many proposals for changes to the current police complaint process.[9] It also proposes that the complaint process, in its entirety, be removed from the *Police Act* in order to reinforce the independence of the office he holds from any perceived influence of either the police or the executive branch of government. A draft statute attached to the White Paper embodies the many proposals for change that are described in the White Paper.[10]

38. In describing the White Paper in his 2004 Annual Report to the Legislature, the police complaint commissioner pointed out that none of the recommendations for change to Part IX of the *Act*, proposed in the Second Report of the Special Committee of the Legislature, following that committee's hearings in 2001 and 2002, had yet been implemented.[11] He also noted, as did virtually all to whom we spoke during our review, that Part IX has a number of shortcomings that need to be addressed. He offered his draft Police Complaint Act as a model for how those recommended changes and shortcomings could be addressed.

39. Both the draft Police Complaint Act and the White Paper have been most helpful to me in my effort to discharge the mandate of this review. While I have not adopted all the changes proposed by the police complaint commissioner, the careful work which he and his staff, together with legal counsel, put into both documents has given me a template against which to test the many, and often disparate, recommendations for change which emerged from both the written briefs submitted to us and the interviews which we conducted during the review.

40. During the course of my interviews with the police complaint commissioner, he reiterated his strong belief in the need for the current Part IX complaint process, including all matters relating to the statutory structure of his office and its relationship to the Legislature, to be in a separate statute which he suggests be under the legislative responsibility of the Attorney General.

41. The authority for this review is found in s. 42 of the *Act* which vests the Minister of Public Safety and Solicitor General with the authority to direct the Director of Policing to study, investigate and prepare a report, *inter alia*, on matters concerning policing. The terms of reference for this review describe the scope of my mandate:

> The review will address the following issues:
>
> - The adequacy and effectiveness of the current complaint process set out in Part IX of the *Police Act* including reviewing how it is currently implemented and any recommendations for change, and
> - The integrity of, and the confidence of stakeholders in, the conduct of the police complaints investigations by municipal police departments.
>
> ...
>
> The review will include consideration of the following:
>
> - The current legal framework for the police complaint system including, but not limited to, the statutory authority and duties and responsibilities of the Discipline Authority and the duty of police officers to account for their activities;

[9] Ryneveld, Dirk, Q.C. (March 2005). *Police Act Reform, White Paper & Draft Police Complaint Act.* (Hereinafter, the "White Paper").

[10] Ibid. (Hereinafter, the "draft Police Complaint Act").

[11] British Columbia Police Complaint Commissioner. *2003 Annual Report*. p.5.

- Compliance of independent municipal police departments with applicable *Police Act* requirements;
- The practices of Internal Investigation Sections in conducting police complaint investigations;
- The management practices of Chief Constables in supervising, managing and ensuring proper internal investigation processes;
- The perception of the fairness of the current police complaint process by stakeholders including, but not limited to, Chief Constables, Police Unions/Associations, Discipline Authorities, police officers, respondent police officers, complainants, witnesses, staff of the office of the police complaint commissioner, and other relevant stakeholders identified in the Review Plan;
- Identification of various service or policy issues applicable to the audit;
- The recommendations of the Special Committee of the Legislature done under s. 51.2 of the *Police Act*; and
- The report of the Police Complaints Commissioner – Pivot Complaints against VPD.[12]

42. Throughout the course of this review I have been guided by these terms of reference. They clearly include the authority to review and make recommendations with respect to the oversight powers of the police complaint commissioner to the extent that those powers, or the lack thereof, relate to the adequacy and effectiveness of the current complaint process. However, in my view, matters related to whether there ought to be a separate statute pertaining to the police complaint process, and which Ministry should have responsibility for that statute, fall outside the terms of reference for this review. For that reason, I decline to make any recommendations with respect to the statutory structure of the police complaint process.

43. For the same reason, I also decline to make any recommendations regarding a number of amendments which the police complaint commissioner proposes in Part II of his draft Police Complaint Act. These include such matters as the process by which the police complaint commissioner is appointed by the Legislature, the number of six year terms the police complaint commissioner should be eligible to serve, the remuneration of the police complaint commissioner, the application of the Public Service Pension Plan to the police complaint commissioner and the length of absence from the office which should trigger the appointment of an acting police complaint commissioner by the Lieutenant Governor in Council.

44. In what follows I have referred to most, but not all, of the many proposals for change that are to be found in the police complaint commissioner's draft Police Complaint Act relating to the actual complaint process itself. The fact that I fail to deal with a specific recommendation should not be taken as any indication that it is an ill-conceived or improper proposal. It merely indicates that, in the overall scheme of Part IX, I have not considered it to be necessary. Furthermore, to the extent that I have obviously not accepted a particular recommendation, does not mean that it was unworthy of consideration. As indicated, I have found all of the thoughts expressed in the White Paper, the proposals in the draft Police Complaint Act and the candid and thoughtful views of the police complaint commissioner in our discussions, to be most helpful in the course of working through this most challenging exercise. To the extent that some of my recommendations may be at odds with some of his is a reflection of the fact that I have found it necessary to balance as much as possible the views of all the stakeholders in this process.

[12] "Terms of Reference for Review under s. 42 of the *Police Act*." (August 2006).

IV. DIVISION 2 – POLICE COMPLAINT COMMISSIONER

A. POWERS AND DUTIES OF POLICE COMPLAINT COMMISSIONER

45. From the Public and Core Area Surveys conducted, it is apparent that there is a significant lack of understanding in the public generally with respect to both the complaint process and the functions and duties of the police complaint commissioner. It is evident that whatever efforts have been made under s. 50(2)(e) of the *Act* in the past, to inform the public with respect to these matters, they have not been particularly successful. No doubt priority has been given to other duties of the office when considering the expenditure of both available time and financial resources.

46. In s. 9(2)(e) of his draft Police Complaint Act, the police complaint commissioner has proposed the words "develop an outreach program" be added to s. 50(2)(e) of the *Act*. This proposal is intended to reflect a similar recommendation of the Special Committee of the Legislature, which included a rider that such education and outreach initiatives acknowledge and address the needs of diverse communities including marginalized groups.[13]

47. While I am of the view that the duty to "develop outreach programs" is already included in the s. 50(2)(e) duty to "inform the public", I see no harm in adding those words to s. 50(2)(e) to emphasize that what is needed is a coherent program of public education. In addition, the results of the Core Area Survey demonstrate that s. 50(2)(e) must emphasize the duty to direct such educational and outreach initiatives, in particular, to the marginalized groups in our society whose condition in life is such that they are likely to come into more frequent contact with the police. Accordingly, I recommend that s. 50(2)(e) be amended to include the duty to develop outreach programs with particular emphasis on those that address the needs of diverse communities including marginalized groups in our society.

48. Another recommendation of the Special Committee of the Legislature was that the discretionary duties in ss. 50(3)(a), (c), (d) and (e) be made obligatory.[14] With one exception, I have decided against recommending this change to s. 50(3). In my view the existence of these discretionary powers is sufficient to enable the responsible exercise of judgment on the part of the police complaint commissioner with respect to what informational reports, recommendations or studies, for whatever reason, may be needed at any given point in time. To convert these broad discretionary powers into

[13] Supra note 4, p. 8. See also Special Committee recommendation 3.

[14] Ibid. pp. 7-8. See also Special Committee recommendation 4.

duties will only burden the police complaint commissioner with the task of making many such reports and recommendations in circumstances where their utility would, at best, be questionable. However, I do agree that the discretionary power in s. 50(3)(d), to prepare guidelines respecting the procedures to be followed by a person receiving a complaint, be made mandatory by removing it to s. 50(2). As will be described in greater detail later, the audit revealed the need for such guidelines which unfortunately, to date, have never been produced. Accordingly, I recommend that the discretionary power in s. 53(3)(d) be converted into a mandatory duty in s. 50(2).

49. There is one mandatory duty that I would add to s. 50(2). During the review, the investigative audit team saw evidence of what might be considered trends in the repetitive incidence of certain types of complaint. For example, fully one-third of the public trust complaints reviewed in the audit sample included allegations of excess force. It is not for me, from this distance, to say whether that number is evidence of a trend, but if someone with the ability to make that judgment were to conclude that it is, then in my view that is something that ought not to be ignored. I do think the police complaint commissioner is in a position to make that sort of judgment and that, as part of the mandatory duties of his office, he and his staff ought to keep an eye out for such phenomena and, when one is identified, to take steps to bring it to the attention of whatever level of authority can properly address the issue. Accordingly, I recommend that s. 50(2) be amended by adding thereto a duty to conduct reviews with respect to the frequency and demographics of complaints so as to identify the development or existence of trends of alleged misconduct and to make whatever recommendations or take whatever actions as may seem necessary in the circumstances.

50. As previously indicated, I am of the view that the oversight powers of the police complaint commissioner must be significantly enhanced if the current model of civilian oversight of the police is to be effective. To ensure that there is no ambiguity with respect to the authority of the police complaint commissioner and his staff, to exercise the enhanced powers which I recommend and describe more fully later in this report,[15] I am of the view that s. 50(2) of the *Act* should be amended to specifically set forth the scope of that expanded authority. Accordingly, I recommend, that s. 50(2) of the *Act* be amended by adding thereto the duty to oversee and, in consultation with the discipline authority, to advise and, if necessary, to direct the course of an ongoing investigation into a public trust complaint.

51. In ss. 9(6), (7), (8) and (9) of his draft Police Complaint Act, the police complaint commissioner proposes that he have a discretionary power to issue binding directives, the breach of which by a police officer would constitute a discipline default. In addition to establishing a broad power to supplement the statutory practices and procedures of the complaint process, this power is intended to include the current s. 50(2)(j) mandatory duty to issue guidelines for informal resolution and the s. 50(3)(d) discretion to prepare guidelines respecting the procedures to be followed by a person receiving a complaint.

52. The BCAMCP objects to this proposal, principally on the ground that it may tend to encourage the police complaint commissioner to become more actively involved in overseeing the actual conduct of investigations, as opposed to reviewing them once they are concluded.[16] As noted, and will be discussed in more detail below, I am of the view that such more active involvement of the police complaint commissioner in the conduct of ongoing investigations under Part IX is, in any event, now necessary.

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[15] See: paragraphs 207-208, infra.

[16] Supra note 8, pp. 7-8.

53. The problem this proposal by the police complaint commissioner seeks to address is the fact that the only guidelines presently authorized by the *Act* are those referenced above and found in ss. 50(2)(j) and (3)(d). Almost immediately after Part IX came into effect, it became obvious that there were many parts of the complaint process where guidelines were needed, either because of lacunae in the *Act*, or simply because of the need to standardize practices across the municipal police departments. Thus, over time, some 12 "Guidelines" or "Practice Directives" were issued by the office of the police complaint commissioner,[17] only one of which, the undated "Practice Directive on Informal Resolutions" was actually sanctioned by the *Act*. Notwithstanding that for the most part these guidelines and practice directives were issued following stakeholder consultation, and contrary to the suggestion in the brief of the BCAMCP prepared in response to the White Paper, I am advised that their authority was frequently challenged. Whatever their underlying motivation, such challenges were legally well founded since the police complaint commissioner was without the statutory authority to issue any such guidelines or practice directives other than that under s. 50(2)(j).

54. Each of the present Guidelines and Practice Directives were developed in response to a need to provide guidance to, and to standardize the practice of, those responsible for implementing the complaint process. In that sense they were considered essential at the time they were prepared. No statutory scheme can ever account for every circumstance that will arise in the course of its application. Indeed, it would be highly undesirable to attempt to draft legislation that would provide for every compliance contingency. Thus, guidelines will always be necessary, and it is essential that the power to make them be clearly provided for in the *Act*. Accordingly, I recommend that the police complaint commissioner, in consultation with relevant stakeholders affected, have the power to issue guidelines with respect to matters not covered by the provisions of the *Act*, but nonetheless necessary to ensure that the objectives of Part IX are achieved. Such guidelines must not be inconsistent with any provision of the *Act*.

55. Some of the 11 unauthorized Guidelines and Practice Directives presently in existence will no longer be relevant if the recommendations in this report are implemented. Others may need to be revised, again depending on the extent to which my recommendations are implemented. Without reviewing each one in detail in this report, I recommend that Part IX be amended by ratifying the existing Guidelines and Practice Directives, to the extent that they are not inconsistent with any recommendations implemented, until such time as they are either withdrawn by the police complaint commissioner or amended after consultation with relevant stakeholders.

56. There remains the issue of whether these guidelines should be "binding" as recommended by the police complaint commissioner. There is a little point in making them if they are not to be binding on those to whom they are meant to apply. Accordingly, I recommend that such guidelines as are made pursuant to this recommendation be binding upon all participants in the Part IX complaint process, subject to the discretion of the police complaint commissioner to waive them in any case where their application would be unreasonable in all its circumstances.

B. STAFF OF POLICE COMPLAINT COMMISSIONER

57. During interviews, we learned that there have been occasions in the past where the authority of members of the police complaint commissioner's staff, to perform the limited oversight powers presently found in the Act, had been challenged. The power of the police complaint commissioner

[17] Office of the Police Complaint Commissioner, British Columbia. "Guidelines, Practice Directives & Policies." www.opcc.bc.ca

to delegate his authority would seem implicit in s. 51(1). However, with the exception of his power in s. 51(3), to delegate his functions to the deputy police complaint commissioner during his absence for up to 30 days, there is no specific power in Part IX to enable him to delegate any of his powers to staff members. In my view, such a power should be expressly set out in the Act. In s. 10(4) of his draft Police Complaint Act, the police complaint commissioner has proposed such a power. I agree with his suggestion, but would increase the list of powers that cannot be delegated except to the deputy police complaint commissioner as provided for in s. 51(3). Accordingly, I recommend that s. 51 of the Act be amended to provide that the police complaint commissioner may delegate any duty or power he may exercise under the Act to any member of his staff, except for the power to order:

- that a complainant not be allowed to file any further complaint without first obtaining the permission of the police complaint commissioner;[18]
- that the investigation into a third party complaint be discontinued and the complaint summarily dismissed;[19]
- an investigation;
- an external investigation;
- that further or better investigative steps by taken;[20]
- a public review;[21] or
- a public hearing.

58. In s. 11 of the police complaint commissioner's draft Police Complaint Act, it is proposed that he and his staff not be compelled either to testify or to produce, in any proceeding other than a criminal proceeding, any record or other information obtained in the course of discharging their duties under Part IX of the *Act*. In s. 13, it is further proposed that immunity be provided to the police complaint commissioner, his staff, employees, agents or any person acting under his direction with respect to the performance, or intended performance, of any duty or the exercise of any power under the *Act*. This latter proposal would not extend such immunity to anything done or omitted in bad faith. These are both sensible proposals and I so recommend.

[18] See: paragraph 126, infra.

[19] See: paragraph 99, infra.

[20] See: paragraph 207, infra.

[21] See: paragraphs 292-296, infra.

V. DIVISION 3 – PROCESSING OF COMPLAINTS

A. SUBMISSION OF COMPLAINTS

59. Section 52(4) of the *Act* requires that before an oral or written complaint can be processed under Division 4 or 5 of the *Act*, it must be "committed to writing in the prescribed form",[22] which must then be lodged with one or more of the individuals described in s. 52(2).[23] This requirement has resulted in the creation of two classes of complaints, those with respect to which the formal requirements of s. 52(4) are met and those, both oral and written, which are not committed to writing in the prescribed form. This latter class has come to be known as non-lodged complaints. Because of the strict requirements of s. 52(4), non-lodged complaints are not processed in accordance with the requirements of Part IX and, more importantly, their investigation and disposition is not subject to the oversight of the police complaint commissioner.

60. In addition to the 294 formal or lodged complaints in the main audit sample, the review team conducted a review of 105 non-lodged complaint files which were obtained from those departments which had organized and accessible records of such complaints in sufficient numbers to permit relevant sampling.[24]

61. The audit revealed considerable variation in the manner in which each department keeps track of non-lodged complaints. In the case of some departments, complete internal records of such complaints are maintained. In others, the audit revealed scant evidence of any systematic record keeping. The review also revealed that the handling of non-lodged complaints varies from department to department. Some departments simply attach a written complaint to a Form 1 and treat it for all purposes as a lodged complaint. This practice, while outside the mandatory provisions of s. 52(4), has quite sensibly been sanctioned by the police complaint commissioner. Other departments refuse to accept a complaint as lodged unless the complainant completes and signs a Form 1. In the case of some oral complaints, it was noted that the discipline authority either completed a Form 1 or requested the police complaint commissioner to order an investigation under s. 55(3) of the *Act*. While this is a laudable practice, which reflects an appropriate commitment to accountability, the audit revealed that it was not systematically or consistently followed by any of the departments.

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[22] *Police Act Forms Regulation*, B.C. Reg. 202/98 mandates the Form 1 Record of Complaint as the "prescribed form."

[23] The police complaint commissioner, the discipline authority as defined in s. 46(1) or a senior constable of the municipal police department with which the respondent, if any, is employed.

[24] Samples of non-lodged complaints were obtained from Delta (15), New Westminster (15), Saanich (15), Vancouver (20 out of 30 selected; records of 10 requested could not be located.), West Vancouver (11), Victoria (15) and Abbotsford (14).

62. Of the 105 non-lodged files reviewed, a total of 14 proved to be irrelevant to the audit analysis,[25] four were ultimately lodged and three were the subject of an ordered investigation under s. 55(3). A total of 69 of the remaining 84 non-lodged files reviewed, contained allegations of a public trust default. Based on the serious nature of the allegations, the investigative audit team concluded that 28 of those 69 complaints ought to have been the subject of a lodged complaint so as to engage both the process requirements of Part IX and the oversight function of the police complaint commissioner.

63. Notwithstanding the requirements, in ss. 52(3) and (5) of the *Act*, that a person receiving a complaint assist the complainant in submitting a complaint and completing a record of the complaint, the review of non-lodged complaint files revealed little evidence of any such efforts. Only six of the 28 files in which a formal complaint should have been lodged, contained any indication that the complainant was provided with a Form 1. Overall, of the 91 relevant non-lodged complaint files reviewed, only 22 contained any such indication. In the case of six of those files, the complainant went on to complete a Form 1,[26] and three were the subject of an ordered investigation at the request of the discipline authority. The overall impression of the investigative audit team was that if a complainant did not make the extra effort to complete a Form 1, or the person receiving the complaint was able to talk them out of doing so, no investigation was conducted. In many instances, questionable records were kept of the complaint even when the allegation may have involved a serious breach of the *Code of Professional Conduct*.[27]

64. Of the 28 non-lodged complaints, which the investigative audit team determined should have been lodged, nine contained no indication of any disposition whatsoever and a further eight recorded a disposition which the investigative audit team was unable to conclude was appropriate.

65. Many of the non-lodged complaints were made orally. While there is a point of view, reflected both in prevailing Canadian police complaint legislation and in the interviews conducted as part of this review process, that a complaint should not be taken seriously unless the complainant has at least taken the time and trouble to set it out in writing, there is no reason why a written complaint should not be processed under Part IX simply because it is not in the prescribed form. From the foregoing, it is apparent that the rigid requirements of s. 52(4) currently operate to discourage some complainants from proceeding further with their complaints, thus preventing some complaints from being properly processed under Part IX of the *Act*.

66. One option would be to do away with the Form 1 requirement in s. 52(4) altogether and simply provide that any written complaint received by any of the persons designated in s. 52(2) be processed according to the requirements of Part IX. However, it is apparent that the Form 1 contains, or at least is designed to record, information essential to the establishment of a formal complaint file, both in the police department concerned and in the office of the police complaint commissioner. For that reason, it is my view that the Form 1 should be retained as the foundational document in both the file kept by the police department receiving the complaint and in its counterpart in the office of the police complaint commissioner.

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[25] See: Appendix B, footnote 36.

[26] However, 2 of the Form 1 complaints were not forwarded to the office of the police complaint commissioner, with the result, as noted, that only 4 were processed as lodged complaints under Part IX.

[27] *Code of Professional Conduct Regulation,* B.C. Reg. 205/98.

67. The practical solution, as noted by the police complaint commissioner[28] and a number of individuals we interviewed, and which in fact was recommended by the Special Committee of the Legislature,[29] is that any complaint received in writing simply be attached to the Form 1, following which the complaint would be processed as if, to use the language of the present s. 52(4), it had been committed to writing in the prescribed form. I agree, and recommend that in any case where a written complaint is received in other than the prescribed form, it should simply be attached to a Form 1 and processed in the ordinary way under Part IX. To this I would add that the person receiving such a written complaint must be required to complete the substantive portion of the Form 1, either by drawing the relevant information from the written document provided by the complainant, or by contacting the complainant to obtain the necessary information.

68. Notwithstanding the argument that only written complaints should be accepted for processing under Part IX, the audit revealed that there were a number of oral complaints that, on their face, were serious enough to warrant being treated as lodged complaints. In most of those cases, the file did not reveal that any effort was made by the person receiving those complaints to comply with the mandatory requirements of ss. 52(3) and (5). Furthermore, with no oversight of at least the manner by which such complaints were disposed of, it was impossible to say that all were properly concluded.

69. For those reasons, I recommend that a formal record be kept, in a standard form, of all oral complaints received which, for whatever reason, are not subsequently reduced to writing. Such complaints should be recorded in a new form provided for in the *Police Act Forms Regulation*[30] which would require that the person receiving the complaint record the name and contact particulars of the complainant, the name and PIN number(s) of the respondent(s) if known, details of the complaint, including the date and location of the alleged conduct complained of, the steps taken to assist the complainant in committing the complaint to writing, including the reasons why the complainant refused to accept such assistance. A copy of this form should be provided to the police complaint commissioner, forthwith upon final disposition of the oral complaint, and a copy must be maintained in the department's complaint records together with the content, if any, of the file associated with the processing of the complaint.

70. In addition, I recommend that the *Act* should clearly provide the police complaint commissioner with the power both to undertake whatever review is deemed necessary to ensure that an oral complaint has been properly disposed of and, again where it is deemed necessary, to order an investigation of any such complaint. While in a general sense such powers may presently be seen to exist in s. 50(4) and s. 55(3) of the *Act*, a reference to those powers specifically in connection with non-lodged oral complaints will remove any ambiguity that might otherwise be seen to limit the police complaint commissioner's oversight powers in regard to such complaints.

71. Section 52(3)(c) references the power of the police complaint commissioner, found in s. 50(3)(d), to make guidelines respecting the procedures to be followed by the persons authorized by ss. 52(2)(b) and (c) to receive complaints. As noted, I am advised by the police complaint commissioner that no such guidelines have ever been produced. Notwithstanding the duties imposed upon persons receiving complaints, in ss. 52(3) and (5), it is apparent from the results of the audit that, in many cases an inadequate level of assistance is being offered to those individuals who do not complete a Form 1 of their own accord. It is impossible to recommend amendments to ss. 52(3)(a), (b), (c) and (5) which would make the duties there described any clearer. However, it may well be that guidelines which set out

[28] See: s. 15(2) of the draft Police Complaint Act.

[29] Supra note 4, p.12. See also Special Committee recommendation 6.

[30] Supra note 22.

specific details of both the procedures to be followed, and the nature of the assistance to be provided, by those persons described in ss. 52(2)(b) and (c) would help to overcome the problem revealed by the audit. Thus, as noted, I have recommended that the discretionary power to produce such guidelines be converted to a mandatory duty.

72. Section 52(2) limits the persons who can receive a complaint against a municipal constable, chief or deputy chief constable or a municipal police department to the police complaint commissioner, the discipline authority or a senior constable of the municipal police department with which the respondent, if any, is employed or about which the complaint is made. As noted by the police complaint commissioner in his White Paper, Professor Stenning found this narrow range of eligible recipients to be a weakness in the Part IX complaint process.[31] Thus, in s. 15(4)(d) of his draft Police Complaint Act, he proposes to add to the list in s. 52(2) any provincial, federal or local person, official or agency designated by him to receive complaints under Part IX. This proposal is consistent with the spirit of a similar recommendation by the Special Committee of the Legislature.[32]

73. As noted, ss. 52(3)(a) through (c) and (5) mandate that the person receiving a complaint assist the complainant in a variety of ways designed to ensure that the desire to lodge a complaint is not frustrated. The same mandatory requirements must be imposed upon any other individuals or agencies who may be authorized to receive complaints. Providing the individuals or agencies that the police complaint commissioner were to designate are able, and are trained so as to be able, to comply with those mandatory requirements, I think his proposal is a sensible one and I so recommend.

B. CHARACTERIZING RECORD OF COMPLAINT AND NOTIFICATION.

74. The characterization of a complaint determines whether it will be processed under Divisions 4, 5 or 6 of the *Act*. There are two issues that, in my view, need to be addressed in connection with this initial step in the complaint process.

75. The first has to do with the definitions of public trust default and internal discipline complaint. Paragraphs (a) through (c) of the former are cast in such broad language as to encompass virtually any conduct which meets the definition of a discipline default under the *Code of Professional Conduct Regulation*,[33] irrespective of whether a member of the public has been directly affected by the conduct complained of. The definition of an internal discipline complaint suffers from two handicaps. Because of its reliance on the definition of a public trust default, paragraph (a) only refers to conduct not caught by that overly broad definition. Paragraph (b) confuses the definition of a complaint with the manner in which that complaint is to be processed in certain rather narrow circumstances.[34] It also suffers, at least superficially, from an apparent circularity which adds little or nothing to one's understanding of the true nature of the type of conduct which, in ordinary circumstances, is intended to be processed under Division 6 of the *Act*.

76. In my view, amendments to the definition of both a public trust default and an internal discipline complaint are necessary as a starting point to a coherent discussion of characterization. Thus, I recommend that the definition of a public trust default be amended to clarify that it is conduct which

[31] Stenning, Phillip. (August 1998). *Review of Part 9 (Complaint Procedure) of the British Columbia Police Act, as amended by Section 36 of SBC 1997*, c. 37. p. 7.

[32] Supra note 4, pp. 7-8. See also Special Committee recommendation 22.

[33] Supra note 27.

[34] See: s. 64(5) and s. 65.1(6) of the *Act*.

directly involves or affects a member of the public and which, if proved, would constitute a discipline default that results in one or more of the consequences described in paragraphs (a) through (c) of the present definition. As a necessary corollary, the definition of an internal discipline complaint must be amended by striking out paragraphs (a) and (b) of the present definition and providing simply that it involves conduct that relates to the acts, omissions or deportment of a respondent which does not directly involve or affect any member of the public.

77. The second issue, in my view, is one of significant importance, namely, the time and effort that is expended in the present characterization process. The administrative audit revealed that, out of 294 complaints in the audit sample, 277, or 94%, were ultimately characterized or processed as including one or more alleged public trust defaults and were processed as such under Division 4.[35] The administrative audit further revealed that, of 284 files in which the dates of both the lodging of the complaint and its characterization by the discipline authority where recorded,[36] the median time for completion of this process was nine business days and the median time for transmittal of that characterization to the office of the police complaint commissioner was a further one business day. Thus, in the case of one half of all complaints, at least ten business days were taken up with the characterization process before the police complaint commissioner could embark upon the process of confirming that characterization as required by s. 52.1(6). While the audit was unable to record the median length of time it took for the office of the police complaint commissioner to confirm the characterization in those complaint files,[37] that process would necessarily have added some number of business days to the delay before the investigation of a public trust complaint could begin.

78. Quite apart from the labour-intensive nature of the characterization process, which necessarily diverts already scarce resources away from other more important duties under the complaint process, I am persuaded that the small number of complaints which do not fall within the definition of a public trust complaint do not warrant maintaining a characterization process that adds a minimum of two weeks to the resolution of at least one half the complaints that do meet that definition. Certainly, in light of the vast proportion of complaints that are ultimately properly characterized and processed as public trust complaints, there can be no justification for maintaining the timelines set forth in ss. 52.1(3) and (7) which collectively have the potential to delay the processing of such complaints for up to a full month. Indeed, when the small proportion of complaints other than public trust complaints are taken into consideration, the need for such a lengthy formal characterization process seems in doubt.

79. Accordingly, I recommend that all lodged complaints should presumptively be characterized as public trust complaints unless the police complaint commissioner is satisfied, either on his own motion or upon application by the discipline authority made forthwith upon receipt of a complaint, that it should be characterized as an internal or a service and policy complaint.

C. WITHDRAWAL OF COMPLAINT

80. The audit revealed that a notice of withdrawal was filed in 27 of the 294 complaint files reviewed. Of those, the investigative audit team concluded that three warranted further investigation. None of these files revealed any evidence of duress. Rather, the conclusion that further investigation ought to have been undertaken, notwithstanding the withdrawal, was provoked in each case by the nature of the

[35] 8 were never formally characterized, although they were handled as public trust complaints. Of the balance, 6 were compound complaints, service and policy and internal complaints accounted for 4 each and 3 complaints were found not to fall under Part IX of the *Act*.

[36] In 10 such cases either or both dates were not recorded.

[37] The administrative audit had a limited number of fields available for data collection.

conduct alleged in the original complaint together with other circumstances revealed when the police file was reviewed.

81. This demonstrates the practical weakness in the current oversight power provided to the police complaint commissioner in ss. 52.2(4) through (6) inclusive. With nothing more than the Notice of Withdrawal on which to base a decision, and no express power to review the contents of the police file, the police complaint commissioner has precious little material on which to make a determination under any of those subsections.

82. However, if the recommendations which I am making with respect to the power of the police complaint commissioner to contemporaneously monitor the ongoing progress of all complaint files are implemented,[38] the police complaint commissioner will have a basis upon which to make such a determination. In that event, the ability to determine whether either there has, in fact, been some form of duress leading to the filing of the notice of withdrawal, or there is some other good reason why a complaint that has been voluntarily withdrawn should nonetheless be processed, will be enhanced with the result that those subsections will have some meaning.

83. That said, there are two other matters that, in my view, need to be addressed before leaving s. 52.2. The first is that I can see no reason why the purpose of ss. 52.2(6) and (7) need to be split between two subsections or, more particularly, why the power of the police complaint commissioner, described in ss. 52.2(7) should be described as the power to make a "direction" rather than an order that the withdrawn complaint(s) be investigated. While the police complaint commissioner has the power to order an investigation in s. 55(3), there seems no good reason to confuse anyone's perception of the overriding nature of the police complaint commissioner's oversight powers by diluting the language with which those powers are described.

84. The second issue is that, in my view, s. 52.2 should provide the discipline authority with an express power to continue to process a complaint notwithstanding that a notice of withdrawal has been filed. While such a power might be inferred from the conditional language of s. 52.2(9), an ambiguity arises from the fact that, at present, the only power to "direct" that a complaint continue to be processed in such circumstances resides with the police complaint commissioner under ss. 52.2(7).

85. The power of the police complaint commissioner to intervene at any stage of the complaint process is a power that flows from the oversight mandate of that office. As long as the power to investigate police complaints remains with the police, the first responsibility to maintain the integrity of the complaint process must necessarily rest with the discipline authorities who, accordingly, must have the unambiguous powers necessary to discharge that responsibility.

86. Accordingly, I recommend that s. 52.2 be amended by adding an express provision to the effect that notwithstanding that a notice of withdrawal has been filed, the discipline authority may continue to process a complaint. I see no reason to curtail this authority with any limiting conditions on its exercise anymore than the legislature saw fit to limit the discretion of the police complaint commissioner to make directions, including directions to conduct an investigation, notwithstanding that a notice of withdrawal was made without duress.

87. Further, I recommend that ss. (6) and (7) be collapsed into one subsection that provides simply that where the police complaint commissioner determines the notice of withdrawal was not made under

[38] See: paragraphs 207-208.

duress, he may nonetheless provide directions to the discipline authority with respect to the complaint or order the discipline authority to conduct an investigation into the complaint.

88. The audit sample of both lodged and non-lodged complaints revealed a small number of complaints that did not fall under the jurisdiction of Part IX. Typically this was because either the individual, whose conduct was the subject of the complaint, was not a municipal constable, chief or deputy chief constable, or the subject matter of the complaint did not fall within the definition of any of the three types of complaint covered by Part IX. Currently, there is no provision in the *Act* which would enable this type of complaint to be quickly and efficiently concluded. Accordingly, I recommend that Division 3 of Part IX be amended by adding a section which gives the police complaint commissioner the power, upon consultation with the discipline authority, to dismiss any complaint that for whatever reason is not subject to the Part IX complaint process.

VI. DIVISION 4 – PUBLIC TRUST COMPLAINTS

A. APPLICATION OF THIS DIVISION TO THIRD PARTY COMPLAINANTS

89. At present, third party complainants are not considered "complainants" for any purposes under Part IX (s. 53) and they have none of the rights available to complainants under Division 4 except the right to be informed of discipline proceedings or criminal charges that result from their complaints (s. 53.1(1) and (2)). In his review of Part IX, completed shortly after it came into effect, Professor Stenning expressed the view that these limitations represented a "significant weakness" in the legislation. [39]

90. In his White Paper the police complaint commissioner suggests a limited easing of these limitations. Acknowledging that there are some instances in which third party complainants have a "legitimate interest" in pursuing a complaint on behalf of another, he proposes that both his office and an adjudicator presiding over a public hearing be provided with a discretion to grant rights to a third party complainant up to but no greater than those that are or, in the case of a public hearing would be, made available to a complainant.[40] The discretion proposed could only be exercised in circumstances where "good cause exists" and the extension of such rights "would not unduly prejudice a respondent".[41]

91. In its response to the White Paper the BCAMCP suggests, without being specific, that the test for exercising this proposed discretion should be considerably "more onerous" than that proposed in the police complaint commissioner's draft legislation.[42] The Association also recommends that corporate persons or associations and other "non-individuals" should be denied third party status altogether.

92. The BCCLA on the other hand, together with the Pivot Legal Society and some complainants interviewed, urge full participatory rights for third party complainants. In a written submission offered in response to the police complaint commissioner's White Paper, the BCCLA argues, as did representatives of that Association who met with us, that such an equal role is consistent with the remedial objective of the Part IX complaint process, which is to correct or discipline police misconduct and not to provide compensation to complainants who may have suffered from such misconduct.[43]

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[39] Supra note 31, pp. 9-10.

[40] Supra note 9, p. 14.

[41] See: Section 20(1) draft Police Complaint Act.

[42] Supra note 8, p. 11.

[43] Correspondence dated May 12, 2006, from Executive Director of BCCLA to Dirk Ryneveld, Q.C.

93. I agree with the views expressed by Professor Stenning in his 1998 review of Part IX,[44] which he reiterated in his testimony before the Special Committee of the Legislature in 2001.[45] The limitation on the right of third party complainants, to participate fully in the complaint process, operates to prevent access to that process by those who lack the psychological, social, educational or financial resources to pursue such complaints on their own behalf. The Core Area Survey results demonstrate that those who suffer from such disadvantages are less likely than others in our society to be aware of, understand or avail themselves of the right they have to lodge a complaint against what they perceive to be police misconduct. Common sense, mixed with a modicum of life experience, tells us that they are the very constituency who are at greater risk of such misconduct.

94. The extent to which, as a society, we are able to ensure that the most vulnerable among us enjoy the benefit of those values which we consider fundamental to a free and democratic society, is the measure by which our commitment to those values will be measured. As noted at the outset of this report,[46] freedom from police misconduct, which necessarily requires a commitment to effective civilian oversight of the exercise of police powers, is one of those fundamental values.

95. In his White Paper the police complaint commissioner expresses the concern that full participatory rights for third part complainants "has the potential to add cost, prejudice to respondents and commission counsel, and even mischief to a fair and efficient complaint process."[47] This thought is picked up in the submission of the BCAMCP, made in response to the White Paper to which is added a concern that equal participatory rights to third party complainants will lead to "increased delay and unnecessary procedural complexity, which may impact the timely resolution of complaints."[48] No specific examples of these potential consequences and, in particular, no historical examples of their occurrence, are offered in support of these concerns and the audit results do not support their existence.

96. Only 15 of the 294 complaint files audited were third party complaints. There is no reason to think that this low number is the result of a widespread understanding in the community at large of the strictures placed upon third party complainants in s. 53.1. Thus, while the overall incidence of lodged public trust complaints will likely increase over time, and may increase if a number of the recommendations contained in this report are implemented, there is no reason to think that the increase in third party complaints will be disproportionate.

97. The assumption that seems to underlie the concerns expressed by both the police complaint commissioner and the BCAMCP in its response to his White Paper, is that a significant number of such complaints will be advanced by improperly motivated complainants. As Professor Stenning points out in his 1998 Review of Part IX,[49] no such assumption is reflected in s. 52(1) which gives the right to file a complaint to any person, and there seems to be no compelling reason to impose such an assumption on third party complainants. In fact, from a review of the audit notes relating to the 15 third party complaints included in the review, it was not apparent that any were lodged by improperly motivated complainants.

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[44] Supra note 31.

[45] British Columbia, Legislative Assembly. Hansard. (November 19, 2001). "Special Committee to Review the Police Complaint Process." p. 54.

[46] See: paragraph 33, infra.

[47] Supra note 9, p. 15.

[48] Supra note 9, p. 11.

[49] Supra note 31, pp. 9-10.

98. That said, I cannot rule out the possibility that increased participation by third party complainants may increase the risk of such improperly motivated complaints. However, in my view, that contingency can be met by providing the police complaint commissioner with the discretion to conclude a third party complaint summarily, the exercise of such discretion being based upon and supported by cogent evidence that satisfies him that such complaint was improperly motivated. In addition, the police complaint commissioner must have the authority to order the summary dismissal of a third party complaint in the event either that more than one such complaint is lodged in connection with the same allegation of misconduct or that the member of the public directly affected by the alleged conduct in question subsequently lodges a complaint under s. 52 of the *Act*.

99. Accordingly, I recommend that necessary amendments be made to Division 4 to eliminate the existing limitations on the right of third party complainants to the same participation in the Part IX complaint process as first party complainants. However, in order to ensure that the right of third party complainants to such full participation is not abused, I recommend that the police complaint commissioner have a discretionary power, either upon application by the discipline authority concerned or on his or her own motion, to order that the investigation into a third party complaint be discontinued and the complaint summarily dismissed upon evidence which establishes on a balance of probabilities that such complaint has been advanced for reasons other than a genuine belief on the part of the third party complainant that the conduct complained of amounted to a breach of the *Code of Professional Conduct*. In addition, I recommend that the police complaint commissioner have the authority to order the summary dismissal of a third party public trust complaint in the event that one or more members of the public directly affected by the alleged conduct in question subsequently lodges a complaint under s. 54 of the Act. If accepted, these latter two recommendations should properly be located as part of the present s. 54 which provides for summary dismissal of complaints.

B. RESIGNATION, RETIREMENT OR TRANSFER

100. Part IX is silent with respect to the continued application of the complaint process to a respondent officer who resigns, retires or transfers to another police department either before a complaint is lodged or while a complaint is outstanding.

101. The Special Committee of the Legislature heard from a number of sources on this issue and recommended that any complaint process lodged against such an officer be "concluded and recorded."[50] The police complaint commissioner, in s. 21 of his draft Police Complaint Act, has fleshed out this recommendation, dealing separately with the issue of transfer, but his recommendation does not clearly differentiate between the situation where the public trust complaint arises after the resignation, retirement or transfer and that where the complaint process is ongoing when the respondent decides to make a career change.

102. Dealing first with the situation where the employment status of a respondent changes in the face of an ongoing public trust complaint, different issues arise with respect to resignation or retirement on the one hand and transfer on the other. In case of the former, the concern is that resignation or retirement will be used as a device to enable the respondent to then obtain employment with another police department, without a record of discipline associated with the complaint that, under the current structure of the *Act*, must be abandoned because there is no statutory authority for it to continue to be processed. In the case of transfer, the statutory void has left the police departments, both from and to

[50] Supra note 4, p. 22. See also Special Committee recommendation 41.

which the respondent has transferred, without any apparent authority to continue with the complaint process.

103. The concern in both cases is to ensure that a respondent's service record of discipline contains a complete record of all complaints that have resulted, or could have resulted, in corrective and/or disciplinary measures being imposed, including any such complaint being processed at the time of the resignation, retirement or transfer, such that any police department which may subsequently receive an application for employment is made fully aware of the respondent's full disciplinary history.[51]

104. The brief of the BCAMCP suggests that there will be occasions in which it is in everyone's interest that an opportunity to resign be afforded to a respondent who faces a clear likelihood of serious disciplinary action, rather than forcing everyone to complete the Part IX complaint process. The example offered is a respondent:

> ...who has engaged in serious misconduct and is facing dismissal [who] may choose to resign in the face of public exposure even where it is uncertain the evidence is sufficient to meet the test of dismissal. Facing the certainty of a public hearing may operate as a disincentive.[52]

105. With respect, the position of the BCAMCP, as reflected in this example, overlooks an important principle. Either the public trust default giving rise to the complaint against a respondent can be proved on the requisite standard of a balance of probabilities, or it cannot. If not, there is no reasonable basis upon which it can be suggested that the respondent's potential future career as a police officer should be blemished by a resignation induced by a desire to avoid public exposure. On the other hand, if the proof is there, a resignation or premature retirement ought not to permit that respondent to move on to another police department with an apparently clean discipline record. While it might be argued that, where it can be said with certainty a respondent will not seek employment with another police department, he or she ought to be allowed to resign or retire without the necessity of completing the complaint process through to its statutory conclusion, the problem will always be ensuring that such certainty exists.

106. Accordingly, I am of the view that resignation or retirement should never interfere with the ability of a police department to continue processing a public trust complaint against a respondent. Thus, what is needed is the statutory obligation to continue that process against a former municipal constable, chief or deputy chief constable, who resigns or retires in the face of an outstanding public trust complaint. The respondent who resigns or retires in those circumstances can choose either to participate or not in the continued complaint process, but if he or she chooses not to participate there should be a statutory adverse inference available to the discipline authority or adjudicator, as the case may be, who has the final responsibility to deal with that outstanding complaint. As well, in such circumstances, the respondent should be deemed to have waived his or her right to request either a public review,[53] or a public hearing, following a discipline proceeding at which the complaint is found to be substantiated.

107. Turning to the situation where an officer transfers to another police department in the face of an outstanding public trust complaint, I am also of the view that the police department from which that

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[51] See: paragraph 153, infra, where I recommend that s. 65.3 be amended to provide, *inter alia*, that the chief of a police department to which a current or former municipal police officer makes application for employment, be entitled to receive, on request, a copy of that officer's service record of discipline.

[52] Supra note 8, p. 12.

[53] See: paragraphs 292-296, infra.

respondent has transferred must complete the Division 4 process and, if the complaint is substantiated, so record that result in the respondent's service record of discipline.

108. Obviously, in the case of resignation, retirement or transfer, the ability to impose corrective and or disciplinary measures upon someone who is no longer an employee does not exist. Thus, in each case, the disciplinary process will conclude with the determination whether the complaint was substantiated. However, if the complaint is found to be substantiated, there should be a statutory duty on the part of the discipline authority or the adjudicator, as the case may be, to indicate what corrective and/or disciplinary measures would have been imposed in the event the respondent was still employed by that department.

109. The situation is more complex where the public trust complaint is not lodged, and therefore does not come to light, until after the respondent has resigned, retired or transferred to another police department. If I understand the proposal in s. 21(2) of the police complaint commissioner's draft Police Complaint Act, in the case of a transfer he would impose the responsibility for investigating and otherwise processing that complaint upon the municipal police department of which the respondent is then a member. I think that is the only sensible way of dealing with the situation, irrespective of whether the respondent's employment at the time the complaint is lodged is a result of a straightforward transfer or an application for employment following a resignation or retirement from the police department in whose employ he or she was when the conduct complained of occurred.

110. Accordingly, I recommend that a section be added to Part IX to provide:

(a) Where a respondent resigns, retires or transfers to another police department, while facing an outstanding public trust complaint, the discipline authority shall continue to process the complaint as though the respondent were still a member or the department and, in the event the complaint is substantiated following a discipline hearing, a public review or a public hearing at which the respondent is afforded full opportunity to participate, the discipline authority or adjudicator, as the case may be, shall record that result in the respondent's service record of discipline together with the corrective and/or disciplinary measure that would have been imposed had the respondent still been an employee of that police department.

(b) The disciplinary authority may draw an adverse inference against a respondent who resigns, retires or transfers to another police department, while facing an outstanding public trust complaint, and who elects not to participate in a discipline proceeding arising out of such a complaint.

(c) A respondent who resigns, retires or transfers to another police department, while facing an outstanding public trust complaint, and who elects not to participate in a discipline proceeding with respect to that complaint, shall not be entitled to request either a public review or a public hearing in the event the complaint is found to be substantiated.

(d) Where a public trust complaint is lodged against a respondent who, since the events giving rise to the complaint but before the complaint was lodged, whether by reason of a resignation, retirement or transfer, is then employed by a different municipal police department, that complaint must be processed under Division 4 of Part IX by the municipal police department of which the respondent is then a member.

C. SUMMARY DISMISSAL OF PUBLIC TRUST COMPLAINTS

111. It is recognized by all stakeholders, and others familiar with the police complaint process generally, that there will inevitably be some complaints of police misconduct which have no merit whatsoever, either because they are completely without any legal or factual foundation or they lack any air of reality. Section 54 of the *Act* is intended to give the discipline authority the power to dismiss such complaints without the necessity of wasting scarce police resources on their investigation.

112. There is no question that such a summary dismissal power is required as an integral part of the Division 4 process. However, the review revealed a significant degree of inconsistency, across the eleven municipal departments, in the use of s. 54(1)(b), as well as some degree of confusion with respect to both when and how it should be used.

113. A total of 85 public trust complaints, out of the main sample of 294 complaint files, were ultimately concluded as summarily dismissed. Of those, six were found to be frivolous or vexatious, four were found to relate to an act or omission that had occurred more than 12 months before the complaint was filed and the balance (75) were concluded under s. 54(1)(b) on the basis that there was no reasonable likelihood that further investigation would produce evidence of a public trust default.[54]

114. Resort to s. 54(1) generally, by municipal departments, ranged from 0% to 78% of all dispositions recorded in the audit sample, with one department utilizing s. 54(1)(b) in 57% of all dispositions recorded in its share of the audit sample.[55] Both the administrative and investigative audits revealed numerous instances where the disposition was formally recorded as a summary dismissal, under s. 54(1)(b), while the language in which that disposition was described in the final investigation report was consistent with a conclusion that the complaint was, in fact, found to be unsubstantiated. In many of such cases substantial investigative steps had been undertaken and, in some cases, what was apparently a full investigation had actually been conducted.

115. From the perspective of a complainant, the only recourse following a summary dismissal is to apply to the police complaint commissioner for a review of that decision,[56] something the police complaint commissioner is statutorily bound to do in any event.[57] If such a review persuades the police complaint commissioner the complaint should not have been summarily dismissed, he may issue an order under s. 54(6)(a)(ii) that it be investigated. By contrast, when a complaint is found to be unsubstantiated, the complainant may request the police complaint commissioner to order a public hearing,[58] or the police complaint commissioner, on his own motion, may order such a hearing. The different consequences flowing from these different dispositions mandate that the formal disposition of a complaint accurately reflect the true basis upon which that complaint has been concluded.

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[54] See: Sections 2.5 and 5.1 of the Administrative Audit Report, Appendix, B. One service or policy complaint was also summarily dismissed.

[55] The weight to be attached to the fact that no summary dismissals were recorded in the audit files received from two departments is almost certainly the result of the small number of files from those departments in the random sample. As well, little weight should be attached to the 78% rate in one department which had only 9 files in the random audit sample. However, the 57% frequency in one department is a clear anomaly. When that department's numbers were removed, 23% of the remaining public trust complaints in the audit sample were summarily dismissed.

[56] Supra note 1. See: s. 54(4).

[57] Ibid. See: s. 54(6).

[58] Ibid. See: s. 57.1(3).

116. In addition to the audit results, which demonstrate a widespread failure to understand the proper use of the summary dismissal power in s. 54(1)(b),[59] the investigative audit team concluded that 11 of the 75 public trust complaints, in which a summary dismissal was formally recorded under that statutory provision, ought to have been fully investigated because the investigative file did not reveal a reasonable basis for concluding that further investigation would not produce evidence of a public trust default. While one cannot conclude that any of these complaints would have been substantiated, if a full and proper investigation had been conducted, the failure to conduct an adequate investigation renders the disposition of these files unsatisfactory.

117. It would also seem that the scope of the s. 54(1)(a) power to summarily dismiss a complaint is not clearly understood. This was confirmed by a number of professional standards officers and discipline authorities we interviewed who expressed frustration at their inability to deal quickly and effectively with what they viewed as frivolous or groundless complaints. One department, in a written submission prepared in response to this review, went so far as to suggest that "patently frivolous" complaints should be "refused" without the need to make a formal dismissal ruling.[60]

118. The Special Committee of the Legislature recommended that s. 54(1)(a) of the *Act* be amended "to replace 'frivolous and [sic] vexatious' with plain language."[61] It is perhaps difficult to conceive of any "plain language" which could more clearly reflect the legislative intent underlying s. 54(1)(a) than "frivolous **or** vexatious." With respect to both the Special Committee of the Legislature, and those to whom we spoke during interviews, who suggested that the words "frivolous or vexatious" have an inflammatory tone which adds to the dissatisfaction of a complainant whose complaint is thus dismissed, I am not persuaded that they should be removed from s. 54(1). Those words clearly describe two distinct types of complaints which can and should be summarily dismissed. As noted in the undated Practice Directive on Summary Dismissal, issued by the office of the police complaint commissioner, a complaint is frivolous when, on its face, (i.e. without the need for any investigation whatsoever) it is devoid of substance and/or lacks an air of reality. The word vexatious, in the context of s. 54(1)(a) speaks to the motivation of the complainant and imports the concept of repetitious similar complaints that have previously been found unsubstantiated.

119. However, the evidence accumulated during the review indicates the need to clarify the language of s. 54(1)(b) so that the purpose and scope of the important power it contains can be more clearly understood and properly utilized. The singular feature of the complaints referred to in s. 54(1)(a) is that their deficiencies will be apparent without the need for any investigation whatsoever. That is clearly not the case with the complaints to which s. 54(1)(b) was intended to apply. The underlying assumption supporting the power to summarily dismiss found in that subsection is that there will be some complaints which, while unremarkable on their face, will nonetheless subsequently be determined to be groundless. When s. 54 as a whole is read together with s. 54.1(1), it is clear that such a determination, if appropriate, would most likely become obvious very early in the investigative stage. As well, it is manifest that a summary dismissal must not result from a weighing of the evidence for or against the substance of the complaint. Rather it must be based upon some circumstance which makes that process unnecessary. If the evidence must be weighed, the proper disposition of the complaint

[59] The audit templates were not designed to record the number of public trust complaints that ought to have been formally recorded as unsubstantiated rather than summarily dismissed.

[60] Delta Police Department. (April 6, 2006). "Section 42 Review of the Police Complaint Process." p. 2.

[61] Supra note 4, p. 12. See also Special Committee recommendation 7.

must necessarily be made under s. 57.1(1). Finally, s. 54(1)(b) must not be used to summarily dismiss a complaint following a selective and incomplete investigation.

120. With the foregoing in mind, I am of the view that s. 54(1)(b) was intended to enable the summary dismissal of a complaint that, on its face, was neither frivolous nor vexatious, but that, nonetheless, for some clearly identifiable, legal or factual reason could never be substantiated. Its purpose was to avoid the waste of time and resources that would otherwise be spent in the investigation, or further investigation, of a public trust complaint that, in any event, must inevitably be concluded as unsubstantiated. While it is perhaps difficult to imagine a circumstance where such a complaint might not also fit the definition of a frivolous complaint, it is impossible to say it could never happen. Suffice it to say that the circumstances in which such a power of summary dismissal could properly be invoked would be rare.[62]

121. Accordingly I recommend that s. 54(1)(b) be amended to reflect that a public trust complaint can be summarily dismissed when there exists either a legal or a factual reason why it cannot possibly be substantiated such that any, or any further, investigation of the complaint is unwarranted.

122. In keeping with my general view that the entire complaint process should be completed in a more timely fashion, I recommend that the 10 business day period which the discipline authority has to notify the parties and the police complaint commissioner of a decision to summarily dismiss a complaint, found in s. 54(3), be amended to require that such notice be given forthwith upon that decision. Notwithstanding some concerns expressed during interviews, I am of the view that, given the work load in that office, the 30-day period provided to the police complaint commissioner to review such a decision in s. 54(6) is reasonable.

123. In the course of the many interviews we conducted, we were made aware of the fact that in each of the municipalities there are one or more individuals who are perpetual complainants. Many of their complaints are summarily dismissed after little investigation, but some are dismissed only after at least some investigation. We were told that the amount of time taken up by processing such complaints puts a serious strain on already scarce investigative resources, especially in those municipal police departments that are not large enough to have a full time professional standards officer. In his draft Police Complaint Act,[63] the police complaint commissioner has suggested a process whereby his office could order that further complaints of a person who has habitually instituted vexatious or groundless complaints not be processed.

124. The audit revealed that such complainants do exist and, while their number may not be large, I think the police complaint commissioner's suggestion is a sensible one and justifies a recommendation that a provision similar to s. 18 of the *Supreme Court Act* be included within s. 54 of the *Act*:

> 18. If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.[64]

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[62] One example might be an abuse of authority complaint, based on an allegation of unlawful search and seizure, where it was determined either that a Warrant to Search had been issued or the complainant was properly arrested or detained, thus giving the respondent a common law power to conduct a warrantless search of the complainant.

[63] Supra note 10. See: s. 15(8).

[64] R.S.B.C 1996, c. 443 and amendments thereto.

125. There is, of course, a risk of abuse resulting from such an order, arising from the fact that even a perpetual nuisance complainant may experience police misconduct. Thus, any power to make an order of the sort recommended should necessarily be rarely exercised and then only after it could be demonstrated on clear and convincing evidence to be necessary. In other words, I am of the view that there must be a high evidentiary standard met before such an order could be made, and that such standard should be clearly spelled out. Further, as a safeguard against any possible abuse, there must be an opportunity given to the individual in question to persuade the police complaint commissioner that a proposed complaint ought to be processed in the ordinary way.

126. Accordingly, I recommend that a section be added to Division 4 giving the police complaint commissioner the power, upon application by a discipline authority, to make an order that no further complaints from an individual complainant be lodged for processing under Division 4 of the *Act* without leave of the police complaint commissioner. The order can only be made after giving the individual complainant an opportunity to be heard, and must be based upon proof that such individual has previously made at least two complaints that have been summarily dismissed as frivolous or vexatious. Further, I recommend that any individual against whom such an order has been made shall have the right to apply to the police complaint commissioner to have such an order vacated.

D. INFORMAL RESOLUTION

127. The administrative audit portion of our review revealed that informal resolution was attempted in just 32 (or 11%) of the 294 complaint files in the random sample. Twenty-five of those attempts were "successful" to the extent that they resulted in the final disposition of the complaint. However, the investigative audit team concluded that, of those so-called successful resolutions, four ought not to have been the subject of an attempt at informal resolution as the complaints alleged were of too serious a nature to conform to the undated Practice Directive on Informal Resolution[65] issued by the office of the police complaint commissioner.[66] It was also noted that one such resolution did not conform strictly to the requirement, in s. 54.2(1)(a), that the respondent sign the letter consenting to the resolution of the complaint.[67] Thus, five of the 25 successful informal resolutions ought not to have been so concluded.

128. The investigative audit team also noted that one of the unsuccessful attempts at informal resolution did not conform to the Practice Directive on Informal Resolution because of the serious nature of the discipline default alleged.[68]

129. My review of the investigative audit team's notes in respect of the 294 files in the audit sample persuades me that informal resolution would have been appropriate, and should at least have been attempted, in 96 of the complaints in those files. That number, of course, includes the 27 files in which informal resolution was properly attempted.[69] In other words, informal resolution should have been attempted in almost 33% of the total number of files reviewed. However, it was properly attempted in only 28% of the complaints contained in those files in which it ought to have been attempted and successfully concluded in only 20% of those files.

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[65] Supra note 17.

[66] Of the 4, 3 alleged the disciplinary default of Abuse of Authority in the form of excess force and 1 alleged deceit by misleading the Court.

[67] The respondent's supervisor apologized and signed the letter after advising the complainant that the respondent refused to apologize.

[68] This complaint was subsequently found to be unsubstantiated, but the investigative audit team concluded that disposition was the result of an improper legal analysis and that the complaint ought to have been concluded as substantiated.

[69] The informal resolution that did not conform to the requirements of s. 54.2(1)(a) of the Act was nonetheless properly attempted.

130. Section 54.1(1) of the *Act* mandates that, unless a complaint is summarily dismissed, the discipline authority must, promptly after receiving a complaint, determine whether an informal resolution of the complaint would be appropriate. The audit revealed that, with the exception of those departments in which the chief constable retained the role of discipline authority, there was no clear evidence that the discipline authorities systematically complied with this statutory requirement. By way of a general observation, the audit revealed that, in the overall complaint process, not much attention is paid to, nor use made of, the provisions of s. 54.1.

131. Interviews conducted during the review revealed what may be one reason for the lack of resort to informal resolution. We were repeatedly told by discipline authorities, professional standards officers and, indeed, by union representatives, that for the most part respondent police officers refused to attend an informal resolution attempt because they believe they have done nothing wrong. The extent to which this negative approach to the concept of informal resolution is, in fact, pervasive among police officers, may be one explanation for why it is that some discipline authorities have not discharged the duty mandated by s. 54.1(1) of the *Act* in many of those cases in which informal resolution ought to have been, but was not, attempted. It certainly explains why the undated Practice Directive on Informal Resolution provides for a formal apology to be made on behalf of the police department rather than by the actual respondent against whom a complaint has been lodged, a practice that is not sanctioned by ss. 54.1 or 54.2.

132. In fairness, the interview process also brought to our attention examples where complainants were unwilling to engage in an attempt at informal resolution. While the self-selection process by which we were given the opportunity to interview both respondents and complainants necessarily lessens the weight to be attached to such evidence, there is no reason to think that the concept of informal resolution would necessarily be unanimously endorsed by all members of the public whose complaints are of the sort deemed suitable for such resolution.

133. A further reason why informal resolution has not been attempted as often as it should have, may be due to the fact that most discipline authorities and professional standards officers have little, if any, dispute resolution training or experience. Again, through the interviews we conducted, it became apparent that, to the extent such training is available in the Justice Institute or elsewhere, generally speaking, resources are not made available for officers to avail themselves of such training. One professional standards officer, who had received alternative dispute resolution training, advised that he was actually required to pay for such training himself and to attend the course during his off-duty hours.

134. While not all of those complaints eligible for such resolution would necessarily be successfully resolved if the attempt were made, it is significant that 20 out of 27 proper attempts at informal resolution in the audit sample ultimately proved successful. A 74% success rate even in a sample so small, is reason to be optimistic about the results that could have been achieved if informal resolution had at least been attempted in the one-third of all complaints in the sample for which it was an appropriate option. As noted, informal resolution was properly attempted in only 27 of the 96 complaint files in the audit sample deemed suitable for such a resolution. Applying a 74% success rate to the remaining 69 suggests that up to 51 investigations by municipal professional standards officers, followed by consideration and adjudication by discipline authorities and then a review of the investigation by staff members at the office of the police complaint commissioner could potentially have been avoided. For every successful such attempt, scarce police and oversight resources could more effectively have been deployed by turning their attention to the more serious complaints that warranted closer scrutiny.

135. It is obvious that ss. 54.1 has not been successful in achieving its stated objective. From the information gathered during our review, it appears that the principal reasons for this are the failure of discipline authorities to discharge their mandate under ss. 54.1(1) and (3) and the requirement in s. 54.1(4) that both parties consent to such a procedure. Accordingly, it is necessary to consider whether some form of mandatory informal resolution process should be included in Part IX and, if so, how resort to such a process should be managed.

136. In Quebec, the Commissioner of Police Ethics has the power to decide whether a particular complaint is suitable for mandatory conciliation. In evidence given before the Special Committee of the Legislature in 2002,[70] Commissioner P. Monty testified that 30% to 35% of all complaints are referred by him to conciliation and 85% of those are successfully resolved. The cost of conciliation, and the cost of a subsequent investigation if the conciliation is unsuccessful, are borne by the police department of which the respondent officer is a member.

137. No other provincial police complaint process in Canada presently includes any form of mandatory informal resolution process. However, the BCAMCP, in its submission to the Special Committee of the Legislature, cited the Quebec model as an example and recommended mandatory alternative dispute resolution for certain cases.[71] The model in that proposal was that the chief constable would make the initial determination whether a complaint would be appropriate for alternate dispute resolution and then refer the complaint to the police complaint commissioner who would then have the power to order the parties to attend and attempt some unspecified form of alternative dispute resolution.

138. In its more recent brief, prepared in response to the police complaint commissioner's White Paper, the BCAMCP describes "ordered mediation" as "counter-intuitive" suggesting that rather than ordering the parties to mediate, mediation be required as a prerequisite to proceeding with any further procedural steps in connection with a complaint.[72]

139. In his White Paper, the police complaint commissioner recommended mandatory mediation which, in s. 15 of his draft Police Complaint Act, he suggested would be ordered by his office in any given case. However, in his Green Paper,[73] he accepted the suggestion of the BCAMCP that complainants should not be forced into a room to mediate a dispute. Instead he proposed that where the police complaint commissioner determines that a case is proper and suitable for informal resolution, the complainant should be advised that the complaint process "will not continue" unless and until he or she attends a mediation process with the respondent.

140. With respect, I do not see the "subtle" distinction between ordering a complainant to attend a mediation and ordering that the complaint not be processed unless and until the complainant attends a mediation. Furthermore, the thrust of the proposal in the police complaint commissioner's Green Paper appears to suggest that unwilling complainants are the explanation for the infrequent resort to informal resolution observed by the audit process conducted in our review. As noted, apart from what we heard from a few former complainants who we interviewed, the preponderance of evidence accumulated during the review suggests that the major impediment to informal resolutions has been the refusal of many respondents to consent to such a process.

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[70] British Columbia, Legislative Assembly. Hansard. (May 10, 2002). "Special Committee to Review the Police Complaint Process." pp. 446-8.

[71] BCAMCP. (January 2002) *Submission to Special Committee to Review the Police Complaint Process*, January 2002, p. 3; and British Columbia, Legislative Assembly. Hansard. (February 11, 2002). "Special Committee to Review the Police Complaint Process." pp. 190-1.

[72] Supra note 8, pp. 12 and 14.

[73] Ryneveld, Dirk, Q.C. (August 2006). *Reform of the Police Complaint Process: Supplementary Report of the Police Complaint Commissioner.* p. 13. (Hereinafter the "Green Paper").

141. Furthermore, I see no reason why it should be the police complaint commissioner who determines, in the first instance, whether a complaint is suitable for ordered mediation. The *Act* presently charges the discipline authority with the responsibility of promptly identifying those complaints which are suitable for informal resolution. That statutory duty recognizes the fact that the discipline authority is initially in the best position to make that judgment. Logic suggests the same is true with respect to the determination whether the attempted informal resolution should take the form of an ordered mediation. While our review did not reveal much evidence of compliance by discipline authorities, other than chief constables, with the mandatory requirements of ss. 54.1(1) and (3), the interviews we conducted suggested that phenomenon was largely the result of the refusal of respondents generally to consent to any informal resolution procedure. If respondents can be ordered to attend and participate in an attempt at informal resolution, that difficulty will be overcome, and there is then no reason to expect other than that discipline authorities will discharge the duties expected of them under ss. 54.1(1) and (3). Accordingly, I am of the view that the discipline authority should be responsible for making the initial assessment whether a particular complaint is a suitable candidate for ordered mediation. However, as the police complaint commissioner will have shared responsibility for the process I recommend, it makes sense that the discipline authority's determination be confirmed upon consultation with the police complaint commissioner.

142. Finally, I am not satisfied it would be appropriate for the police complaint commissioner to be vested with the power to order the respondent to attend and participate in an ordered mediation. In my view, the normal chain of command in a municipal police service should be respected. In that chain of command, the only person who has the authority to order a municipal constable to do anything is a superior officer. As is the case with the initial determination whether a complaint is suitable for ordered mediation, I believe the discipline authority is the appropriate authority to order a respondent to attend and participate in such a process.

143. However, I do agree that there has to be some means by which the unwilling complainant will be persuaded to participate in an ordered mediation. I also accept that the only means by which such persuasion can be effected is to provide that once the discipline authority, upon consultation with the police complaint commissioner, determines that an ordered mediation is appropriate, the complainant should be advised that no further steps will be taken to investigate the complaint until both parties have participated in such a process.

144. In my view the police complaint commissioner is the proper person to oversee the process by which a complainant is thus forced to attend an ordered mediation. In order to ensure that a complainant, who has a legitimate reason not to participate in an ordered mediation, is not forced to do so, it should be the police complaint commissioner who issues the requisite notice to the complainant to attend and, through that notice, advises of the consequences of failing to participate. In that way, a complainant who has reason to do so will have an opportunity to persuade the police complaint commissioner that his or her failure to attend ought not to interfere with the complaint going forward to investigation. In the event a complainant fails to attend an ordered mediation, the police complaint commissioner should have the discretion to order the complaint be dismissed.

145. Finally, notwithstanding the failure of a complainant to participate in an ordered mediation, with or without justification for doing so, there must be a residual discretion in the police complaint commissioner, upon consultation with the discipline authority, to order an investigation into a complaint be undertaken or continued, as the case may be, under Division 4.

146. One absolutely fundamental precondition to adopting mandatory or ordered mediation as a means by which a public trust complaint can be informally resolved, is that such mediations must be conducted by trained and independent mediators, preferably those who have some background and familiarity with Part IX and policing in general. Under s. 54.1(8) of the *Act*, the police complaint commissioner is presently mandated to complete a roster of such mediators. I see the fulsome discharge of that mandate as essential to the success of any form of mandatory mediation that may be adopted.

147. The final question that necessarily arises is who shall bear the costs of a mandatory mediation process. In the draft Police Complaint Act, attached to his White Paper, the police complaint commissioner has suggested that the cost of such a mediation be paid by the municipality out of which the complaint arises.[74] Both the municipal police department and the office of the police complaint commissioner stand to benefit from any mediation that proves successful. Thus, an argument can be made that the cost of a mandatory mediation should be borne equally by both offices. However, measuring the financial cost and consequences of such a process are beyond the scope of this review. Thus, I would leave the determination of where the ultimate cost burden should lie to those who are in the best position to make that delicate decision.

148. With all the foregoing in mind, I recommend that appropriate amendments be made to s. 54.1 to reflect the following:

(a) Where the discipline authority determines that informal resolution of a complaint would be appropriate, the discipline authority shall <u>first</u> try to obtain the consent of both the complainant and the respondent to engage in such a procedure.

(b) If the consent of both parties is forthcoming, the discipline authority may engage either or both of the procedures described in s. 54.1(5).

(c) Section 54.1(4) should be repealed.

(d) If the consent of either or both parties is not forthcoming, and the discipline authority is of the view that ordered mediation would be appropriate, the police complaint commissioner must be so advised.

(e) If, after consultation with the discipline authority, the police complaint commissioner agrees that ordered mediation of the complaint is appropriate:

(i) the police complaint commissioner shall order that any, or any further, investigation of the complaint be suspended pending the outcome of the mediation;

(ii) the police complaint commissioner shall appoint a mediator;

(iii) the discipline authority shall order the respondent to attend at and participate in the mediation at a time and place to be determined by the mediator;

(iv) the police complaint commissioner shall order the complainant to attend at and participate in the mediation at a time and place to be determined by the mediator, and shall advise the complainant both that further investigation of the complaint is suspended pending the outcome of the mediation and that failure to attend the mediation may result in the complaint being dismissed. The notice should further provide that if the complainant has good reason not to attend the mediation, he or she can apply to the police complaint commissioner to be relieved of the requirement to attend;

(v) if the police complaint commissioner is satisfied that the complainant has a justifiable reason for not attending a mediation, the police complaint commissioner shall so advise

[74] Supra note 10. See: s. 23(17).

the discipline authority, the suspension of the investigation shall be lifted and the complaint processed in the ordinary way under Division 4 of the *Act*.

(f) If the mediation does not result in resolution of the complaint, the police complaint commissioner shall lift the suspension of the investigation and the discipline authority shall promptly proceed to initiate, or continue with, as the case may be, an investigation into the complaint.

(g) If, notwithstanding the notice to the complainant, the complainant fails to attend the mediation, the police complaint commissioner in consultation with the discipline authority may order either that the complaint be dismissed, or that it be processed under Division 4.

(h) With appropriate consequential amendments, the substance of the balance of s. 54.1 should be retained.

149. Much of s. 54.2 is devoted to a formula by which either the complainant or the respondent can revoke their consent to an informal resolution and to the consequences that would flow from such revocation. The notion of a subsequent revoking of consent is inconsistent with the concept of a mediated settlement. Thus, in any case in which the parties, either by consent or by order, engage in a mediation, and thereby achieve a resolution of a complaint, the results should be considered final. Further, I am of the view that as long as the police complaint commissioner has an appropriate oversight power with respect to those informal resolutions which do not result from a mediation, there is no reason to give either party the option of revoking an informal resolution. Thus, I would recommend that s. 54.1 be further amended to provide that, in order to ensure that the guidelines for informal resolution are followed, the police complaint commissioner shall have the authority to make inquiries of the discipline authority with respect to any informal resolution other than one that has resulted from a mediation and, where for any reason he considers that such resolution was inappropriate, to order that it be set aside and the complaint processed under Division 4. If that recommendation is implemented, ss. 54.2(2), (3) and (4) can be deleted.

150. As it is presently worded, s. 54.2(5) indirectly authorizes the imposition of disciplinary action following an informal resolution. That authority should be explicit. As well, there is a conflict between s. 54.2(6), which provides that a complaint resolved by informal resolution must not be entered in the respondent's service record of discipline, and s. 65.3(1), which mandates that the service record of discipline of a respondent record the disposition in respect of all complaints against the respondent whether processed as a public trust or internal complaint.

151. Notwithstanding that informal resolution is a form of disposition limited to less serious complaints, there is no reason why corrective, or even disciplinary, action might not be appropriate following a successful informal resolution. The fact that instances of such outcome may be rare is no reason to clothe that possibility in the ambiguity of an inference. In my view, when corrective or disciplinary action is taken with respect to any complaint, no matter how it may ultimately be resolved, such action should be recorded in the respondent's service record of discipline. On the other hand, where a complaint is resolved without any corrective or disciplinary action being imposed, whether by some form of informal resolution or by way of summary dismissal or dismissal on the merits, there is no justification for recording either the complaint or that disposition in the respondent's service record of discipline. However, all complaints, irrespective of their disposition, will clearly be relevant to the management of the ongoing employment relationship and for that reason should be recorded in the respondent's personnel file.

152. Accordingly, I recommend that ss. 54.2(5) and (6) be amended to:

(a) confirm that corrective or disciplinary measures may be imposed by the discipline authority following an informal resolution, and

(b) that any complaint resolved by way of informal resolution, which does not result in corrective or disciplinary action, shall not be recorded in the respondent's service record of discipline, but shall be entered in the respondent's personnel file. A correlative amendment to s. 65.3(1) is required to ensure that no complaint that is informally resolved without subsequent corrective or disciplinary action, and no complaint that is finally either summarily dismissed or found to be unsubstantiated shall be recorded in a respondent's service record of discipline.

153. Since s. 65.3 has been referenced at this point, it is convenient to note another issue raised by several chief constables and discipline authorities, namely, the transferability of a service record of discipline. We were told that in some instances municipal police departments have experienced difficulty obtaining the service record of discipline of an officer who has applied to transfer from one department to another. Section 65.3(2) restricts access to a service record of discipline in such a way as to imply that disclosure to anyone other than the individuals therein listed is prohibited. Section 65.3(4) supports such a conclusion by speaking only of the internal use that may be made of a service record of discipline. In my view, a current or former municipal constable's service record of discipline should be made available, upon request, to the chief constable of any police service to which that current or former police officer has made an application of employment. Accordingly, I recommend that s. 65.3 be amended by adding thereto a further subsection which would clearly provide for that form of disclosure of a service record of discipline.

E. INVESTIGATION OF PUBLIC TRUST COMPLAINTS

154. The conduct of investigations into public trust complaints is referenced in ss. 55, 55.1, 55.2 and 56 of the *Act*. The direction provided by these sections is exclusively administrative in nature, dealing with such matters as timelines, the authority to order investigations, both internal and external, who shall conduct investigations and what reporting requirements accompany the conduct and conclusion of investigations.

155. The conduct of a thorough investigation involves the exercise of an uniquely human skill, one that is impossible to ensure or regulate through legislation. Thus, one would hardly expect Part IX to mandate the way in which investigations should be conducted. However, even the most dedicated and skilful investigator must have sufficient investigative powers in order to utilize that dedication and skill to maximum advantage. Part IX does not provide investigators with any special investigative powers. The audit results have demonstrated that some such powers are required.

156. In his White Paper, the police complaint commissioner has proposed a duty to cooperate with "the commissioner and with any complaints investigation"[75] and has offered specific details of what he sees as the appropriate scope of that duty in s. 14 of his draft Police Complaint Act. He suggests that such a duty can be found in other police complaint statutes,[76] and notes that in 2001 such a duty was urged upon the Special Committee of the Legislature by the BCCLA.[77] The BCAMCP, in their brief in response to the White Paper, supports such a duty but would focus the duty, at least initially, as one owed to the

[75] Supra note 9, p. 12.

[76] See for example s. 113(9) of the *Police Services Act*, R.S.O. 1990, c. P.15 and amendments thereto.

[77] BCCLA (December 17, 2001). *B.C. Civil Liberties Association Submission to the Special Committee to Review the Police Complaint Process;* and British Columbia, Legislative Assembly. Hansard. (December 17, 2001). "Special Committee to Review the Police Complaint Process." pp. 98-99.

discipline authority rather than to the police complaint commissioner.[78] The Pivot Legal Society also supports a duty of cooperation and proposes specific and escalating penalties for respondents who do not cooperate promptly with interview and statement requests.[79]

157. As the recommendation of the Pivot Legal Society notes, the concept of a duty to cooperate is closely related to another subject which was explored extensively during the interview process, namely, the compellability of statements from respondents, an issue with respect to which the *Act* is silent.[80] An effort was made to address this void in the *Act* when, after extensive consultation with unions and police management, the office of the police complaint commissioner issued a Practice Directive on Statements on October 24, 2000.[81] It purported to mandate a duty to cooperate fully with investigators in the conduct of investigations of public trust complaints, but stopped short of requiring a respondent to provide a statement when called upon to do so. When read in its entirety, the so-called duty to cooperate in this Practice Directive extended no further than providing that, if they chose to do so, respondents could provide an investigator with a voluntary statement setting out their version of the subject matter of the dispute.

158. As the power of the police complaint commissioner to issue the Practice Directive on Statements was in considerable doubt, a joint submission by the Vancouver Police Union, the B.C. Federation of Police Officers and the Vancouver Police Officers Association urged the Special Committee of the Legislature to recommend that its content be incorporated into the *Act*.[82] Were such a recommendation to be implemented it would enshrine in the *Act* the right of a respondent not to cooperate with an investigation.

159. For the most part, the chief constables and deputy chief constables we interviewed were of the view that the *Act* should be amended to provide that both respondents and witnesses be compelled, when asked, to provide statements and to submit to interviews, providing it was clearly stipulated in the *Act* that they be entitled to seek and obtain advice before responding to such a request and that any compelled statements be admissible only in proceedings under Part IX of the *Act*. A similar view was expressed by over two-thirds of the professional standards officers we interviewed, with most of those who expressed opposition doing so on the ground they believe compelled statements to be of poor quality. In what seems to signal a positive reassessment of the issue, a significant majority of union representatives we interviewed also agreed, after some discussion, that a statutory requirement to provide a statement when called upon to do so would be acceptable as long as there were adequate statutory safeguards to ensure that any such statement could never be used outside of *Police Act* proceedings.

160. The audit results revealed a number of instances where respondent officers were requested either to provide a "duty report" or to answer questions, but where no response was in evidence in the investigative file. There were also some files in which a similar request to witness officers had apparently been made to no avail. While such cases were not common, they were in sufficient number to add substance to the view that the *Act* must be amended to provide both a duty to cooperate with an investigation and,

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78 Supra note 8, pp. 9-10.

79 Correspondence dated June 21, 2006, from Pivot Legal Society to Josiah Wood, Q.C.

80 Section 61.1 of the Police Act deals only with compellability of "a municipal constable, chief or deputy chief constable" to make statements at internal discipline proceedings and public hearings and inquiries.

81 Supra note 17.

82 Vancouver Police Union, B.C. Federation of Police Officers and Vancouver Police Officers Association. (December 17, 2001). *Joint Submission to Special Committee to Review the Police Complaint Process*; and British Columbia, Legislative Assembly. Hansard (December 17, 2001). "Special Committee to Review the Police Complaint Process." pp. 123-4.

in particular, a duty by police officers, whether as respondents or as witnesses, to provide a statement and to submit to an interview when called upon to do so during an investigation into a public trust complaint.

161. With respect, firstly, to the duty to cooperate, I accept the submission of the BCAMCP that the duty to cooperate with an investigation is one owed first and foremost to the discipline authority or the officer whose responsibility it is to conduct the investigation. However, as the BCAMCP brief acknowledges, there is a duty on the part of discipline authorities (as indeed there is a duty on the part of officers conducting an investigation) to comply with "requests" from the police complaint commissioner "as to matters within his competence."[83] From the interviews we conducted, it is apparent that duty has not always been observed. If the recommendations of this report are implemented in their entirety, the matters within the "competence" of the police complaint commissioner will be substantially increased. Accordingly, the statutory duty to cooperate must include a specific duty on the part of all municipal constables, chief constables and deputy chief constables to cooperate with any requests or directions by the police complaint commissioner made pursuant to the exercise of the powers and duties of the office under Part IX of the *Act*.

162. Turning first to the duty to cooperate with an investigation, it seems to me that there is no distinction to be drawn between those officers, such as respondents and witnesses, who will be directly involved in the investigation, and their superior officers who must surely have a duty to ensure that such cooperation is forthcoming. Thus the duty must extend to all municipal constables, chief constables and deputy chief constables. In the case of an external investigation, whether initiated voluntarily by the discipline authority or ordered by the police complaint commissioner, it must include a duty on the part of all respondent and witness officers to cooperate with the external investigator. That, in turn, imposes a duty on the discipline authority of the department of which the respondent is a member to ensure that such cooperation is forthcoming.

163. In my view, the duty to cooperate with an investigation need not be confined to the investigation of public trust complaints, as investigations into service and policy complaints and internal discipline complaints are clearly contemplated in Divisions 5 and 6 of Part IX respectively. This may have some bearing on where the recommended amendment, if implemented, should be located.

164. However, as noted, in the case of investigations into public trust complaints, there is a need to particularize the scope of the duty that respondent and witness officers have to cooperate with an investigation insofar as it relates to statements and interviews. In s. 14 of his draft Police Complaint Act, the police complaint commissioner suggests a duty to make and preserve "duty reports." During the interviews we conducted, we heard a great deal about "duty reports." It became apparent, early on in the process, that the content of a duty report is something entirely within the control of the police officer who authors it. Depending on the underlying motivation of that officer, a duty report can offer little more than a chronological summary of his or her activities while on duty. What an investigator who is faced with the duty of conducting a thorough investigation needs is a statement, coupled with the ability, where necessary, to conduct an interview to ensure that a full understanding is gained of all the relevant events giving rise to a public trust complaint. Everybody, and in particular every police officer, knows what is meant by a "statement." Thus, I am of the view that Division 4 of Part IX should include a provision which stipulates that a duty to cooperate with an investigation into a public trust

[83] Supra note 8, pp. 9-10.

complaint includes the duty of a respondent or witness officer to provide a statement and/or to submit to an interview when called upon to do so during an investigation into a public trust complaint.

165. A duty to provide a statement or submit to an interview must be complied with promptly if the quality of the investigation is to be maintained. The investigative audit revealed a number of instances where a requested duty report or statement was provided only after a lengthy delay. In some cases, usually those involving allegations of excess force, the delay exceeded six months, leading to the inference that the delay was deliberately related to the six month limitation period associated with a charge of common assault under the *Criminal Code*.[84] In a recent move, designed to improve the department's response to public complaints, the Vancouver Police Department has imposed a deadline of five days following receipt of a request for delivery of a duty report to the investigating officer. That deadline provides sufficient time for the officer facing such a request to obtain advice from either a union agent or counsel, thus ensuring that the investigation will not be unduly delayed and should prevail, subject only to the discretion of the discipline authority in special circumstances to grant an extension.

166. Turning to the duty to cooperate with the police complaint commissioner, as noted we heard during our interviews that there have been instances in the past where efforts of the police complaint commissioner or his staff to discharge the oversight duties of the office have been frustrated either by investigating officers who challenged the authority of the office to direct that further investigative steps be taken, or, less frequently, by discipline authorities who refused to investigate or reinvestigate a complaint. To be sure, some of these difficulties have arisen as a result of ambiguities in the *Act* in connection with the description of the police complaint commissioner's substantive powers or his power of delegation. However, it is the case that some have arisen because of a lingering resistance by some police officers to the concept and authority of civilian oversight.

167. If the police are to retain the privilege of investigating complaints against their own members, there must no longer be any uncertainty with respect to the powers of the police complaint commissioner, and his properly delegated staff, both to oversee the conduct of complaint investigations and to insist upon further and better investigative steps being taken in those cases where such a direction appears necessary as a result of the exercise of the oversight function. As well, the other powers of the office must be respected and accepted by those whose primary responsibility it is to see that those complaints which merit full attention are thoroughly and properly investigated and, where necessary, proceed through the disciplinary process.

168. Accordingly, I recommend that Part IX of the *Act* be amended to provide that every municipal constable, chief constable and deputy chief constable has a duty to cooperate fully with any investigation conducted under Part IX of the *Act*. As well, there must be an amendment to provide that every municipal constable, chief constable and deputy chief constable has a duty to cooperate with the police complaint commissioner, and his properly delegated staff, in the exercise of the powers and duties of that office under Part IX of the *Act*. I leave to the expertise of those drafting these amendments to decide where they should be located in Part IX.

169. Further, I recommend that Division 4 of Part IX be amended by adding a section containing an express duty on the part of respondent or witness officers to provide a statement, and to submit to an interview, when called upon to do so by an officer conducting an investigation into a public trust complaint. The amendment should further require compliance with such a request within five days of its receipt by the respondent or witness in question, subject only to the discretion of the discipline authority, in

[84] R.S. 1985, Chapter C-46.

special circumstances, to grant an extension. To be clear, while such amendment should provide that any statement so obtained shall be admissible in any proceedings under the *Police Act*, it must also contain an express and strongly worded proviso that such statement cannot, under any circumstance excepting a prosecution for perjury, be admitted into evidence in any civil or criminal proceeding.

170. Finally, in order to ensure compliance with both the duty to cooperate and the duty to provide a statement or submit to an interview when called upon to do so, there must be some sanction available upon proof that the duty has not been met. Accordingly, I recommend that Section 5 of the *Code of Professional Conduct Regulation*[85] be amended to provide an additional category of discreditable conduct in the form of a failure to cooperate with any investigation or a failure to provide a statement or to submit to an interview when called upon to do so by an investigating officer.

171. In his White Paper the police complaint commissioner has also recommended the inclusion of an administrative search warrant provision in s. 28(2) of his draft Police Complaint Act. This proposal appears to be non-contentious. During our discussions with, in particular, discipline authorities and professional standards officers, it became evident that past experience has demonstrated the need for such an investigative tool. An amendment to provide for same was not opposed by anyone we interviewed during the course of our review.

172. Accordingly, I recommend that Part IX of the *Act* be amended by adding thereto a section which provides that a justice of the peace, who is satisfied by information on oath that there are reasonable grounds to believe that there is in a building, receptacle or place anything that there are reasonable grounds to believe will afford evidence with the respect to the commission of a disciplinary default under the *Code of Professional Conduct Regulation* may, at any time, issue a warrant authorizing a discipline authority or a municipal constable, chief constable or deputy chief constable conducting any investigation under Part IX to search the building, receptacle or place for any such thing and to seize it. Such a provision should be accompanied by the usual safeguards relating to the custody, preservation and ultimate disposal of such evidence following conclusion of the investigation in question.

F. ROLE OF POLICE COMPLAINT COMMISSIONER IN INVESTIGATION

173. Of the 294 complaint files they reviewed, the investigative audit team noted 150 in which there was what purported to be a full investigation, i.e. an investigation resulting in a finding that the complaint was either unsubstantiated (126) or substantiated (24). The balance of the complaints were withdrawn (27), summarily dismissed (86) or informally resolved (25).[86]

174. The investigative audit team noted what they considered to be investigative deficiencies in 123 of the 294 audit files they reviewed. Many of these deficiencies were of a minor nature, and did not affect the validity of the ultimate disposition of the complaint. However, after a detailed review of the investigative audit notes in each such case, I have concluded that in 48 of the 123 files in question, the investigative deficiencies were material to the outcome. This number includes complaint files in which there was what purported to be a full investigation and those in which a full investigation ought to have been, but was not, conducted.

[85] Supra note 27.

[86] Of the total of 294 complaint files audited, 6 were "reviewed and closed." It should also be noted that the 86 summarily dismissed complaints include 85 public trust complaints and 1 service or policy complaint.

175. It is important to understand what is meant, in this context, by what I consider to be a material investigative deficiency. A material deficiency in an investigation is a deficiency that makes it impossible to conclude that the ultimate disposition of the complaint would necessarily have been the same if the deficiency had been corrected. This is by no means a conclusion that, in all or even a significant number of these 48 files, the complaints would have been substantiated. Viewed collectively, it might be that in the case of most complaints the outcome would have been the same. But the fact is that, in light of the inadequate investigations, it is impossible to reach that conclusion with respect to each of the files when considered individually. Thus, it is entirely possible that within that 48 files there may be some complaints which ought to have been, but were not, substantiated because of the unsatisfactory nature of the investigation.

176. The following is a breakdown of the materially deficient investigations.

177. There was a material investigative deficiency in 30 (24%) of the 126 files in which the public trust complaint was ultimately found to be unsubstantiated. Of the 85 public trust complaints that were summarily dismissed, the investigative audit team found that 11 (13%) should not have been so concluded, but ought to have been fully investigated. Because of either the serious nature of the complaint, or the manner in which the ultimate result was achieved, a similar finding was made by the investigative audit team with respect to five (20%) of the 25 complaints that were informally resolved and two (7%) of the 27 complaints that were withdrawn.

178. Of the 48 materially deficient investigations, 33 or 69% were with respect to complaints, among other defaults, of excess force. Of these, 23 were found to be unsubstantiated, two were withdrawn, five were summarily dismissed and three were informally resolved. Because of the serious nature of the excess force allegations, the audit team concluded that full investigations ought to have been conducted in the two complaints that were ultimately withdrawn and that the informal resolutions did not conform to the police complaint commissioner's guidelines, and were thus inappropriate, in respect of the three complaints that were concluded in that fashion. Little if any investigation was conducted with respect to the five complaints involving allegations of excess force that were summarily dismissed.

179. Of the remaining 15 files in which there were material investigative deficiencies, five involved allegations of unlawful arrest, one of which was unsubstantiated, three of which were summarily dismissed and one of which was inappropriately informally resolved. A further five involved allegations of wrongful search and seizure or retention of property that had been seized, four of which were found to be unsubstantiated and one of which was summarily dismissed. Two rudeness complaints (one summarily dismissed, one unsubstantiated), two neglect of duty complaints (one summarily dismissed, one unsubstantiated) and one deceit complaint (informally resolved) round out the balance of the files in which there were materially deficient investigations. With the exception of the two complaints of rudeness, the balance of the 48 complaint files in which the investigation was materially flawed, alleged what I consider to be serious public trust defaults.

180. In addition to the foregoing files in which there were materially deficient (and in some cases no) investigations, there were eight public trust complaint files in which an inappropriate result was recorded. In six of these files the complaint was concluded as unsubstantiated, one was summarily dismissed and in one case the internally generated complaint was withdrawn. In all eight files the investigative audit team was of the view the complaints should have been concluded as substantiated. In these files, the problem was not so much the result of a materially deficient investigation as the consequence of either a legal or factual analysis which led to a wrong result. Three of these files involved complaints that

included allegations of excess force, while two involved allegations of wrongful search and seizure or retention of property, two involved allegations of rudeness, and one was a complaint involving the use of police data banks for a purpose unrelated to a police investigation, contrary to policy.

181. In summary, there were 56 out of the 288,[87] or 19%, of the complaint files reviewed in which either the ultimate outcome could not be demonstrated to have been correct because of material investigative deficiencies (48 or 17%), or the ultimate outcome was found to be inappropriate because of a faulty legal or factual analysis (8 or 3%). Of the 56 complaints in question, 36 (64%) involved complaints of excess force.

182. Of the 283 complaint files in the audit sample, containing allegations of a public trust default, a total of 96 included allegations of excess force. Thus, 38% of the excess force allegations included in the investigative audit sample were either not properly investigated or were improperly concluded following an investigation which, by itself, was not materially deficient. When the wrongful arrests, wrongful search and seizure or detention of seized property, neglect of duty, deceit and the other abuse of authority complaints are added to those of excess force, the number of serious abuse of authority complaints that were not either properly investigated or concluded was 52 or 18% of all files reviewed in the audit sample.[88]

183. In my view, that is an unacceptable number which indicates clearly that remedial legislative amendments are required in order to enhance the civilian oversight powers of the police complaint process. These results demonstrate that, while Division 4 of Part IX provides an adequate process for the investigation, resolution and oversight of less serious complaints, there is an unacceptably high risk that the more serious public trust complaints will not either be investigated thoroughly or concluded appropriately. The question then, is what can or should be changed to address the problem effectively.

184. Some of those interviewed, in particular representatives of the BCCLA and the Pivot Legal Society, as well as some complainants and counsel who represent complainants, urged me to recommend the establishment of an independent "civilian" investigative body, which would operate either as an adjunct to the office of the police complaint commissioner or as a completely independent unit, and which would be responsible for investigating all or at least the more serious complaints against the police.[89]

185. There are currently four provinces in which the established civilian oversight body has some form of investigative role to play in the determination of complaints. In Saskatchewan, the Saskatchewan Police Complaints Commission determines who will investigate every complaint of police misconduct. It can investigate the complaint itself, order that the police investigate the complaint alone or with a Commission observer, or order that another police service investigate the complaint.[90] In Manitoba, the Police Complaints Commissioner has the responsibility to investigate all complaints and employ any person required for the prompt and thorough investigation of complaints.[91] In Quebec, an independent investigator reporting to the Police Ethics Commissioner investigates those complaints which either are not successfully resolved on conciliation or, in the opinion of the Police Ethics Commissioner, are too serious to be eligible for conciliation.[92] The New Brunswick Police Commission may appoint an

[87] See: note 86. Of the total of 294 complaint files in the audit sample, 6 were "reviewed and closed."

[88] Excluded are the 4 rudeness complaints.

[89] I put "civilian" in quotes to emphasize that, while the proposed investigative bodies would be characterized as such, because of the need for personnel with investigative experience, some if not most of its staff would likely be ex-police officers.

[90] *Police Act,* 1990 S.S. 1990-1991 c. P-15.01, s. 45(3)(a) – (d) as amended.

[91] *Law Enforcement Review Act,* [C.C.S.M.]: Chapter L75. See: s. 12(1) and s. 12(7).

[92] *Police Act,* [R.S.Q.]: Chapter P-13.1. See: s. 178.

investigator to investigate a complaint on its own motion either directly or in circumstances where it is not satisfied with the investigation conducted by the chief of police.[93] In addition to those provinces in which the civilian oversight body already has some investigative capacity, in Ontario Bill 103 received first reading on April 19, 2006 and is presently under consideration by a committee of the Legislature. Under its provisions, the Independent Police Review Director, would be responsible for the entire complaint process and have three investigative options to chose from. He could refer complaints about police conduct (other than conduct of a chief or deputy chief of police) to the chief of the police force to which the complaint relates, to the chief of a different police force or he could retain the complaint to be investigated by his own staff investigators.[94]

186. While the results of the audit generally may provide some support for a recommendation that the office of the police complaint commissioner have an independent power to investigate public trust complaints, it must be kept in mind that adequate investigations were conducted in 96 (76%) of the 126 complaint files that were concluded as unsubstantiated and that an ultimately proper result was reached in 75 (88%) of the 85 files in which the public trust complaints were recorded as summarily dismissed even though, in a number of those instances, a full investigation was conducted and the results should more properly have been recorded as unsubstantiated. These results suggest that the Part IX process we currently have, while deficient in some important respects, has a demonstrated potential, to provide an impartial and accountable complaint process. As noted, the deficiencies revealed by the audit occurred, for the most part, in connection with the more serious public trust complaints. This suggests that what is needed is a mechanism by which the risk that the more serious public trust complaints will not be thoroughly investigated can be eliminated.

187. If an independent unit was established to handle the investigation of such complaints, there is the immediate problem of which complaints would be assigned to it. To simply develop a list of the more serious public trust defaults, as described in the particulars listed in ss. 5 through 16 of the *Code of Professional Conduct Regulation*,[95] would not suffice. For example, while excess force complaints accounted for 64% of those that were the subject of either a materially deficient investigation or an inappropriate disposition, the fact is that 62% of all excess force complaints contained in the audit sample were satisfactorily investigated and concluded. Thus, if the mandate of the independent investigative unit were to be restricted to the more serious complaints, someone would have to be given the discretion to decide, on a case by case basis, which complaints contained an inherent risk that the investigation would be flawed, if left to the police, and thus were "serious" enough to warrant assignment to that unit. For obvious reasons the only person capable of exercising that discretion on a consistent and objective basis would be the police complaint commissioner. In order for that office to perform such a role effectively, the entire structure of the present complaint process would have to be changed such that the police complaint commissioner, like the proposed Independent Police Review Director in Ontario's Bill 103, would assume responsibility for the entire complaint process. Such a change would fundamentally change the oversight role of the office, converting it into an independent complaint processing unit.

188. Another problem associated with the creation of an independent investigative unit, with responsibility for only serious complaints, is the cost associated with establishing such a unit. There are currently 18 full time professional standards officers, in six of the municipal police departments, who have handled,

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93 Police Act, [R.S.N.B.]: Chapter P-92. See: s. 26(3) and 26(8).

94 Legislative Assembly of Ontario. (2006). *Independent Police Review Act (Bill 103)*. See: ss. 66(5)(a), (b) and (c).

95 Supra note 27.

on average, 91% of all complaints lodged under Part IX in the past five years. In the case of two of those departments, each of which currently have only a single professional standards officer, we were told there was an intention to address the workload of that officer by adding another officer to the unit in the near future. When interviewed, the professional standards officers in three of the other four departments indicated they needed assistance in order to discharge the duties assigned to them, with the inspector in charge of the Vancouver professional standards unit, which has a present strength of 10 officers, indicating that two additional officers were needed The other five departments, accounting on average for 9% of all complaints lodged under Part IX in the past five years, as noted, do not have a full time professional standards officer assigned to investigate complaints.

189. Thus, it would appear that if all the existing professional standards units were brought up to strength, something in the order of 24 officers would be required to handle the current load of lodged complaints in the 6 departments accounting for 91% of all such complaints. Assuming that at least two full time officers would be required to properly handle the remaining lodged complaints received by the other five departments, the total strength to investigate thoroughly, and in a timely way, the number of complaints received annually, could be as high as 26. This would suggest that, if something between one-quarter and one-third of the total number of lodged complaints were assigned to an independent unit designed to investigate the more serious allegations, an investigative staff of six to eight would be needed in order for it to discharge its duties in a timely and effective way. Add in the required administrative staff, the cost of premises and the other operating and capital costs associated with such a unit and it would obviously be a very expensive solution to the problems revealed by the audit.

190. Given the very practical consideration of cost, if there is a less expensive alternative way of avoiding the risk that the more serious public trust complaints will not be properly investigated or resolved, I would not be inclined to recommend that their investigation be transferred to an independent investigative unit.

191. Another means suggested, by which the risk of inadequate investigations into serious public trust complaints might be avoided, is by creating an investigative unit consisting of officers seconded from the existing municipal police departments who would conduct what would amount to external investigations of such complaints. For the most part, while they were opposed to the idea of a completely independent investigative body, such as the Special Investigations Unit (SIU) in Ontario, the chief and deputy chief constables, discipline authorities and professional standards officers interviewed were not seriously opposed to the concept of an integrated investigative unit consisting of professional standards officers seconded from the municipal departments. Such a unit would be quartered separately, have its own chain of command, and operate independently from any individual municipal service. It would be responsible to a management committee made up of officers in senior management positions from the participating departments and would operate under the principle that no member of the unit would investigate a complaint against a respondent who was a member of the department from which he or she had been seconded unless accompanied by another member of the unit seconded from a different department.

192. Such an integrated unit would have the potential to conduct investigations that would not only be, but also appear to be, impartial and to provide greater consistency in the quality of such investigations. If properly equipped and provided with adequate administrative and technical assistance, it would also have the potential to conduct and conclude more timely investigations.

193. However, as with the independent investigative unit, there are certain practical considerations that lead me to conclude that such a unit is not a viable option at this time. The first, and most important, is once again the cost associated with putting such a unit in place. There are currently 2,263[96] out of a total of 8,118[97] municipal, provincial and special constables in this province who are subject to the Part IX complaint process. Of that number 1,174, or 52% are with the Vancouver Police Department which, in 2005, accounted for approximately 52% of all complaints lodged under Part IX. As already noted, the operational strength of five of the 11 municipal departments covered by Part IX is too small to permit a full time officer to be dedicated to the investigation of complaints, and the professional standards units of all but one of the remaining departments are considered to be understaffed.

194. If only the more serious complaints would be assigned for investigation to such an integrated unit, each department would need to retain some capacity to process the less serious complaints that could not be informally resolved. Thus, if sufficient officers were to be seconded to such a unit, in order to ensure both that Vancouver complaints were investigated by at least one officer from another department and that there was continuity in the secondment of experienced investigators, it seems inevitable that all departments would need to increase their operational strength in order to make an appropriate contribution to such a unit. Added to that would be the expense associated with establishing separate facilities with adequate equipment and administrative support staff. Then there are the geographic realities that would necessarily add significant cost to the operating budget of such a unit. These would include the relocation costs of some members of the unit if it operated out of a single headquarters in the Lower Mainland, and travel costs associated with investigations outside of that geographical area. Alternatively, the integrated seconded unit would have to operate out of two independent headquarters, one situated in the Lower Mainland and the other on Vancouver Island.

195. Given that, under the current circumstances, Part IX applies to only 28% of all municipal, provincial and special constables in the province, a fiscally responsible approach to the problem of ensuring a high quality of investigation, in the case of serious complaints, mandates consideration of a less costly, but potentially equally effective, alternative. In my view that alternative can be achieved by increasing the oversight role of the office of the police complaint commissioner with respect to the investigation into public trust complaints, without going so far as to make it responsible for actual conduct of such investigations.

196. Part IX of the *Act* currently provides for very limited substantive, as opposed to administrative, participation by the police complaint commissioner in the investigation of public trust complaints. The emphasis in the statute is on what I will refer to as *ex post facto* oversight, namely a review of a completed investigation as that investigation is summarized in the final investigation report and other records provided to the police complaint commissioner pursuant to s. 57(2) of the *Act*. The only potential exceptions to this *ex post facto* review are:

(a) the power to request a progress report on an investigation at any time, pursuant to s. 56(5);

(b) the power to order a new or an external investigation, pursuant to s. 56.1(3), where the police complaint commissioner concludes that the original investigation was either inadequate or unreasonably delayed; and

[96] This number includes 2,160 municipal constables, 93 Greater Vancouver Transportation Authority Police, 2 members of the Kitasoo Xaisais Tribal Police and 8 members of the Stl'atl'imx Tribal Police (source: Police Services Division, Ministry of Public Safety and Solicitor General).

[97] In addition to those covered by Part IX, this number includes 5,029 municipal and provincial RCMP officers and 826 special constables employed in 37 provincial agencies (source: Police Services Division, Ministry of Public Safety and Solicitor General).

(c) the power to appoint an observer, pursuant to s. 56.1(1), to an investigation being conducted under:

(i) section 55(1)(a), (a discipline authority-initiated investigation);

(ii) section 55(1)(b), (an investigation ordered by the police complaint commissioner under s. 54(6)(a)(ii) or s. 54(8));

(iii) section 55(3), (an investigation ordered by the police complaint commissioner on his own initiative);

(iv) section 55.1(1)(b), (an external investigation ordered by the police complaint commissioner as necessary in the public interest); and

(v) section 56.1(3), (a new or external investigation ordered by the police complaint commissioner where the original investigation was either inadequate or unreasonably delayed).

197. None of these powers have proved of much use in terms of insuring that a high investigative standard is maintained with respect to all public trust complaints. Section 56(1)(a) and (b) require the discipline authority to provide progress reports to the police complaint commissioner at regular intervals, the first within 45 days after the initiation of an investigation and every 30 days thereafter. In addition to noting many instances where these requirements were not observed, the audit revealed that many such progress reports amounted to little more than a cryptic statement to the effect that "the investigation is continuing." Furthermore, the investigative audit revealed more than an insignificant number of occasions where such reports misrepresented the fact that little if anything of an investigative nature had occurred since the last such report. The audit did not record any instance where the exercise by the police complaint commissioner of the power to order a progress report pursuant to s. 56(5), was used other than to effect compliance with the mandatory provisions of s. 56(1).

198. Apart from the 12 Pivot and two Hyatt files which were included in the random sample of closed files selected for the review, the audit did not reveal any instance where the police complaint commissioner had ordered either a new investigation or an external investigation for the reasons set forth in s. 56.1(3).[98] Properly construed, this power may well be viewed in any event as an *ex post facto* form of oversight insofar as it relates to the power to order a new investigation where the police complaint commissioner concludes that the "original investigation was inadequate" since, subject to the power to appoint an observer under s. 56.1(1), the police complaint commissioner has no ability to reach such a conclusion pending receipt of the final investigation report under s. 57(2). While the power to order an external investigation, where the original investigation was (or is?)[99] unreasonably delayed, may be seen as a contemporaneous form of oversight, the audit did not reveal any instance where that power was exercised, the preference apparently being for the police complaint commissioner's staff to write letters to investigators querying the reasons for the delay in concluding a particular investigation.

199. While the power to appoint an observer to an investigation, pursuant to s. 56.1(1), might be seen as an attempt to give the police complaint commissioner some formal role in an ongoing investigation, the audit revealed no instance where that power was utilized. Information obtained during the review revealed that it had been exercised only twice in the eight years since Part IX was implemented.[100] No

[98] I am advised by the police complaint commissioner that, in addition to the Pivot and Hyatt files, a s. 56.1(3) order was made in the Berg complaint file which was not included within the random sample.

[99] Section 56.1(3) uses only the past tense, suggesting the power is, again, one that can only be exercised after the delayed investigation has been completed. However, a common sense construction would enable the police complaint commissioner to intervene before the delayed investigation is completed.

[100] One such occasion occurred in 1999, in connection with the first investigation into the Hyatt complaints, and the other in 2000, in connection with an external investigation by the New Westminster Police Service into various allegations involving the Nelson City Police Department.

doubt the reluctance to utilize this power has been influenced to a significant degree by the absence of any apparent consequence that might flow from such an appointment, other than the requirement that the observer prepare an independent report on the investigation for the police complaint commissioner. The absence of any expressed power given to the observer to participate in, or influence the conduct of, the investigation, together with the clear inference that the report prepared by the observer pursuant to s. 56.1(2) is intended to be prepared following the completion of the investigation, leads to the irresistible conclusion that this power also provides nothing more than an *ex post facto* form of investigative oversight.

200. Apart from the power to order a new investigation, external or otherwise, if the original investigation was inadequate, the only other statutory remedy for an inadequate investigation in Part IX, is the power of the police complaint commissioner to order a public hearing if he determines there are grounds to believe (s. 60(3)), or considers there are grounds to believe (s. 60(4)),[101] that such is necessary in the public interest. However, a flaw in the investigation is but one of the factors which the police complaint commissioner must weigh in deciding whether the public interest test is met and, in the absence of the police complaint commissioner ordering a new or further investigation prior to its commencement, a public hearing is neither an effective nor a timely method of curing a serious investigative flaw.

201. As noted previously,[102] the audit revealed that the average length of time between the date a complaint was lodged and the date of the final investigation report, in those files where a full investigation was conducted, was 190 days, or just slightly in excess of the statutory six month time limit provided for in s. 56(7). The median length was 156 days or just over five months, which means that in close to 50% of those public trust complaints, where full investigations were conducted, it took longer than the statutory time limit to complete the investigation. Even when those cases in which an extension was sought and granted for one of the reasons in s. 56(9) are excluded from the analysis, the audit revealed the average length of time between the date a complaint was lodged and the date of the final investigation report was 140 days or just under five months.

202. When these audit results are taken into account, the shortcomings of an *ex post facto* oversight process, such as that provided for in Part IX, are apparent. As noted, when confronted with a flawed investigation, the police complaint commissioner has only two statutory options. To order a new investigation, following an original investigation which has already taken five or more months to complete, is to condemn the resolution of that complaint to a further similar delay, a result which must be viewed as unacceptable. For the reasons already noted, the alternative of ordering a public hearing really provides no remedy at all.

203. While the lack of timeliness, in the present complaint process generally, is considered elsewhere in this report, it is appropriate to note here that the surveys and the interviews conducted revealed that both complainants and respondents were critical of the length of time it takes for complaints to be resolved. For complainants, delay leads to a perception that their complaints are not taken seriously and thus will not be investigated fairly. For respondents there is a real sense of prejudice from having unresolved complaints hanging over their heads for long periods of time while they are expected to continue carrying out their duties. From the point of view of those two most important stakeholders

[101] The difference between a determination and a consideration in these two subsections signals a qualitative difference in the police complaint commissioner's state of mind, with the former representing a stronger belief that mandates he order a public hearing, and the latter representing a lesser belief that gives him a discretion to do so.

[102] See: paragraph 19, infra.

in the process, an oversight function that adds significantly to a process that already takes too long to unfold must be viewed as completely unsatisfactory.

204. The audit did reveal that, notwithstanding the lack of any express statutory requirement, the police complaint commissioner has adopted a policy of reviewing each final investigation report. In the course of doing so investigative deficiencies have from time to time been noted and brought to the attention of the investigator or the discipline authority in question. While this *ad hoc* process has resulted in some deficiencies being corrected, it is an imperfect answer to the problem for a number of reasons.

205. To begin with, it was reported to us that such interventions by the police complaint commissioner or his staff are occasionally met by a challenge to the authority of the office to require that additional investigative steps be taken. Additionally, the practice in most services is such that a complete investigative summary is not included in the final investigation report with the result that the police complaint commissioner must rely on a report that contains a limited summary of the investigative findings. The effectiveness of the resulting oversight is thus dependent on the completeness and accuracy of that summary, which consciously or unconsciously will have been prepared with a view to supporting the investigator's recommended conclusions. Even though investigative analysts from the office of the police complaint commissioner often attend personally to review the investigative file, not all investigative flaws can be caught in this fashion.

206. Finally, the problem of lack of timely oversight is not addressed by the present *ad hoc* process. The administrative audit revealed that the average length of time between the completion of the investigation and the conclusion of the complaint by the office of the police complaint commissioner was 105 days.[103] Thus, by the time office of the police complaint commissioner staff have been able to review a final investigative report, analyze its content and identify any further steps that should have been taken in the original investigation and perhaps even personally review the investigative file, considerable additional time will have passed before final disposition of the complaint in question is possible.

207. In light of the foregoing, I have reached the conclusion that the *ex post facto* oversight model presently found in Part IX of the *Act* is inadequate, at least insofar as it relates to the conduct of the investigation of serious public trust complaints. Oversight, if it is to be both timely and effective, needs to occur during, not after, the investigation of a public trust complaint and it must of necessity be based upon full access to that investigation as it unfolds. In my view, the role of the police complaint commissioner, as that role is presently defined by s. 56.1 of the *Act*, must be expanded to provide that, at any time following the receipt of a record of complaint, the police complaint commissioner may review the conduct of an ongoing investigation and, upon consultation with the investigating officer and/or the discipline authority, as the case may be, provide such advice and/or direction as necessary to ensure that a full and thorough investigation is conducted. Further, and in order to ensure that this amendment achieves its full purpose, the *Act* must provide that, for the purpose of giving effect to this expanded oversight role, the police complaint commissioner must, on an ongoing basis and on request, be afforded full access to the investigative file and any other documents or information in the possession of the police which may be relevant to that investigation. Finally, in order to ensure that any advice or direction provided by the police complaint commissioner is complied with, the police complaint commissioner must have a specific statutory power to order an external investigation in those instances where the advice and/or direction given with respect to an ongoing investigation is not accepted and complied with by the

[103] When complaints in which an extension was granted were excluded from the analysis, this number dropped to 82 days.

investigator. Such a power necessarily would include the power to order that the full investigative file accumulated to that point in time be turned over to the new external investigator.

208. The purpose of these suggested powers is not to assign investigative responsibility for public trust complaints to the police complaint commissioner. In my view, that responsibility should remain with the police until such time it becomes apparent that civilian oversight in this province cannot be successful unless responsibility for investigating police complaints is transferred to a completely independent investigative unit. Taking into account the entire results of the audit, together with the practical consideration of cost and the alternative of vesting a contemporaneous oversight power in the office of the police complaint commissioner, I am not persuaded that point has yet been reached in this province. Rather, the purpose is to ensure that, where and when necessary, the police receive the advice and direction essential to the achievement of a full and thorough investigation. Obviously, in the discretion of the police complaint commissioner and his staff, some public trust complaint investigations will receive closer scrutiny than others. In the case of many complaints, they may not find it necessary to oversee the ongoing investigation closely, or perhaps even at all. In such cases, *ex post facto* oversight of the investigation can continue with a minimal risk that material flaws will have occurred in that investigation. However, in those public trust complaints involving more serious allegations, where the risk of a flawed investigation is higher, the ability of the police complaint commissioner to contemporaneously oversee the investigation should lead to results that are both more timely and free of material deficiencies.

209. These changes to the oversight role of the police complaint commissioner will not be effective, indeed could not possibly be effected, unless the mechanisms by which the current *ex post facto* oversight is accomplished are changed. Although the office of the police complaint commissioner has recently initiated a computerized Police Act Complaints Tracking System,[104] which essentially enables it to track its own functions in connection with individual complaint files, the day to day oversight process remains essentially a paper-driven process. This process includes reviewing: (i) notices of withdrawal of a complaint (s. 52.2(2)), (ii) notices of the discipline authority's decision to summarily dismiss a complaint, complete with the reasons therefore (s. 54(3)), (iii) letters of consent to the informal resolution of a complaint (s. 54.2(1)(a)), (iv) status reports with respect to ongoing investigations (ss. 56(1)(a) and (b)) and (v) final investigation reports together with "other records" that concern the complaint and the complainant (s. 57(2)), much if not most of which is transmitted to the office of the police complaint commissioner in hardcopy form. In addition, as noted, much time is spent by staff physically reviewing the actual investigative files located in the offices of the municipal police departments.

210. From the statistics published by the police complaint commissioner in his Annual Reports to the Legislature, it would appear that since 1999, the first full year of operation under Part IX, his office has on average opened 406 and closed 375 complaint files per year. Thus, with the number of files carried forward each year, it would appear that at any given point in time the police complaint commissioner and his staff currently have between 300 and 400 active files. Assuming that roughly one-third, or 100 to 133, of those files would involve allegations of a public trust default that are serious enough to warrant the exercise of the proposed contemporaneous oversight powers, it seems clear that, unless there is a change in the current paper-heavy review process, supplemented as it is in many cases by the physical examination of the concluded investigation file, current staffing in the office of the police complaint commissioner would not be adequate to meet the additional demands placed upon staff in

[104] See: paragraph 215, infra.

terms of the time and effort required to manage the contemporaneous oversight of those estimated 100 files.

211. There are two ways in which the extra work associated with the proposed contemporaneous oversight process can be met. The first is to replace the current paper process with one that utilizes the available technology of the electronic age in which we now live and work. With the technology currently available, the oversight function of the police complaint commissioner, whether *ex post facto* or contemporaneous, can be much more efficiently and effectively performed electronically. All that is required is that the entire complaint investigation file, with the obvious exception of exhibits that cannot be reduced to electronic form, be stored electronically as that file is created. All documents, including notes of interviews and the narrative reports of the investigators can be stored in an electronic file by the investigators. All photographic exhibits and tape recorded or video taped interviews can be rendered electronically into the file. In turn, the office of the police complaint commissioner can be linked electronically to the electronic complaint files of each of the 11 municipal police departments in such a way that staff can, at any time, review the current state of an investigative file, without the necessity of travelling to the offices of the police department in question to conduct a physical review of the investigative file. There may still be the need to attend physically at the police department to review some exhibits that cannot be copied or electronically conveyed, but from the results of the investigative audit it is clear that such instances would be rare.

212. Two issues need to be addressed if the current inefficient process is to be replaced by one such as that just described. The first is cost. Progress cannot be achieved without a monetary cost. The Saanich Police Department has, on its own initiative, commissioned the creation and installation of a software program,[105] containing a Professional Standards module that enables its professional standards officers to process, record and store all the department's complaint files, both lodged and non-lodged, electronically. In addition to the Professional Standards module, this program also has other salutary features such as modules for personnel file management, quartermaster inventory control and staff development and training. In all, eight modules, any one or more of which can be obtained separately, provide a complete personnel record for each member of the Saanich Police Department.

213. The entire IPDMA software program can be obtained at a cost of $36,000 plus an additional $15,000 for installation and training. The Professional Standards module, by itself, can be obtained at a cost of $5,000 plus $2,000 for installation and training. In addition there are some costs associated with customizing and updating in the case of each installation. Thus, there is in place, at a reasonable cost, the means by which each municipal police department can create and store their complete complaint investigation files electronically.

214. The second issue is the technology that would enable the electronic investigation file to be monitored contemporaneously with the conduct of the investigation itself. The office of the police complaint commissioner recently obtained the Professional Standards module of the IPDMA which, as noted, is currently being used to track its own functions in respect of the complaint files in the two departments that currently have that same module.[106] While this represents a significant improvement in the internal efficiency of the office, without an integrated system linking the other users to a standardized data bank through one server, it necessarily involves the creation of duplicate files in the Police Act Complaints Tracking System database which contains all the information sent to it electronically. What must occur,

[105] The Integrated Police Data Management Application or "IPDMA."

[106] In addition to the Saanich Police Department, the New Westminster Police Service recently acquired the Professional Standards Module. The Greater Vancouver Transportation Authority Police Service has acquired it as well, but does not currently have the capacity to use it.

if the full benefit of this technology is to be utilized, is that all police departments covered by Part IX acquire the professional standards module of the IPDMA, following which all would be linked to the office of the police complaint commissioner through an integrated system that would enable that office to access the complaint files, both lodged and non-lodged, of each department on an ongoing basis.

215. Through discussions with the president of Systemtek Consulting, the company which developed the IPDMA, I am advised that such a system could be designed and up and running within three to six months, with full security, at a cost not much in excess of $100,000. While there are alternative system designs, the preferred one would consist of one shared back end database belonging to the office of the police complaint commissioner and one shared front end user interface with remote access available to all departments and the office of the police complaint commissioner. Adequate server storage capacity exists in the system presently in use at the office of the police complaint commissioner and the only part of the system that would need to be designed is the security software. That would control access to the system in such a way that each department could only access its own files, while the police complaint commissioner and his staff would have access to all at will. Finally, I am advised that one day of training for each department would suffice for professional standards officers required to utilize the IPDMA and that experience with those departments that have adopted it already indicate new trainees would become fully competent in its use in less than 30 days.

216. The Executive Director of the Information Technology Services Division, Management Services Branch, of the Ministry of the Attorney General, confirms that linking all municipal police departments together in a secure integrated system is possible. However, from recent experience associated with getting PRIME[107] up and running throughout the police services in this province, he cautioned that implementing such a change could prove to be a slow process. If the electronic contemporaneous oversight process I am suggesting is to become a reality, there is a demonstrated need to implement the proposed changes quickly. That, of course, can be achieved by a statutorily mandated timetable for the creation and installation of the necessary computer programs and the training of the personnel responsible for operating them.

217. The second way in which the extra workload associated with the contemporaneous oversight function must be borne is by the police complaint commissioner hiring additional staff. There are currently four investigative analysts, including the deputy police complaint commissioner working out of two office locations in downtown Vancouver and Victoria. Given the increased efficiency of the proposed electronic form of complaint file monitoring, together with the increased number of informal resolutions, if the recommendation with respect to ordered mediation is implemented, it is difficult to estimate how many more, if any, fulltime equivalents would be required to ensure effective oversight given the gradual increase in the complaint case load across the 11 municipal police departments. However, bearing in mind that contemporaneous oversight would not be necessary in the case of every active complaint file, and that a careful discretion would necessarily be exercised in choosing those files in which it would be employed, it seems unlikely that more than two additional investigative analysts would be required.[108] If that were the case, additional office space would be required in Vancouver and there will necessarily be additional overhead and capital costs associated with such an increase in staff. From inquiries made of the Director of Corporate Services, for the Office of the Ombudsman, I am given

[107] "Police Records Information Management Environment" or PRIME, is the operational records management system for police agencies in British Columbia.

[108] Obviously the police complaint commissioner is in the best position to advise the Legislature what, if any, additional staffing requirements flow from the implementation of the recommended contemporaneous oversight model.

to understand that the total salaries and benefits of two additional investigative analysts, together with the associated overhead costs, would not likely exceed $350,000 to which must be added additional capital costs of approximately $15,000.

218. While these costs, together with those associated with the integrated IPDMA system, represent an increase of approximately 35% over the 2005 budget of the office of the police complaint commissioner,[109] they are much less than would be required if either of the two alternative forms of independent investigative units, discussed above, were to be implemented. As noted, creating an independent investigative unit, operating either independently or as an adjunct of the office of the police complaint commissioner, would involve six to eight fulltime investigators if only a quarter to a third of the current annual complaints were to be assigned to that unit for investigation. Alternatively, the creation of a seconded integrated professional standards unit would likely involve at least 10 of the 11 municipal police forces having to increase their operational strength by at least one fulltime position, as well as the cost of establishing separate quarters and employing administrative support staff.

219. One category of complaint that did not appear in our random sample of 294 closed files, and was therefore not included in the audit process, is that which arises when a person dies either while in-custody or as a result of police-related actions. Such events often attract widespread media attention which, in turn, has a tendency to affect the public's perception of the integrity of any resulting criminal investigation and complaint process.

220. It is difficult to get accurate figures with respect to the number of deaths that occur in such circumstances. Surprisingly, Police Services Division does not keep official statistics of such events. In fact, I am told that it is not systematically formally advised of a police-related death. The most recent available figures on in-custody and police-related deaths in BC are from the BC Coroners Service for up to and including 2004. In the three years, 2002 to 2004, there were a total of 26 in-custody or police-related deaths which occurred in seven of the 11 municipalities whose police departments fall under the jurisdiction of Part IX of the *Act*.[110] Because the statistics for each category are not segregated,[111] it is impossible to know how many of those were in-custody deaths, at least some of which would likely have been the result of causes unrelated to any police act or omission, and how many were the result of some form of police action.

221. The office of the police complaint commissioner received only seven complaints in connection with the 26 in-custody or police-related deaths that occurred in that three year period.[112] Of these, four involved police shootings, two involved the use of a TASER and one resulted from a death that occurred following an arrest involving the use of force. With the exception of one of the TASER-related death complaints, which has not yet been concluded, all of the complaints were found to be unsubstantiated.[113]

222. Police-related deaths are often the cornerstone of the argument advanced by those who advocate the creation of an independent investigative unit dedicated to the investigation of police complaints.

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[109] The 2005 combined operational and capital budgets of the office of the police complaint commissioner was $1,315,000 (source: BC Police Complaint Commissioner. *2005 Annual Report*. p.25).

[110] Source: BC Coroners Service.

[111] The B.C. Coroners Service statistics break down the total deaths into 8 categories, 4 of which are in-custody related, but do so only on a province wide basis, not by municipality. Similarly, there are 5 death classifications: accident, homicide, natural, suicide and undetermined, but these classifications are also recorded only on a province wide basis without municipal breakdown.

[112] Two additional files were opened without a Form 1 complaint, 1 of which, a police shooting, was closed after a review of the circumstances involved. The other, classified as a "death following arrest," is still being "monitored."

[113] Correspondence dated September 18, 2006, from Dirk Ryneveld, Q.C. to Josiah Wood.

Since such deaths often occur in the course of rapidly evolving circumstances, in which there are few if any independent witnesses, many questions arise concerning both the facts giving rise to the use of deadly force and the manner in which that force was used. Such circumstances are the natural breeding ground for suspicion and distrust, and when the answers to those questions appear to come only from those whose conduct is under investigation, reasonable and right thinking people are occasionally left to wonder whether those whom we entrust with the right to use deadly force are, in fact, properly accountable in all cases of its use. Thus, there is a need to ensure that complaints arising from such incidents are investigated and resolved, as much as possible, in a manner that not only enhances, but is perceived to enhance, accountability.

223. I have already concluded that, from a practical point of view, the results of our review do not justify the establishment of either an independent investigative unit, or an integrated seconded investigative unit, with a mandate to investigate the more serious public trust complaints. The number of in-custody and police-related deaths that occur annually in the Part IX jurisdictions, and in particular the low incidence of complaints that result from such deaths, does not persuade me that this category of complaint gives rise to a compelling argument for the establishment of either of those specialized investigative units, particularly if there exists an alternative means by which the requisite degree of accountability can be achieved in such cases.

224. One suggestion, made during the course of our interviews, was that all police-related deaths should be the subject of a statutorily mandated external investigation, irrespective of whether a complaint is lodged in respect of such deaths. As noted, less than one-third of the in-custody and police-related deaths, in the three years for which related statistics are available, resulted in a lodged public trust complaint. External investigations were requested by discipline authorities in connection with the complaints arising from three of the four police shootings resulting in death during the three year period described above. In one of the TASER-related deaths, the police complaint commissioner ordered an external investigation. The other three complaints were investigated and resolved by the police department of which the respondent police officer is a member. While the sample would be too small to enable a comparative assessment of the outcome in each of these seven cases, common sense suggests that a mandatory external investigation in all in-custody and police-related deaths provides at least some degree of public confidence that real accountability exists in such cases.

225. Section 55.1(1)(a) of the *Act* places a mandatory duty on a discipline authority to refer an investigation into a complaint to either another municipal police department or the RCMP, if such a referral is necessary in order to preserve public confidence in the complaint process. Section 55.1(1)(b) presently gives the police complaint commissioner the power to order an external investigation into a public trust complaint where he considers it necessary in the public interest. It is, of course, in the public interest to preserve public confidence in the police themselves as well as in the complaint process. In my view, as suggested above, common sense compels one to the conclusion that public confidence in the police will be preserved, if not enhanced, by requiring that all in-custody and police-related deaths must be investigated by an external agency. That will particularly be so, if the police complaint commissioner is vested with the power both to oversee such investigations as they unfold and to ensure that all necessary steps are taken to ensure a thorough and complete investigation.

226. In this respect there are two further matters that must be addressed. The first is that while the police complaint commissioner has the authority, under s. 55(3), to order an investigation irrespective of whether a record of complaint has been lodged, his power to order an external investigation under s. 55.1(1)(b) is limited by the language of the section to "public trust complaints." In other words, there

must be a lodged complaint before the power to order an external investigation can be exercised. The s. 55(3) power to order an investigation, irrespective of whether a record of complaint has been filed, does not explicitly reference an external investigation. As noted, in the three year period for which concurrent data is available, from both the B.C. Coroners Service and the office of the police complaint commissioner, there were two instances where the police complaint commissioner found it necessary to "monitor" the police investigation into a police-related death where no complaint had been lodged. One of those deaths in fact resulted from a police shooting. The s. 55(3) discretionary power to order a "complaint" investigation, in circumstances where no complaint has been lodged, is one important means by which the police complaint commissioner can ensure that the oversight process he administers achieves its intended purpose. To that end, there must be no uncertainty with respect to his power to order an external investigation notwithstanding that no public trust complaint has been lodged. Furthermore, in order to ensure that the power to order an investigation where no complaint has been lodged can be exercised effectively in the case of an in-custody or police-related death, it seems to me axiomatic that notice of all such deaths must be given to the police complaint commissioner

227. The second matter with respect to the power to order external investigations, that was brought to our attention during the interviews, is that when ss. 55.1 and 56.1 are read in conjunction with the definition of "municipal police department" in s. 1 of the *Act*, it seems apparent that the police complaint commissioner's choice of an external agency, when exercising the power to order an external investigation, is confined either to one of the other 10 municipal police departments which are covered by Part IX of the *Act*, or to the RCMP as the provincial police force. We were advised by the police complaint commissioner that this restriction has created difficulties in the past. While it would obviously make sense, in any given case, to assign an external investigation as a matter of first choice to another municipal police department or the provincial police force, there does not seem to be any logical reason why such restriction should be placed on either a discipline authority or the police complaint commissioner who has decided it is in the public interest that an investigation into a public trust complaint should be referred to another police agency.

228. Finally, if an external investigation, which is either requested by the discipline authority or ordered by the police complaint commissioner, is assigned to a police service other than a municipal police department, the contemporaneous oversight power of the police complaint commissioner could not be exercised through the proposed integrated IPDMA system. However, in such a case, the police complaint commissioner can appoint an observer under s. 56.1 of the current *Act*. For this to be a meaningful appointment, s. 56.1 must be amended to provide that the observer has the ability, upon consultation with the investigator or the discipline authority, to advise and, if necessary, to direct that certain investigative steps be taken.

229. Accordingly, I recommend that s. 56.1 of the *Act* be amended to provide that the police complaint commissioner's oversight powers include both the power to monitor the investigation into a public trust complaint, as that investigation is being conducted, and the power, upon consultation with the investigating officer or the discipline authority, to provide advice and direction with respect to further investigative steps that he believes are necessary to ensure that a thorough and complete investigation is conducted. In order to ensure that this power is effective, s. 56.1 should further be amended to provide the police complaint commissioner with the power to order an external investigation in any case where, after and notwithstanding consultation with the investigating officer and the discipline authority, he believes that a thorough and complete investigation will not be conducted. Concurrent with this power must be the power to order that the full investigative file accumulated to the point

where the order for an external investigation is made be delivered forthwith to the external agency which is to assume conduct of the investigation.

230. In addition to the contemporaneous oversight power with respect to lodged complaints, the amendment must include the power of the police complaint commissioner to contemporaneously monitor the non-lodged oral complaint records of each municipal department. In this way the police complaint commissioner can make a timely decision whether to require an investigation in respect of a complaint which is serious enough to warrant such investigation, but where the complainant refuses to commit his or her complaint to writing.

231. In order to facilitate the ability of the police complaint commissioner to exercise the expanded oversight mandate resulting from the power to contemporaneously monitor both non-lodged complaints and on-going public trust investigations, I recommend that Part IX of the *Act* be amended to require all municipal police departments to acquire either the IPDMA Professional Standards Module, or its equivalent, and to link that module to a fully secure integrated system that gives the police complaint commissioner electronic access to the complete complaint files of each such department. To be effective, this amendment must include a requirement that all municipal police departments utilize the IPDMA Professional Standards Module, or its equivalent, to store the entire contents of all lodged and non-lodged complaint files. In order that this innovation not be unnecessarily delayed, I recommend that the statutory amendment giving effect to it include a specific deadline for implementation, such deadline to be set after consultation with the departments and the technological personnel charged with the responsibility of designing and installing the system and training the professional standards officers who must use it.

232. I further recommend that Division 4 be amended to provide that the police complaint commissioner must be given notice of any in-custody or police-related death and that an external investigation, under Part IX of the Act, be conducted in all in-custody and police-related deaths irrespective of whether a complaint has been lodged in connection with that death. I further recommend that all such investigations shall be subject to the same contemporaneous oversight powers given to the police complaint commissioner in the case of investigations into public trust complaints. To facilitate the ability of both discipline authorities and the police complaint commissioner to ensure that any required external investigation can be undertaken and concluded, I also recommend that those provisions of Division 4 which provide for such investigation be amended to ensure that the scope of available external agencies is not limited to existing municipal police departments or the provincial police force, as both are currently defined in the *Act*.

233. Consistent with the proposed power of contemporaneous oversight, I recommend that s. 56.1 of the *Act* be amended to provide that an appointed observer will have the power, upon consultation with the investigator or the discipline authority as the case may be, to advise and, if necessary, through the police complaint commissioner to direct that certain investigative steps be taken.

G. REASSIGNMENT OR SUSPENSION PENDING INVESTIGATION OR HEARING

234. Having reviewed the joint submission to the Special Committee of the Legislature by the Vancouver Police Union, the B.C. Federation of Police Officers and the Vancouver Police Officers Association,[114]

[114] Supra note 82, pp.41-43.

as well as the testimony of Professor Stenning at the same hearings,[115] and notes of interviews we conducted during the review with various union representatives and, indeed, some discipline authorities, I am satisfied that the provisions of s. 56.2 must be amended to provide for a fair process by which a suspended respondent's right to pay and allowances during the period of his or her suspension can be determined.

235. To begin with, a respondent officer does not have any right, under Part IX, either to a hearing before, or a review after, a suspension order is made. That lack of process is, to some extent, offset by the stringent tests in s. 56.2(1)(a) and (b) that must be met before a suspension can be ordered. As well, the overriding responsibility of the discipline authority to maintain public confidence in the integrity of the police service justifies the unilateral nature of the power of suspension. However, there seems to be little, if any, justification for denying a suspended respondent the right to at least be heard before the employer discontinues his or her pay and allowances. Under s. 56.2(6), the only rights such a respondent presently has is to a hearing after such an order has been made by a police board under s. 56.2(5), there being no right even to a hearing if the discontinuance of pay and allowances is automatic, after 30 business days, under s. 56.2(4)(a).

236. As pointed out by Professor Stenning,[116] there is no apparent rationale for the 30 day limit on a suspended respondent's right to receive pay and allowances, particularly given that, as our administrative review demonstrates, any investigation is likely to take very much longer than that to complete.

237. In s. 30(4) of his draft Police Complaint Act, the police complaint commissioner would provide a suspended respondent the right to receive pay and allowances, subject to the local police board at any time discontinuing same if the allegation in response to which the suspension was ordered would, if proved, constitute a criminal offence, or if the board otherwise concludes there are strong reasons in the public interest to do so. This proposed amendment would preserve the s. 56.2(6) right of a suspended respondent to request a hearing after such an order had been made by the board.

238. I am of the view that a respondent who is suspended pursuant to s. 56.2 should be presumptively entitled to receive full pay and allowances during the period of such suspension unless the local police board, after proper notice to the respondent, and after a hearing at which the respondent is entitled to appear, to be represented by counsel or an agent and to be heard, decides there are strong reasons in the public interest why his or her full pay and allowances should be discontinued. Accordingly, I recommend that s. 56.2(4) through (8) be amended to reflect those basic principles of fairness.

H. DISCLOSURE OF DOCUMENTS AND NOTICES TO RESPONDENT AND COMPLAINANT

239. There are certain problems with ss. 57 and 57.1 of the *Act*. To begin with, when read together, they do not adequately separate the roles of the investigating officer and the discipline authority. For example, given the requirement in s. 57(2), for the discipline authority "promptly after receipt" of the final investigation report, to provide same to the police complaint commissioner along with, *inter alia*, all reasons for imposing or not imposing corrective and/or disciplinary measures in relation to the complaint, it is clear that any such reasons given must be those of the investigating officer, and not the discipline authority who can hardly have had time to consider the matter. While s. 57.1(1) requires

[115] British Columbia, Legislative Assembly. Hansard. (November 19, 2001). "Special Committee to Review the Police Complaint Process." p. 56.

[116] Ibid.

the discipline authority "to determine" whether corrective and/or disciplinary measures are warranted, that section does not require that the notice reflecting that decision be sent to the police complaint commissioner, the obvious inference being that it is not expected those determinations will be any different than the "recommendations" in the final investigation report.

240. From the review we conducted, it is apparent that this confusion of roles has resulted, in many instances, in the investigating officer essentially performing both functions, with the discipline authority simply accepting and rubber-stamping the former's conclusions and recommendations. In some services, this practice has developed to the point where the investigating officer drafts a reporting letter for the discipline authority to sign, which includes a summary of the investigation and the conclusions which the investigator has reached.

241. In my view, the proper role of the investigating officer is to conduct a thorough investigation, to apply all relevant policies and the provisions of the *Code of Professional Conduct Regulation*[117] to the results of that investigation, and to produce a final investigation report containing a complete summary of the investigation, a recommendation with respect to whether the complaint should be found to be substantiated and, in the event it is, a recommendation as to the appropriate range of corrective or disciplinary measures based on previous complaint experience. The obligation of the discipline authority is to review the final investigation report, and to decide whether to accept the recommendations of the investigating officer. That function involves the discipline authority exercising his or her independent judgment and deciding firstly whether, on the basis of the evidence in the final investigation report, the alleged public trust default has been established on a balance of probabilities. If it has, the complaint has been substantiated. If, and only if, the complaint has been substantiated, the discipline authority must then go on to decide what corrective or disciplinary measures should be imposed in all the circumstances.

242. Section 57.1(1) fuses these two separate and distinct functions of the discipline authority. Nowhere in this subsection is there any reference to the words "substantiated" and "unsubstantiated." The distinction between the determination whether a complaint is substantiated and, if so, the determination of what consequences should flow from that conclusion is important. From the point of view of the respondent, it is essential that distinction be recognized. No corrective or disciplinary measures can be imposed, in connection with an alleged public trust default, unless that default has been established on the proper standard of proof. By contrast, it would be an exceptional case, requiring the closest of scrutiny, where a public trust default was established and no corrective or disciplinary measure was imposed.[118] From the point of view of the complainant, the required notice under s. 57.1(1)(b) leaves open the question whether the conduct complained of was found to have occurred and simply advises that corrective or disciplinary measures have been found not to be warranted, thus inviting the conclusion that the complaint was not taken seriously.

243. Turning to another problem, it is difficult to understand why the disclosure of "documents" provided for in s. 57, and the notice requirements of s. 57.1, needs to be separated into two distinct functions. There is an unnecessary complexity in the way in which these steps are set out in the *Act*. They can and should be combined into a relatively simple and straightforward process whereby the investigating officer provides the final investigation report to the discipline authority who reviews it, reaches an

[117] Supra note 27.

[118] The administrative audit revealed that in the case of 15 of the 24 substantiated complaints in the audit sample, no corrective or disciplinary measure provided for in the *Code of Professional Conduct Regulation* was imposed. In many of these cases, "managerial advice" or "advice as to future conduct" was the measure imposed.

independent judgment with respect to the proper conclusion(s) to be drawn from it and notifies all concerned accordingly. One of the anomalies of the present process, as described in these two sections, is that while the police complaint commissioner is supposed to receive a complete, unedited version of the final investigation report, together with any other "records" under s. 57(2), as already noted there is no requirement that he be provided with a copy of the notice which the discipline authority is obligated to provide to the respondent and complainant under either s. 57.1(1)(a) or (b). Thus, apart from any "recommendation" of the investigating officer contained in the final investigation report, the first notice which the police complaint commissioner would have of a decision by the discipline authority under s. 57.1(1)(b) would be a request from the complainant for a public hearing under s. 57.1(3) if, in fact, such a request was made. As I have suggested, this oversight in the legislation tends to reinforce the perception that it is really the investigating officer who decides whether a complaint is substantiated since, in the absence of a complainant's request for a public hearing, the content of the final investigation report would be the only basis upon which the police complaint commissioner could decide on his own motion to order a public hearing.

244. Other problems exist with each of these sections. Dealing first with s. 57, it is noteworthy that during the course of the interviews we conducted, we heard no reasonable explanation why both the respondent and the complainant should be entitled only to a summary of the final investigation report, rather than the complete document subject, of course, to proper editing with respect to any sensitive law enforcement information or any portion of the report exempted from disclosure under the *Freedom of Information and Protection of Privacy Act*.[119] The need to provide a summary of the final investigation report, which itself is but a summary of the entire investigation, in effect requires the investigating officer to prepare two separate reports at the conclusion of the investigation. This obvious waste of time and resources has led to the practice in some municipal departments of producing only one summary of the investigation which is then provided to both the respondent and complainant in the form of a letter, signed by the discipline authority, which also advises of the discipline authority's decision under s. 57.1(1) of the *Act*. The police complaint commissioner receives a copy of this letter in place of the final investigation report, which s. 56(6) requires the investigating officer to prepare, and s. 57(2) requires the discipline authority to provide to the police complaint commissioner "promptly after receipt." Thus, as a result of what amounts to a sensible effort by the police departments in question to avoid the unnecessary duplication of work mandated by s. 57(1) the police complaint commissioner does not receive the disclosure anticipated by s. 57(2), a fact which necessarily must interfere with his ability to perform the oversight function of that office.

245. The statutory requirement that the respondent and complainant be provided with only a summary of the final investigation report also sets in motion a process failure, in that a respondent who may be required to decide whether to accept a corrective or disciplinary measure offered at a prehearing conference, or whether to proceed to a discipline proceeding, is left to make that decision on the basis of what, as previously noted, is essentially a summary of a summary of the full investigation.

246. During the course of the review, we noted that the quality and completeness of final investigation reports varied considerably from department to department. In some cases, virtually the full investigative file was included. In others, as noted, a bare summary of that file was provided in the form of a letter which served as well to give the respondent and complainant notice of the discipline authority's decision under s. 57.1(1). In my view, the former sets the standard that should be met by all municipal police departments. If the recommended integrated IPDMA system is put in place, the creation of a high

[119] R.S.B.C. 1996, c. 165 and amendments thereto.

quality and complete final investigation report will be a simple matter, as will the process by which the copies of that report can be edited as necessary before being served on the respondent and the complainant.

247. As already discussed, the same integrated IPDMA system, if implemented, will also ensure that the police complaint commissioner has full access to the investigative file, including the final investigation report. Thus, s. 57(3) would no longer be relevant. However, there may be instances in which all the information required by the police complaint commissioner in the exercise of his oversight function is not contained in the investigative file. One example might be when a complaint investigation is stayed pending the outcome of a criminal investigation into the circumstances giving rise to the complaint. In that event, there may be information in the criminal investigation file which does not find its way into the complaint file. The duty of disclosure found in s. 57(2) must clearly provide that the police complaint commissioner is entitled to any information relevant to the circumstances giving rise to the public trust complaint, irrespective of where it might be located in the records of the municipal police department to which that complaint relates.

248. Turning to s. 57.1, I have already noted that for some reason it does not require that the police complaint commissioner be given notice of the discipline authority's decision(s) under s. 57.1(1)(a) or (b). As a result, in the absence of a s. 57.1(3) request for a public hearing from the complainant, the only basis upon which the police complaint commissioner could exercise his discretion to order a public hearing under s. 60(4) of the *Act*, would be the content of the final investigation report notwithstanding that, in the circumstances, it is the discipline authority's decision, and not the recommendations of the investigating officer, that must be the object of the public hearing remedy. Thus, in my view, the notices required by s. 57.1(1)(a) and (b) must also be provided to the police complaint commissioner along with the final investigation report.

249. Currently, under s. 57.1(3), a complainant, who is aggrieved by a discipline authority's decision under s. 57.1(1)(b), may file a written request for a public hearing with the police complaint commissioner who, under s. 60(3)(b), must arrange such a hearing if he determines there are grounds to believe that a public hearing is necessary in the public interest. As well, without any such request from the complainant, under s. 60(4) the police complaint commissioner may order a public hearing on his own motion, if he considers that a public hearing is necessary in the public interest. In my view, neither alternative provides an effective safeguard against the potential that the discipline authority may reach the wrong conclusion and find a public trust complaint unsubstantiated when there is a reasonable basis in the final investigation report for concluding that it should have been concluded as substantiated.

250. To begin with, the public interest test is too high a threshold to permit rectification of error by that means in any but the most egregious of public trust defaults. Furthermore, as experience has shown, public hearings of the sort presently provided for in the *Act*, are a costly, lengthy and generally unsatisfactory means of ensuring the integrity of the complaint process. In my view, some means short of a public hearing should be available to address the situation where, in the opinion of the police complaint commissioner, the discipline authority's conclusion under s. 57.1(1)(b) is wrong. As noted, the investigative audit team concluded that such errors had occurred in eight of the complaint files in the audit sample. If the police complaint commissioner had the statutory authority to intervene and to require a review of that decision, without having to order a public hearing, those errors could potentially, have been avoided. Similarly, in those cases where the investigative audit team observed that inadequate disciplinary measures were imposed, in the discipline files they reviewed, such a review process could have produced a quick and effective correction.

251. In my view, the police complaint commissioner should have such authority. Under the current statutory framework the role of the police complaint commissioner is to oversee, and not to perform, the disciplinary function in the complaint process. Thus, I do not accept the proposal of the BCCLA that the police complaint commissioner should have the power to substitute his own decision for that of the discipline authority.[120] Instead, I recommend that s. 57.1 be amended to provide that if the police complaint commissioner believes, on reasonable grounds, that the decision of a discipline authority under s. 57.1(1)(b) is wrong, he may order that a discipline proceeding be convened before a chief or deputy chief constable of a different municipal department. In such a case, an alternate discipline authority or a senior officer of that department would be responsible for presenting the evidence at such a proceeding, and the discipline proceeding would be conducted in accordance with the recommendations I am making for amendments to s. 59.

252. If this recommendation is implemented, s. 57.1(3) should be deleted as the right of a complainant to request a public hearing, following the conclusion of such a discipline proceeding, is preserved in s. 59.1(3).

253. In summary, I recommend that ss. 57 and 57.1 be amended by combining them into a single section which provides that:

(a) Upon receipt of the final investigation report, the discipline authority must decide, on the basis of the evidence contained in that report, whether the discipline default alleged in the public trust complaint has been established on a balance of probabilities. If the discipline authority decides that the public trust complaint is substantiated, he or she must then decide the appropriate corrective or disciplinary measure to be imposed upon the respondent.

(b) Within 10 business days of the receipt of the final investigation report, the discipline authority must provide the respondent, the complainant and the police complaint commissioner with a copy of the final investigation report together with notice of his or her decision whether the public trust complaint is substantiated and, if so, what proposed corrective and/or disciplinary measures are warranted in the circumstances. The notice accompanying the final investigation report should also contain the matters listed in s. 57.1(2) of the *Act*.

(c) The final investigation report must be served on both the respondent and the complainant, subject to editing to remove any sensitive law enforcement information or any information which is subject to exemption under the *Freedom of Information and Protection of Privacy Act*.[121] The final investigation report provided to the police complaint commissioner shall not be edited and, in addition to the final investigation report, the discipline authority shall provide to the police complaint commissioner any and all information in the possession of the municipal police department and not included in the investigation file related to the complaint, that may possibly be relevant to the circumstances giving rise to the complaint, including, without limitation, those matters currently listed in s. 57(2)(a) through (f) inclusive.

(d) If the final investigation report provided to the respondent and complainant is edited, either or both may apply to the police complaint commissioner to be given access to the edited portions, and the police complaint commissioner may disclose such portions on the grounds presently set out in s. 57(5).

(e) S. 57.1(3) be deleted.

[120] Supra note 43, pp. 5-6.

[121] Supra note 119.

(f) If the police complaint commissioner considers there are grounds to believe that the decision of a discipline authority under s. 57.1(1)(b) is wrong, he may order that a discipline proceeding be convened in respect of the complaint before the chief or deputy chief constable of another municipal department.

(g) Any decision by the police complaint commissioner, on his own motion, to require that a discipline proceeding be convened in connection with a complaint, which a discipline authority has found to be unsubstantiated under s. 57.1(1)(b), must be made within 30 days of the police complaint commissioner's receipt of the final investigation report and notice of the discipline authority. Finally, if no such discipline proceeding is ordered and the police complaint commissioner does not arrange a public hearing, the decision of the discipline authority to dismiss the complaint as unsubstantiated is final and conclusive.

254. As a necessary consequential amendment, I recommend that s. 56(6) be amended to provide that the final investigation report contemplated by that section contain a complete summary of all relevant evidence in the investigative file, together with copies of any relevant documents or records and the investigator's findings, conclusions and recommendations.

255. One further matter needs to be addressed under this heading. In recommending that the complete final investigation report be given to both the complainant and the respondent, I added the *caveat* that it be subjected to editing, *inter alia*, with respect to sensitive law enforcement information. The Special Committee of the Legislature received a thoughtful submission from representatives of what was then the Organized Crime Agency of British Columbia, which stressed the need to protect the confidentiality of information that, if disclosed, would adversely affect the integrity of ongoing police operations.[122] As a consequence, in its Second Report, the Committee recommended that protocols be developed, in consultation with relevant agencies for the "protection of such information."[123] This recommendation set out considerable detail with respect to the substance of the proposed protocols.

256. The police complaint commissioner, in s. 18 of his draft Police Complaint Act, proposes that a power be vested in his office, upon the *ex parte* application of any police officer or police agency, to order that sensitive police information not be disclosed to the complainant or any other person, or that it only be disclosed upon such terms and conditions as he directs. I am satisfied that such a provision is necessary and I recommend an amendment accordingly. I leave it to the legislative drafters to determine where such an amendment should most conveniently be located in Part IX.

I. PREHEARING CONFERENCES

257. The only substantive issue that arose during our review with respect to the prehearing conference, was whether it should be abolished. The submission of the BCAMCP, in response to the police complaint commissioner's White Paper, recommended it should be abolished, suggesting that its purpose would just as well be served by informal discussions between the respondent and the discipline authority.[124] The problem with informal discussions is that they are not subject to oversight. The report which the police complaint commissioner is presently entitled to receive under s. 58(5)(a) of the *Act*, together with the final investigation report, provides him with an informed basis upon which to determine whether the proposed final disposition of a substantiated complaint is appropriate.

[122] Organized Crime Agency of British Columbia. (January 21, 2002) *Report to the Special Committee of the Legislature.*

[123] Supra note 4, p. 21. See also Special Committee recommendation 38.

[124] Supra note 8, pp. 13-4.

258. The interviews we conducted with both professional standards officers and discipline authorities confirmed that corrective and/or disciplinary measures recommended by the former are frequently "bargained down" during the prehearing conference. Whether that is a good or a bad thing is not really the issue. What is important is whether the ultimate disposition of the complaint, including the corrective and/or disciplinary measures proposed, is appropriate. I am satisfied that, if the changes I am recommending are implemented, the oversight powers of the police complaint commissioner will be sufficient to ensure that no proposed dispositions are improperly reduced at a prehearing conference.

259. In my view, the prehearing conference is a straightforward and expeditious process by which public trust complaints can be properly resolved. Accordingly, I would not recommend that it be eliminated from the disciplinary process in Division 4.

J. CONVENING A DISCIPLINE PROCEEDING

260. During the interviews we conducted we heard repeated concerns regarding the extent to which the discipline proceeding, as currently structured in Division 4, is not viewed as an impartial hearing process. On behalf of respondents it was argued that a discipline authority who has already decided that a public trust complaint against a respondent has been substantiated, and settled upon what he or she believes is an appropriate corrective or disciplinary measure which has been offered and rejected at a prehearing conference, is unlikely to approach that respondent's defence at a discipline proceeding with an open mind. On the other hand, the police complaint commissioner, while acknowledging that respondents have a legitimate concern in that regard, also expressed a concern that, in some circumstances, a perception of partiality on the part of discipline authorities in favour of respondents may arise.

261. In his draft Police Complaint Act, the police complaint commissioner proposes a solution to both concerns. In response to that raised on behalf of respondents, he proposes that where a discipline authority has participated in a prehearing conference, a subsequent discipline proceeding must be conducted by a chief or deputy chief constable of a different municipal department.[125] In response to his concern that, in some circumstances, a discipline authority may be perceived to "have tainted the necessary perception of fairness and impartiality," he proposes a power in his office to order, at any time, that the functions of the discipline authority be exercised by another (i.e. an external) chief or deputy chief constable.[126] This power, as drafted, would enable the police complaint commissioner to order the appointment of an external discipline authority at the earliest stages of the complaint process.

262. Turning first to those concerns expressed by and on behalf of respondents, it is a fact that s. 11(d) of the *Charter of Rights and Freedoms*[127] cannot be invoked to guarantee an independent and impartial tribunal to a respondent in a disciplinary process such as that provided for in Part IX of the *Act*.[128] However, the real question is whether there is any persuasive argument in favour of denying respondents at least some measure of confidence that discipline proceedings will not be presided over by someone who has already decided the case against them. The answer to that question lies in the balance that must be struck between providing respondents with a reasonable expectation of an impartial discipline

[125] Supra note 10. See: s. 34(2).

[126] Ibid. See: s. 9(13).

[127] *Constitution Act*, 1982, [R.S.C. 1985]: Appendix II, No. 44.

[128] See: *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

process on the one hand and creating a process that does not interfere unduly with a chief constable's responsibility to ensure a high standard of discipline on the other.

263. In my view, that balance can be struck by an amendment to s. 58.1 of the *Act* which provides that a discipline authority who has presided over a prehearing conference which does not result in a resolution of all alleged discipline defaults against a respondent, shall not preside over the subsequent discipline proceeding mandated by s. 58.1(1)(a). I would not go so far as to require that such discipline proceeding be presided over by a chief or deputy chief constable of another municipal department, as all municipal departments have at least two discipline authorities. However, a wise exercise of discretion on the part of a discipline authority who is faced with the mandatory requirement of such an amendment, may well require that an external discipline authority be appointed, particularly in those smaller departments in which there is a natural tendency for a close relationship to develop between all ranks. In order to ensure that wise exercise of discretion, s. 58.1 of the *Act* should be further amended to provide that a discipline authority may request a chief or deputy chief constable of another municipal department to preside over a discipline proceeding.

264. The other side of the partiality concern must also be addressed. The submission of the BCAMCP, made in response to the White Paper and its attached draft Police Complaint Act, suggests the proposed power of the police complaint commissioner to order an external discipline authority at any time is overly broad and, if exercised, could well have the effect of undermining the authority of the chief constable to promote good discipline.[129]

265. The police complaint commissioner already has the power to order an external investigation into a public trust complaint, under s. 55.1(1)(b), if he considers such an order to be necessary in the public interest. This power exists notwithstanding the mandatory duty of a discipline authority to refer such an investigation to another municipal police department, or to the commissioner,[130] if he or she considers an external investigation is necessary in order to preserve public confidence in the complaint process. I view public confidence in the complaint process as the paramount consideration when applying the public interest test wherever it is mandated in Part IX.

266. The police complaint commissioner also already has a discretionary power, under s. 60(4) of the *Act*, which may be exercised at any time after an investigation has been completed, to order a public hearing in circumstances where he considers there are grounds to believe that such is necessary in the public interest. As well, s. 58.1(2) acknowledges the power of the police complaint commissioner to "arrange" a public hearing with respect to a public trust complaint that is the subject of a pending or ongoing discipline proceeding under s. 58.1(1). The effect of such an "arrangement", of course, is to replace the discipline authority with an adjudicator appointed under s. 60.1(2).

267. In his Green Paper, the police complaint commissioner acknowledges that the proposed power to appoint an external discipline authority would only be required to be exercised in "exceptional circumstances."[131] Viewed reasonably, the exceptional circumstances to which he refers would be those in which public confidence in the complaint process would be undermined if there exists, for whatever reason, a reasonable apprehension of bias on the part of a presiding discipline authority. In other words, the very circumstances which the police complaint commissioner suggests would justify the exercise of

[129] Supra note 8, p. 9.

[130] The "commissioner" is defined in s. 1 of the *Act* as the commissioner of the provincial police force.

[131] Supra note 73, p. 8.

the proposed power to appoint an external discipline authority, are the same circumstances in which he already has the power to order a public hearing.

268. Thus, the proposed power to order an external discipline authority, albeit in the form of an adjudicator, is already in Part IX. However, given what has already been said about the efficacy of public hearings, it seems to me that appointing an external discipline authority, who would conduct a much simpler, more streamlined discipline proceeding, is a far more effective, and therefore preferable, way of supporting public confidence in the complaint process.

269. That said, I understand the concern expressed by the BCAMCP that the exercise of such a power by the police complaint commissioner may have, at least the appearance, if not the effect, of undermining the discipline authority of a chief constable who would otherwise preside over the conduct of the discipline hearing in question. However, as I understand to be the case when the police complaint commissioner feels an external investigation is required in any given case, I would expect that, before exercising the power to order an external discipline authority, the police complaint commissioner would first consult with the discipline authority in question, thus providing the latter with the opportunity, on his or her own initiative, to request a chief or deputy chief constable from another municipal department to preside over the pending discipline hearing.

270. I accept the police complaint commissioner's proposal that he have the power to order that the function of discipline authority be exercised by a chief or deputy chief constable from another municipal department. However, I would limit the exercise of that power specifically to the conduct of the discipline proceeding and, rather than using the language in which the justification for the exercise of that power is cast in s. 9(13) of the draft Police Complaint Act, I would recommend language which parallels that found in s. 55.1 of the *Act* in relation to the duty of the discipline authority to require, and the concurrent power of the police complaint commissioner to order, an external investigation.

271. Accordingly, I recommend that s. 58.1 of the *Act* be amended to provide:

   (a) A discipline authority who has presided over a prehearing conference that has not resulted in the resolution of all discipline defaults alleged against a respondent, shall not preside over the subsequent discipline proceeding mandated by s. 58.1(1)(a).

   (b) A discipline authority may, at any time and for any reason, require that a chief or deputy chief constable of another municipal department preside over a discipline proceeding mandated by s. 58.1(1)(a).

   (c) A discipline authority must refer a discipline proceeding into a public trust complaint to a chief or deputy chief constable of another municipal department if he or she considers that such a referral is necessary in order to preserve public confidence in the complaint process, or if the police complaint commissioner so orders.

   (d) The police complaint commissioner may make an order that a discipline proceeding be presided over by the chief or deputy chief constable of another municipal department if he considers that such is necessary in the public interest.

272. Section 58.1(3) gives the complainant the right, prior to the commencement of a discipline proceeding, to make written or oral submissions to the discipline authority respecting the complaint, the adequacy of the investigation and the range of disciplinary or corrective measures that should be considered. Curiously, there is no requirement in s. 58.1(1)(b) that the notice to the complainant, advising of the discipline proceeding, also advise the complainant of this right and, in the case of oral submissions,

how, where and to whom such might be made. In my view, such notice should be provided to the complainant. As well, I am of the view that if the complainant chooses to make oral submissions with respect to the matters set forth in s. 58.1(3), those submissions should be recorded and transcribed and form part of the record in the subsequent discipline proceeding. Finally, the police complaint commissioner has suggested that a discipline proceeding must be conducted within 60 days from the date on which the discipline authority was served with the final investigation report.[132] This is a sensible suggestion which I would adopt.

273. Accordingly, I recommend that s. 58.1(1)(b) be amended to provide that the notice to the complainant of a discipline proceeding include notice of the right to make written or oral submissions to the discipline authority respecting the matters set out in s. 58.1(3), and the manner in which oral submissions can be made. I further recommend that s. 58.1(3) be amended to provide that any oral submissions be recorded and transcribed and that a copy of any written submissions, or the transcript of any oral submissions, shall form part of the record at the subsequent discipline proceeding. Finally, I recommend that s. 58.1 of the *Act* be amended by adding a requirement that a discipline proceeding must be convened within 60 days of the date upon which the discipline authority received the final investigation report.

K. CONDUCT OF THE DISCIPLINE PROCEEDINGS

274. While the discipline proceeding, as currently structured in s. 59 of the *Act* would likely survive a challenge under s. 7 of the *Charter of Rights and Freedoms*, alleging denial of the principles of natural justice,[133] it is apparent that s. 59(2) has been interpreted as preventing a respondent from testifying at a discipline proceeding on his or her own behalf. The effect of such a construction, together with the adverse inference provided for in s. 61.1(1) of the *Act*, would clearly offend even the most primitive view of procedural fairness. While I do not believe that s. 59 and s. 62.1(1), when read together, were intended to prevent a respondent from testifying, any ambiguity in that regard must obviously be eliminated.

275. However, it is clear that the language of s. 59(2) was intended to prevent any other evidence being led on behalf of a respondent and, indeed, any witnesses being called apart from the investigating officer who prepared the final investigation report.

276. While the submissions to the Special Committee of the Legislature, together with views expressed to us during the interviews conducted, contain many different, and in some cases conflicting, recommendations for changes to the discipline proceeding, there is general acceptance of the view that the respondent ought to be able to present evidence on his or her own behalf. In his draft Police Complaint Act the police complaint commissioner would go further and make the respondent a compellable witness at such a proceeding.[134] The BCAMCP has suggested that the discipline authority should have the option of either holding an oral hearing (as opposed to a proceeding) or making a decision on the basis of written submissions, as opposed to being required to hold a hearing with "more significant procedural protections" depending on the degree of the proposed disciplinary and/or corrective measures.[135]

277. In approaching the many different views expressed on how a discipline proceeding should be structured, I have been guided by two essential considerations. The first is that the extent to which procedural

[132] Supra note 10. See: s. 34(7).

[133] See: *Landry v. Gaudet* (1992), 95 D.L.R. (4th) 289 and *Vanovermeire v. Edmonton (City) Police Commission* (1993), 9 Alta. L.R. (3rd) 396.

[134] Supra note 10. See: ss. 34(3) and (4) and s. 40(1).

[135] Supra note 8, p. 14.

fairness is made available to a respondent facing a disciplinary proceeding, should be governed more by what it is possible to provide without undermining the discipline authority of the chief constable, rather than by any strict adherence to what the law says is the minimum standard required to avoid a successful judicial review. The second is that the discipline proceeding should be structured in such a way as to enable a more expeditious and less costly form of public review to be utilized as an alternative to that form of public hearing which is presently provided for in Part IX. As will be described in greater detail below, I am recommending that a public review, in the form of a review on the record, be included as an option available to the police complaint commissioner where he considers that there is a reasonable basis to believe that the final disposition of a public trust complaint is wrong. In order for that type of public hearing to produce a result that is both fair and reasonable to all in whose interest it is sought, there must be a sufficient record to enable a meaningful review to be conducted.

278. In the result, I favour the suggestion by the BCAMCP that there should be different degrees of procedural fairness made available to a respondent who faces a discipline proceeding, based upon the degree of the proposed disciplinary and/or corrective measures which that respondent is facing.

279. At a minimum, and irrespective of the proposed disciplinary and/or corrective measures, I can see no justification for denying a respondent the right to produce evidence at a discipline proceeding on his or her own behalf, whether in the form of voluntary *viva voce* testimony or otherwise. Assuming that the recommendations regarding the compellability of statements from respondent and witness officers is accepted, I see no need to require that a respondent be a compellable witness at a discipline hearing, again irrespective of the nature of the proposed disciplinary and/or corrective measures.

280. Where the proposed disciplinary and/or corrective measures include either reduction in rank or dismissal, I am of the view that the respondent should have the right to what the BCAMCP properly characterizes as a hearing rather than a proceeding, supported by procedural rights including the right to disclosure of the complete final investigation report, any separate reports prepared respecting the investigation and any other relevant written records including any written submissions, or the transcript of any oral submissions, made by the complainant pursuant to s. 58.1(3) of the *Act*, the right to be represented by counsel or an agent, the right to cross-examine any witness, including the complainant, whose evidence is referenced in the final investigation report, and the right to make full submission following conclusion of the evidentiary phase of the hearing. Either a senior officer, or the discipline authority who reviewed the final investigation report and whose disciplinary recommendation has led to the hearing, would logically be the person to present the case before the presiding discipline authority and would be entitled to lead evidence and make submissions in support of the recommended disciplinary and/or corrective measures.

281. In the case of all other disciplinary proceedings, where the proposed disciplinary and/or corrective measures include anything less than reduction in rank the respondent would again be entitled to full disclosure of the complete final investigation report, any separate reports prepared respecting the investigation and any other relevant written records including any written submissions, or the transcript of any oral submissions, made by the complainant pursuant to s. 58.1(3) of the *Act* and the right to be represented by counsel or an agent. However, the right to cross-examine would be confined to the investigating officer and would not include any witness named in the final investigation report, including the complainant unless, in the opinion of the presiding discipline authority, such cross-examination was necessary in order to resolve conflicting evidence material to the ultimate outcome of the disciplinary proceeding. However, as noted, the respondent would be entitled to produce evidence on his or her own behalf and would, of course, be entitled to make full submissions following the conclusion of the

evidentiary portion of the discipline proceeding, As with the previously described proceeding, either a senior officer, or the discipline authority who received and reviewed the final investigation report and who presided over the prehearing conference if such conference was held, would present the case before the presiding discipline authority, and would be entitled to lead evidence and make submissions in support of the proposed disciplinary and/or corrective measures.

282. In the case of all disciplinary proceedings, the presiding discipline authority must be entitled to retain the assistance of legal counsel. A full record must be kept of the discipline proceeding, which means that all oral proceedings must be recorded and all written materials marked as exhibits, such that in the end a full and accurate record of the entire proceeding is available for review by the police complaint commissioner.

283. As previously noted, assuming that the recommendation regarding compellability of statements from all respondent and witness officers is accepted, I see no need to require that a respondent at a discipline hearing be compelled to give evidence, or to answer questions from either the presiding or the presenting discipline authorities. However, I see no reason why the presiding discipline authority should not be entitled to draw an adverse inference in any instance where there is an absence of evidence, which the respondent could reasonably be expected to adduce, and which is considered by the presiding discipline authority to be material to the ultimate disposition of the discipline proceeding. Finally, in order to avoid any doubt on the matter, a presiding discipline authority should have the statutory authority, at any time, to order that the discipline proceeding be adjourned and that a further investigation be undertaken if, in his or her opinion, such further investigation is necessary in the public interest.

284. In summary, I recommend that s. 59 of the *Act* be amended so as to provide that:

(a) In the case of a discipline proceeding into an alleged public trust default where the proposed disciplinary measures include either a reduction in rank or dismissal, the respondent shall be entitled to:

(i) full disclosure of the complete final investigation report, any separate reports prepared respecting the investigation and any other relevant written records including any written submissions, or a transcript of any oral submissions, made by the complainant pursuant to s. 58.1(3) of the *Act*, all of which should be filed as exhibits in support of the alleged public trust default and proposed disciplinary measures;

(ii) be represented by counsel or an agent;

(iii) in addition to cross-examining the investigating officer, to require the attendance for cross-examination, and to cross-examine, any witnesses, including the complainant, named in the final investigation report;

(iv) to present evidence on his or her own behalf; and

(v) to make full submissions following the conclusion of the evidentiary phase of the discipline proceeding, including with respect to those matters referenced in s. 59(3)(b) of the *Act*.

(b) In the case of a discipline proceeding conducted with respect to an alleged public trust default where the proposed disciplinary and/or corrective measures include anything less than reduction in rank, the respondent shall be entitled to all of (i), (ii), (iv) and (v) above, but the right of cross-examination shall be confined to cross-examining the investigating officer unless, in the opinion of the presiding discipline authority, the cross-examination of a witness named in the final

investigation report is necessary in order to resolve conflicting evidence material to a proper disposition of the alleged public trust default.

(c) A discipline authority who presides over the discipline proceeding shall be entitled to the assistance of legal counsel both during and subsequent to the discipline proceeding, including with respect to the preparation of the formal disposition record.

(d) In addition to the electronic recording of the discipline proceeding, provided for in s. 59(4) of the *Act*, a full record of the discipline proceeding, including all exhibits filed, shall be prepared.

(e) The discipline authority presiding over a discipline proceeding may adjourn the proceeding and order that a further investigation into the conduct of the respondent be undertaken, if in his or her opinion such further investigation is warranted and necessary in the public interest.

285. In his draft Police Complaint Act, the police complaint commissioner has proposed that discipline proceedings be held in camera.[136] Given the increased oversight powers I am recommending be given to his office, I think that is an appropriate suggestion. Accordingly, I recommend that s. 59 of the *Act* be further amended to provide that all discipline proceedings be held in camera.

L. REQUEST FOR A PUBLIC HEARING, ORDERING PUBLIC HEARINGS AND PUBLIC HEARING PROCEDURES

286. As indicated in the previous section, I am recommending that an additional, alternative form of public hearing be introduced into Part IX of the *Act*. Rather than attempting to design all of the substantive and consequential amendments to ss. 60, 60.1 and 61, that would flow from such a recommendation if implemented, I have elected to leave that task to those who have the specialized drafting talents required to give effect to the essence of what I am proposing. In addition, of course, I will offer some thoughts on, and recommendations for, changes to the existing public hearing process.

287. In the eight-and-a-half years since Part IX came into effect, there have been only 13 public hearings "arranged" by the police complaint commissioner.[137] This small number reflects the fact that for a number of reasons the present public hearing process is not a useful remedy in circumstances where the police complaint commissioner considers the disposition of a public trust complaint by a discipline authority to be inappropriate.

288. To begin with, as previously noted, the threshold test in s. 60(5) for ordering a public hearing, is very high. Not every error in the disposition of a public trust complaint will necessarily undermine public confidence in the complaint process. Yet each is of singular importance to both the complainant and respondent(s) involved, and there is no doubt that if such errors are not properly corrected, they will become systemic and eventually their cumulative effect will bring the complaint process into disrepute. Thus, there needs to be some public hearing process by which the disposition of a public trust complaint, which the police complaint commissioner believes to be wrong, can be reviewed even though that disposition, by itself, is not likely to undermine the public's confidence in the complaint process. Furthermore, and again as has been noted, the current public hearing process has proven to be time consuming, costly and in some cases fraught with much public controversy. For the most part, they amount to what, in different circumstances, lawyers would refer to as a trial *de novo* where, irrespective of what process has previously taken place, a full evidentiary hearing takes place before the adjudicator followed by submissions and then, usually, a reserved decision. Given the schedules of

[136] Supra note 10. See: s. 35(5).

[137] That number includes 1 that is currently ordered but not yet concluded.

counsel, and the length of time that must be reserved for such a hearing, it more often than not takes place at least a year or more after the disposition in issue was recorded.

289. For all these reasons, the police complaint commissioner is necessarily discouraged from ordering a public hearing in any but the most egregious of public trust complaints. Thus, as the audit we conducted revealed, instances will arise where the disposition of a public trust complaint will clearly be wrong, and yet no practical or effective remedy will be available to the police complaint commissioner to rectify the error.

290. As noted, The BCCLA has responded to these perceived inadequacies in the current public hearing process by recommending that the police complaint commissioner have the authority to substitute his own decision for that of a discipline authority both with respect to the nature of the conduct complained of and with respect to any corrective and/or disciplinary measures imposed. I have previously recommended that the s. 57.1(1)(b) decision of a discipline authority be subject to the police complaint commissioner's discretion to order that it be reviewed in a discipline proceeding to be held before a chief or deputy chief constable of a different municipal police department. However, there remains for consideration the ss. 58(5) and 59(5) and (6) decisions of a discipline authority.

291. I agree with the BCCLA that some form of review of those decisions, short of the current public hearing process, is required. However, I am inclined to the view that it too should be a form of public process, with the role of the police complaint commissioner more properly confined to identifying those instances where such a process is required.

292. The public process I have in mind is one that would take place before an independent adjudicator. It would, in fact, be a review based on the record below, with the proviso that, in exceptional circumstances, the adjudicator could receive additional evidence. The parties entitled to appear at such a public review would be the police complaint commissioner, who through counsel has carriage of the review, and the respondent. Each party would be entitled to make submissions, with the police complaint commissioner bearing the onus of satisfying the adjudicator that the proposed complaint disposition below was wrong. The standard of review would be that of correctness.

293. The test governing the police complaint commissioner's decision to order what I shall refer to as a "public review," would be the existence of a reasonable basis to believe the decision as to either the nature of the conduct, or the proposed corrective and/or disciplinary measures, is wrong. However, he may also order a public review when he considers there are grounds to believe that such a hearing is necessary in the public interest. In other words, in all cases where a public hearing is either requested by a complainant or respondent, or for any reasons considered by him to be necessary in the public interest, the police complaint commissioner will have the option of choosing the form of public process he believes will be the most effective in all the circumstances.

294. Resort to this proposed public review would be available following both the proposed resolution of a public trust complaint at a prehearing conference under s. 58(5) and the proposed disposition of a public trust complaint, under either ss. 59(5) or (6) following a discipline proceeding.

295. In the case of a s. 58(5) resolution of a public trust complaint at a prehearing conference, which the police complaint commissioner considers to be wrong, the record available for a public review hearing would consist of the final investigation report, including any records, documents or information relevant to the complaint, as provided by the discipline authority to the police complaint commissioner, under s. 57(2) as amended pursuant to my recommendation, and the discipline authority's report under s. 58(5) of the

Act. In such a case, the conclusion of the adjudicator, following submissions from the parties, on both the nature of the conduct and the appropriate corrective and/or disciplinary measures that should be imposed, should be considered final. This result can be justified by the fact that the respondent, by agreeing at the prehearing conference to the disposition from which the review is taken, must be presumed to have accepted the content of the final investigation report as accurately reflecting both the nature of the conduct complained of and the circumstances in which it occurred.

296. In the case of a public review hearing following a discipline proceeding, the full record of the discipline hearing will be the basis upon which an adjudicator can reach a fair and reasonable conclusion whether the decision of the discipline authority in respect of both the conduct complained of and/or the corrective and/or disciplinary measures imposed were correct.

297. I have considered the current provisions of s. 60(3) of the *Act*, which impose a mandatory duty on the police complaint commissioner to order a public hearing in certain circumstances. Dealing first with s. 60(3)(a), we heard virtually unanimous opinion from everyone we interviewed that a respondent's automatic right to a public hearing, in the event of a proposed corrective and/or disciplinary measure more severe than a verbal reprimand, could not be justified. I agree. I note that s. 58(2)(a), which prohibits a prehearing conference in any case where the complaint against the respondent is sufficiently serious to warrant dismissal or a reduction in rank, is consistent with my recommendation as to the appropriate point on the proposed penalty scale where a respondent is entitled to substantial procedural protection at a discipline proceeding. In my view, a similar threshold would be appropriate for a respondent's automatic right to a public hearing. In respect of all other proposed corrective and/or disciplinary measures, of course, the respondent has an unencumbered right to request a public hearing.

298. A curious aspect of ss. 60(3) and (4) is the subtle distinction which is drawn between the situation where the police complaint commissioner determines, under s. 60(3)(b), that there are grounds to believe that a public hearing is necessary in the public interest, in which case he is bound to order a public hearing, and where he considers, under s. 60(4), that there are grounds to believe that public hearing is necessary in the public interest, in which case he has a discretion whether or not to order a public hearing. The police complaint commissioner is the guardian of the public interest, insofar as the complaint process is concerned. He is in the best position to determine when a public hearing is necessary. In my view he does not need statutory guidance in that respect other than that which flows from the public interest test which is dominant throughout Part IX. Thus, I am of the view s. 60(3)(b) be deleted.

299. From the way Part IX is presently structured, a proposed disposition of a public trust complaint, whether under s. 57.1(1)(b), s. 58(5) or ss. 59(5) and (6), does not become final until a decision is made by the police complaint commissioner not to arrange for a public hearing.[138] While both the complainant and respondent must request a public hearing within 30 days of certain triggering events, all of which are temporally close to the disposition of a public trust complaint,[139] there is no time limit on the police complaint commissioner's decision whether to respond to such a request by ordering a public hearing, and in particular, no time limit within which he must decide on his own motion whether to make such an order. Thus, both complainant and respondent can potentially be left in an indefinite state of uncertainty until such time as the police complaint commissioner's decision in that regard is made known.

[138] Supra note 1. See: ss. 57.1(4), 58(7) and 59.1(4), respectively.

[139] Ibid. See: s. 60(1).

300. During the interviews we conducted, this obvious lacuna in the *Act* was repeatedly drawn to our attention. In his draft Police Complaint Act,[140] the police complaint commissioner has recognized this deficiency. However, he suggests that his decision whether to order a public hearing be made within 90 business days of a request for one from either the complainant or the respondent and within 120 business days when acting on his own motion.

301. In my view these time limits are excessive, particularly when taking into account that a business day would not include either Saturday or Sunday. Under this proposal, both complainant and respondent could theoretically wait five-and-a-half months before the police complaint commissioner made a decision on his own motion to hold a public hearing, during which time both could be forgiven for believing that the matter had long since been finally concluded. I am of the view that it should be possible for the police complaint commissioner to make such a decision in much less time, particularly if the recommended integrated IPDMA system is adopted. Ordinarily, one would expect such a decision to be made within 30 days. But in deference to the police complaint commissioner's assessment of the current workload in his office, which is implicit in his suggested time limits, I would double that time period. In my view any decision to order either a public review or a public hearing, whether prompted by a request from either the complainant or the respondent, or made on his own motion, should be made by the police complaint commissioner within 60 days of the proposed disposition of a public trust complaint under ss. 57.1(1)(b), 58(5) and 59(5) or (6).

302. There are several other recommendations in the police complaint commissioner's draft Police Complaint Act which merit consideration. In s. 37(7), he proposes a power in his office to reopen a decision not to hold a public hearing if he is satisfied that new or additional information has emerged which warrants holding such a hearing. In s. 37(10) he suggests that the police complaint commissioner should provide written reasons for refusing a public hearing. In s. 37(11) he proposes that the police complaint commissioner should be able, at any time, to cancel a public hearing he has ordered on his own motion, under present ss. 60(3)(b), 60(4) or 60(7). In ss. 37(12), (13) and (14), he proposes that the police complaint commissioner cancel a public hearing which was either mandated by what is presently s. 60(3)(a,) or ordered as a result of a request by a respondent, if the respondent so requests, in which event the respondent shall be deemed to have accepted the discipline proposed by the discipline authority. All these with the exception of the reference to s. 60(3)(b) which I have suggested be deleted, are sensible suggestions with which I agree.

303. Turning to the present s. 60.1, under the heading Ordering Public Hearing, the current process for appointing an adjudicator must be changed in order to ensure that the adjudicator appointed not only is, but is perceived to be, independent of any influence emanating from the office of the police complaint commissioner. As a result of, and since, the decision in *Doern v. Police Complaint Commissioner*, (2001) 203 D.L.R. (4th) 295 (B.C.C.A.), the practice that has been followed is for the police complaint commissioner to request that the Associate Chief Justice of the British Columbia Supreme Court appoint a retired judge from one of the Courts listed in s. 60.1(2). That process has worked reasonably well and s. 60.1(2) should be amended accordingly.

304. If my recommendation for the addition of the proposed public review is implemented, I would expect there would be an increase in the demand for suitable adjudicators. In discussions with the Associate Chief Justice of the British Columbia Supreme Court, he expressed a concern that, if there was a

[140] Supra note 10. See: s.37(6).

significant increase in the number of adjudicators needed, the current pool of retired judges willing to accept such an appointment may not be sufficient to meet the demand.

305. With that in mind, I met with the Chief Judge of the Provincial Court to discuss the possibility of reviving the proposal advanced, when Part IX was first introduced, namely that current active judges of that Court be appointed as adjudicators. The Chief Judge advanced concerns of a constitutional nature with the prospect of judges of the Provincial Court presiding over administrative tribunals created by the Executive Branch, but expressed a strong desire to work with the Attorney General to explore ways in which his judges might be able to undertake such tasks as part of an initiative to create a more expedited process for determining civil complaints than presently exists under the *Small Claims Act* and *Rules*.[141] In light of that discussion I would not recommend that judges of the Provincial Court be included as potential adjudicators in s. 60.1. However, I would urge the Attorney General to explore the possibilities suggested by the Chief Judge, as the benefits to be derived from having judges of that Court available, or even assigned full responsibility, for such adjudications seems obvious.

306. In his draft Police Complaint Act, the police complaint commissioner suggests that what is presently s. 60.1 be amended to provide that if an adjudicator who has been appointed is, for any reason, unable to continue to preside over a public hearing, a new adjudicator shall be appointed to continue with the hearing and may do so after reviewing a transcript of the evidence given to that point in time unless he or she determines that it is necessary to rehear some or all of such evidence.[142] This is a sensible proposal with which I agree.

307. With respect to the public hearing process, the police complaint commissioner has made a number of suggestions for amendment to the present procedures described in s. 61. Most have to do with the role of his counsel, the respondent and the complainant, matters which are touched upon but briefly in s. 61.

308. Rather than review those recommendations in detail, I propose to set out what I see as the proper scope of the role for each of those parties in a s. 60 public hearing. I have already described the respective roles of the respondent and counsel representing the police complaint commissioner in a public review. Turning to the public hearing, both the police complaint commissioner, through counsel, and the respondent, either in person or through counsel or an agent, must have the ability to present their respective cases in full. That necessarily involves the right to call witnesses, to introduce evidence, to cross-examine the witnesses presented by the party opposing and to make full submissions at the conclusion of the evidence. There can be no reasons to curtail any of these procedural rights simply because the hearing is properly characterized as administrative rather than penal.

309. The prevailing opinion is that the adjudicator is in the best position to know whether there are compelling reasons to permit the complainant some greater degree of participation in such a hearing than is presently provided for in ss. 61(4)(b) and (c). Accordingly, s. 61 should be amended to provide the adjudicator with the discretion, on application, to permit the complainant such level of participation in the hearing process as he or she thinks is necessary in order to ensure that the public hearing can achieve a proper result.

310. In s. 39(10) of his draft Police Complaint Act, the police complaint commissioner proposes that the adjudicator have the power to grant intervener status to any person who he or she is satisfied has a

[141] *Small Claims Act*, R.S.B.C. 1996, c. 430 and amendments thereto; and *Court Rules Act and Small Claims Act, Small Clams Rules*, B.C. Reg 261/93.

[142] Supra note 10. See: ss. 38(5) and (6).

"legitimate interest" in the hearing and can make a valuable contribution to its outcome, such intervener to have the ability only to make submissions following the evidentiary portion of the hearing. In my view, any person who the police complaint commissioner's counsel believes can make such a valuable contribution to the outcome of the hearing can either be called as a witness or provide counsel with their input in such a way that counsel can put their views before the adjudicator during the course of submissions. There is no need to encumber the public hearing process with yet another procedural layer, which is only likely to result in longer, more protracted hearings.

311. Apart from those and such general provisions as are already provided for in s. 61, I am of the view that the adjudicator should have full discretion to conduct the public hearing, making whatever procedural and evidentiary decisions as appear to be reasonable and necessary for the attainment of a just result. I recommend that such a provision be included in s. 61 in language that is sufficiently broad and all-encompassing, such that there can be no doubt about the adjudicator's authority to control the public hearing process so that its object can properly be achieved. Such a provision would obviate the need to include in s. 61 a plethora of specific powers which, by their very inclusion, would reinforce an argument that the adjudicator's powers are limited to those listed.

312. In s. 39(3) of his draft Police Complaint Act, the police complaint commissioner has included a provision that would enable him, or his counsel, to undertake such inquiries or investigations as are considered necessary to present the case to the adjudicator. If the recommended power of the police complaint commissioner to contemporaneously oversee an investigation into a public trust complaint, together with the authority to give advice and, if necessary, direction with respect to the conduct of that investigation is implemented, no such investigative power should be required. Prior to embarking upon a public hearing, there is nothing to prevent counsel for the police complaint commissioner from engaging in the normal preparatory steps, such as interviewing witnesses and otherwise marshalling the evidence, but where counsel considers that further or better evidence is required in connection with some part of the case to be presented to the adjudicator, the proper course is to require that further investigative steps be undertaken, either by the investigating officer who conducted the original investigation or, if necessary, by an investigator from another municipal department or the provincial police force.

313. In ss. 39(11) and (12) of his draft Police Complaint Act, the police complaint commissioner proposes powers that would enable an adjudicator to order a publication ban, that some or all of a public hearing be held in camera, and that all or part of the evidence of any witness or other evidence be received in confidence to the exclusion of one or more of the parties to the hearing. If the recommended provision giving the adjudicator full discretion with respect to the conduct of a public hearing is implemented, these powers do not need to be specifically set forth in s. 61. The same is true with respect to the balance of the proposed changes to the present s. 61, as described in s. 39 of the police complaint commissioner's draft Police Complaint Act.

314. However, I do agree with and support the underlying rationale for the proposal in s. 39(17) of the police complaint commissioner's draft Police Complaint Act to the effect that the cost of a public hearing incurred by his office be paid out of the consolidated revenue fund. To be effective, the process of civilian oversight must be properly funded. A number of the recommendations I have made, if implemented, will add to the number of public hearings. It is impossible to provide for the contingency of such hearings when preparing an annual budget, as there is no way of knowing how many such hearings may be ordered in the course of the forthcoming fiscal year. I agree with the police complaint commissioner when he asserts that his discretion to order a public hearing, or a public review if that recommended

form of public hearing is implemented, should never be fettered or compromised by a lack of funds. However, neither would I propose to interfere with the Minister of Finance's discretion with respect to the consolidated revenue fund. Thus, I would recommend that funding for public reviews and public hearings not form part of the annual budget of the office of the police complaint commissioner, but be provided for separately, leaving it to the Legislature to decide how best that funding should be arranged.

315. In s. 39.1 of the police complaint commissioner's draft Police Complaint Act, he proposes that an adjudicator have the power, on application of his counsel, the respondent or on his own motion, to order an assessment of the mental or physical condition of a respondent and to conduct what is described as a fitness hearing. No explanation is offered to support the need for such a specific power and during the course of our review we did not become aware that issues regarding the mental fitness of a respondent had ever arisen such as to require specific mention in the statute. Again, if the adjudicator is given full discretionary powers, with respect to the conduct of a public hearing, while such discretion may not include the power to require the respondent to submit to a medical assessment, it would most certainly include the power, indeed the obligation, to enquire into the fitness of the respondent and make any orders with respect to the continuation of a public hearing as would appear necessary in the circumstances.

316. In summary, with respect to present ss. 60, 60.1 and 61 I recommend that:

(a) Part IX of the *Act* be amended to provide for a public review of a decision made pursuant to ss. 58(5) and 59(5) and (6), as an alternative to a public hearing under s. 60.

(b) The police complaint commissioner have the discretion, on receipt of an application made pursuant to ss. 58(6) and 59.1(3), or on his own motion, to order a public review rather than a public hearing.

(c) The police complaint commissioner may order a public review if he considers either that there is a reasonable basis to believe the disposition of a public trust complaint by a discipline authority, including the imposition of corrective and/or disciplinary measures, if any, is wrong, or if he considers that there are grounds to believe such a review is necessary in the public interest.

(d) The public review shall be presided over by an adjudicator appointed under s. 60.1(2) of the *Act*, and shall be confined to the record upon which the discipline authority made the decision(s) being reviewed, including any records, documents or information provided by the discipline authority to the police complaint commissioner under s. 57(2), subject to the power of the adjudicator in exceptional circumstances to admit additional evidence.

(e) The police complaint commissioner, or his counsel, and the respondent, either in person or through counsel or an agent, shall have standing to appear at a public review and make submissions based upon the record which is before the adjudicator.

(f) The standard of review at a public review is that of correctness and at the conclusion of the review the adjudicator shall

(i) confirm the decision(s) of the discipline authority, or

(ii) substitute his own decision(s) for any decision(s) of the discipline authority which he believes to be wrong.

(g) In the case of a public review of a decision of a discipline authority under ss. 58(5) or 59(5) and (6), the decision of the adjudicator shall be final and conclusive and not open to question or review by a Court on any ground.

(h) Section 60(3)(a) be amended to provide that the police complaint commissioner must arrange either a public review or a public hearing if the request for a public hearing is made by a respondent with respect to whom a disciplinary measure of reduction in rank or dismissal has been proposed.

(i) Section 60(3)(b) be deleted.

(j) The police complaint commissioner shall be required to make a decision on his own motion whether to order a public review or a public hearing within 60 days of receiving a notice under s. 58(5)(a) or the date upon which he either receives notice under s. 59.1(6) or he receives further reasons from the discipline authority under s. 59.1(2)(a), or within 60 days of receiving a request for a public hearing under ss. 58(6) or 59.1(3).

(k) The police complaint commissioner may at any time reopen a decision by him not to order a public review or a public hearing if new or additional information becomes available which, in his opinion, requires such decision to be reconsidered.

(l) The police complaint commissioner must provide written reasons for refusing a request for a public review or public hearing.

(m) The police complaint commissioner may at any time cancel an order for a public review or public hearing which he has made on his own motion.

(n) The police complaint commissioner may, in his discretion, cancel a public review or public hearing ordered at the request of a respondent, if the respondent so requests, in which event the decision of the discipline authority from which the order for the public review or public hearing was made shall become final and conclusive and shall not be open to question or review by a Court on any ground.

(o) Section 60.1(2) be amended to provide that if the police complaint commissioner orders a public review or public hearing he shall request the Associate Chief Justice of the British Columbia Supreme Court to appoint a retired judge of the Provincial Court, the British Columbia Supreme Court or the Court of Appeal to preside as adjudicator at the public review or public hearing.

(p) Section 60.1 be amended to provide that, if an adjudicator appointed under ss. (2) is unable for any reason to continue or complete a public review or public hearing, the police complaint commissioner shall request the Associate Chief Justice of the British Columbia Supreme Court to appoint a new adjudicator who shall continue with the public review or the public hearing, as the case may be, after either reviewing a transcript of the previous proceedings or rehearing part or all of the previous proceedings.

(q) Sections 61(3) and (4) be amended to reflect that:

  (i) both the police complaint commissioner, through counsel, and the respondent, either in person or through counsel or an agent, shall have the right to present their respective cases in full, including without limitation, the right to call and cross-examine witnesses, introduce evidence, and make full submissions at the conclusion of the evidence; and

  (ii) upon application by or on behalf of the complainant, the adjudicator may make such order as to the further participation of the complainant in the public hearing as in his or her opinion it is necessary to ascertain the truth.

(r) Section 61 be amended to provide that an adjudicator who presides over a public hearing shall have full discretion to conduct such hearing in whatever manner he or she thinks is necessary to achieve a just result and to make whatever procedural and evidentiary decisions at such a hearing as are necessary to ensure that such result is achieved.

(s) The cost of public hearings, including the cost of the police complaint commissioner's counsel retained for the purpose of such a hearing, shall not form part of the annual budget of the office of the police complaint commissioner but shall be provided for in a separate fund to be established by the Legislature.

M. COMPELLABILITY

317. I have previously dealt with the compellability of a respondent both to provide a statement and to submit to an interview when called upon to do so by an investigating officer. In the circumstances I see no need to make the respondent compellable at either a discipline hearing or a public hearing. Thus, as I have indicated, I would not endorse the police complaint commissioner's proposals in ss. 40(1), (2) and (3) of his draft Police Complaint Act. Section 61.1(3) of the *Act*, as presently drafted, would, in fact, support the compellability of the respondent at a public hearing. Accordingly, I recommend that s. 61.1(3) be amended so as to ensure that it does not include a respondent at either a discipline proceeding or a public hearing into a public trust complaint.

VII. DIVISION 5 – SERVICE OR POLICY COMPLAINTS

A. SERVICE OR POLICY COMPLAINTS

318. As noted by the police complaint commissioner in his White Paper, and reflected in s. 42(4) of his draft Police Complaint Act, the Special Committee of the Legislature recommended an amendment to s. 63 of the *Act* which would prohibit a police officer from making a service or policy complaint where the subject matter of the complaint is grievable under his or her collective agreement.[143] That proposal, which was endorsed in submissions made before the Special Committee of the Legislature by both the BCAMCP and the Vancouver Police Board, is non-contentious and I would recommend such an amendment to s. 63 of the *Act*.

B. INVESTIGATION OF SERVICE OR POLICY COMPLAINTS

319. The police complaint commissioner also recommends, in ss. 43(6), (7) and (8) of his draft Police Complaint Act, that time limits be placed both on the right of a complainant to request that he review the decision of a police board under s. 63.1(5), and on the duty of the police complaint commissioner to complete such a review, irrespective of whether the review was initiated as a result of a request from the complainant. I agree that time limits are needed in both cases and I agree also with the suggested time limits within which a complainant must request such a review, although I would make that 30 days rather than 30 business days. However, as I have previously noted, a proposed time limit of 120 business days for the completion of any review by the police complaint commissioner is simply too long. I recommend that the police complaint commissioner be required to complete a review of a police board's decision under s. 63.1(5) of the *Act*, whether that review was requested by a complainant or undertaken on his own motion, within 60 days from the date that decision was received in the office of the police complaint commissioner.

[143] Supra note 4, p. 15. See also Special Committee recommendation 17.

VIII. DIVISION 6 – INTERNAL DISCIPLINE COMPLAINTS

A. INTERNAL DISCIPLINE COMPLAINTS

320. During the course of our interviews, we heard a great deal about s. 64(5) of the *Act*, a section that must be read carefully to be understood. As it provides for the circumstances in which a public trust default would be processed under Division 6 rather than Division 4 of Part IX, it is the apparent explanation for paragraph (b) of the definition of an internal discipline complaint in s. 46(1) of the *Act*, although the latter refers to a public trust "complaint" rather than a "discipline default." As noted, I have recommended that the definition of an internal discipline complaint be amended to delete both paragraphs (a) and (b).

321. From a review of the proceedings before the Special Committee of the Legislature,[144] and from the comments expressed by various stakeholders interviewed during our review, it is apparent that a tension exists between the position of the unions and that of senior management of the police departments on the issue of whether, and if so when, a public trust default should be processed as an internal complaint. Union representatives, both past and present, tend to the view that any complaint concerning the conduct of a municipal constable, which meets the definition of a public trust default, should be characterized as such and processed under Division 4, irrespective of whether the complaint originates from a member of the public or any member of the public is affected by the conduct in question. Senior management, on the other hand, understandably wants the ability to deal internally with matters of discipline which do not involve or affect any member of the public, in accordance with the practices and procedures provided for under their respective collective bargaining agreements, notwithstanding that the conduct in question may fall within the current definition of a public trust default.

322. In his White Paper, the police complaint commissioner has addressed this debate by suggesting there should be a presumption that complaints regarding conduct "meeting the definition of public trust" be subject to processing under Division 4 of the *Act* unless the police complaint commissioner orders otherwise. Under this proposal, the decision to process a public trust complaint under Division 6

[144] See: Vancouver Police Union, B.C. Federation of Police Officers and Vancouver Police Officers' Association, supra note 88, pp. 14-26; Contra: British Columbia, Legislative Assembly. Hansard. (January 21, 2002). "Special Committee to Review the Police Complaint Process," pp. 149-50 per Dr. John Hogarth.

would depend upon the discipline authority discharging the onus of persuading the police complaint commissioner that the public trust process was not appropriate in any particular circumstances.[145]

323. The police complaint commissioner's proposal is a response to strong submissions made by those representing what I have characterized as the union position on this issue. Equally strong submissions have been made by police management whose viewpoint is that the maintenance of good discipline and efficient police services requires that chief constables have the ability, through an internal discipline process based upon "normal labour law principles", to deal with conduct matters in which the public is not involved.[146] The debate between these two points of view has tended to focus, at least from the union perspective, on ambiguities surrounding the definitions of both an internal discipline complaint and a public trust default found in s. 46(1). As noted, I recommend that these definitions be amended. However, in addition to problems stemming from the actual definitions in s. 46(1), there is the underlying policy decision, reflected in paragraph (b) of the current definition of an internal discipline complaint, that in certain circumstances what is properly defined as a pubic trust complaint may be processed under Division 6. Those who hold the union viewpoint see this as undermining the integrity of the "three stream model" reflected by Divisions 4, 5 and 6 of the present *Act*.[147]

324. I am not persuaded that the provisions of s. 64(5), under which a public trust default may be processed as an internal complaint, undermine anything more than an overly rigid and simplistic theoretical model of the three types of complaints described in Part IX and the different "streams" under which they are processed. Subject to the implementation of the recommendations regarding the manner in which written and oral complaints should be handled, as well as the recommendations implementing the police complaint commissioner's power of contemporaneous oversight of both lodged and non-lodged complaints, there is nothing earth shattering about the notion of a public trust default being processed under Division 6 if, in fact, a complaint about the conduct in question is never formally lodged (s. 64(5)(b)(ii)). Neither is there anything untoward about a public trust complaint, which has been properly withdrawn by the complainant, being processed under Division 6 (s. 64(5)(b)(iii)). In both these circumstances, the member of the public who was directly affected by the conduct complained of, for whatever reasons, no longer has any interest in pursuing the matter. In essence, there is no longer a public trust "complaint", although there may still be an outstanding allegation of a public trust default which the discipline authority may feel merits investigation.

325. Assuming that the recommended increased oversight powers of the police complaint commissioner are implemented, and the police complaint commissioner has no reason either to order an investigation or, if an investigation has already been completed, to order a public review or a public hearing, in either case there may still be a legitimate basis upon which management will want to review the conduct of the officer(s) in question. I can see no reason why management should be deprived of the ability to do so, nor any reasons why the consent of the police complaint commissioner should be a prerequisite to such an internal review. Thus, I would not recommend that s. 65(4) either be eliminated or, as the police complaint commissioner suggests in his draft Police Complaint Act,[148] reduced to describing a discretion vested in his office to be exercised upon application of the discipline authority.

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[145] Supra note 9, p. 9.

[146] BCAMCP, supra note 8, pp. 6-7.

[147] British Columbia, Legislative Assembly. Hansard. (December 17, 2001). "Special Committee to Review the Police Complaint Process." pp. 108-109, per Insp. John de Haas.

[148] Supra note 10. See: s 44(8).

326. That said, it is apparent that the present s. 64(5) suffers from some inherent ambiguity. As well, if my recommendations with respect to the definition of "internal discipline complaint" and "public trust default" are implemented, certain consequential amendments to s. 64(5) will be necessary. To begin with, it should be clear that s. 64(5) is intended to deal with the unusual circumstance in which a public trust complaint has essentially been abandoned and can thus be dealt with as an internal discipline complaint. Accordingly, what is referred to as a "disciplinary default" in the third line of the opening phrases of s. 64(5) should properly be amended to read "public trust default." In addition, s. 64(5)(b)(i) should be deleted as irrelevant. If the *Act* or omission would not, if proved, constitute a public trust default, it must be either an internal disciplinary matter or conduct which does not fall under the auspices of Part IX of the *Act*. In either event, it is unnecessary to make reference to it in s. 64(5).

327. In the course of interviews it was suggested that if there is to be a presumptive characterization of all complaints as public trust complaints, subject to recharacterization on application by a discipline authority or by the police complaint commissioner on his own motion, s. 65(7) would become unnecessary. In order for this subsection to have any meaning, in the event that my recommendation with respect to presumptive characterization is accepted, it could only have application in circumstances where, after being persuaded by the discipline authority to recharacterize a complaint as an internal discipline complaint, either new or previously undisclosed information emerges indicating that a member of the public was directly or indirectly affected by the conduct in question. In such circumstances, the police complaint commissioner already has the authority, under s. 55(3), to order an investigation following which, under s. 60(4), he also has the authority, if necessary, to order a public hearing. Thus, I agree with the suggestion that s. 65(7) is redundant and would recommend that it be eliminated.

IX. DIVISION 7 - GENERAL

A. CRIMINAL PROSECUTION AND CIVIL REMEDIES NOT PROHIBITED

328. In s. 46(3) of his draft Police Complaint Act, the police complaint commissioner suggests that s. 65(3) of the *Act* be amended to clarify that a conviction of a respondent for an offence arising out of the same facts and circumstances giving rise to a complaint does not operate to prevent that complaint from being processed under Part IX. While we heard of no instance in which a problem has arisen because of this apparent oversight in the *Act*, it is best to head off such problems before they arise. I recommend that s. 65(3) be amended accordingly.

329. Section 65(4) presently authorizes the suspension of proceedings under Part IX of the *Act* until the conclusion of criminal proceedings brought against a respondent or complainant. The police complaint commissioner has also suggested, in s. 46(4) of his draft Police Complaint Act, that s. 65(4) be amended to expand the power to suspend proceedings under Part IX of the *Act* "for any reason related to the ... potential commencement" of criminal proceedings in which a respondent officer may be involved as an accused or a witness. Currently, s. 65(4) authorizes the suspension of proceedings under Part IX only in circumstances where criminal proceedings have actually been commenced. As became evident during the investigative audit, and was made clear during our interviews, the police complaint commissioner has interpreted the words "criminal proceedings" in s. 65(4) to include the circumstance whenever an investigative file has been forwarded to Crown counsel for consideration or approval of charges.

330. This is a difficult subject. Some of the discipline authorities we interviewed were of the view that suspensions are ordered too often and seem almost automatic in any case where there is a suggestion of criminal proceedings against either the respondent or the complainant. Any time the investigation into a public trust complaint is suspended pending the outcome of criminal proceedings which can take years to unfold, a process that some feel already takes far too long will necessarily take very much longer to conclude.

331. On the other hand, there will obviously be cases in which prejudice will result to either the respondent or the complainant if the Part IX complaint process is not stayed pending the conclusion of criminal proceedings. As well, there could be circumstances in which prejudice would result to an ongoing criminal investigation if a simultaneous complaint investigation were to be conducted. In such circumstances the police complaint commissioner must obviously have the authority to order a stay.

332. In the joint submission of the Vancouver Police Union, the British Columbia Federation of Police Officers and the Vancouver Police Officers' Association to the Special Committee of the Legislature on December 17, 2001, it was recommended that s. 65(4) be amended to clarify that a suspension shall not occur unless an information has been laid against the respondent or complainant charging either one with a criminal offence in relation to the matter that led to the *Police Act* complaint. The argument offered in support of this recommendation, as might be expected, was that long and protracted *Police Act* processes are prejudicial for both the respondent and the complainant. The joint submission also recommended that both the respondent and the complainant be notified in the event that the police complaint commissioner decides that a suspension is necessary and that each be given an opportunity to make submissions in writing regarding their concerns and to request the police complaint commissioner instead to order the investigation to continue.[149] This last recommendation parallels the content of an undated Guideline on Suspension of Proceedings issued by the officer of the Police Complaint Commission.[150]

333. In my view, the key to exercising the discretion to stay proceedings under Part IX lies in a careful assessment of what, if any, prejudice could result either to an ongoing criminal investigation or to either party if the complaint process proceeds in the face of criminal proceedings that have actually been commenced. Accordingly, I recommend that s. 65(4) be amended to provide that the authority to suspend proceedings under Part IX rests with the police complaint commissioner who has the discretion to order such a suspension when satisfied that prejudice would result either to an ongoing criminal investigation or to either party if the complaint proceedings under Part IX were to continue in the face of an outstanding criminal charge against either arising from the same circumstances giving rise to the complaint. I agree with the police complaint commissioner's suggestion in s. 46 of his draft Police Complaint Act, and recommend, that both the respondent and the complainant be notified when he intends to order a suspension of the Part IX process. I also recommend, as suggested by the joint submission of the unions, that both parties at the same time be given an opportunity to provide the police complaint commissioner with written submissions as to why they feel such a suspension ought, or ought not, to be ordered. In order to implement this recommendation, the notice issued by the police complaint commissioner should give the parties 14 days in which to provide such submissions.

B. COMPLAINTS MADE IN CONFIDENCE

334. Section 65.1(6) was the subject of concerns expressed by those who feel strongly that public trust complaints should, at all times, be processed under Division 4 of Part IX. In s. 48(6) of his draft Police Complaint Act, the police complaint commissioner has suggested that a public trust complaint, made in confidence, must be processed under Division 4 unless he orders otherwise.

335. The rationale for the requirement that a confidential complaint not be processed under Divisions 4 or 5, of course, is the preservation of the confidentiality of the complainant. There may well be circumstances in which such confidentiality can only be achieved if the complaint is processed internally. However, in those cases where a public trust complaint can be investigated and processed without revealing the identity of the complainant, or that identity has already been revealed, it obviously should be processed under Division 4 of Part IX.

[149] Supra note 82, pp. 54-55.

[150] Supra note 17.

336. Thus, there clearly needs to be a discretion vested in the police complaint commissioner to decide under which division of Part IX a confidential complaint should be processed. It seems to me that the chances of preserving the confidentiality of the complainant are greater if the complaint is processed under Division 6. Thus, I would recommend that s. 65.1(6) be amended to provide that unless the police complaint commissioner orders otherwise, the allegations constituting a report made in confidence must not be processed under Division 4 or 5.

C. HARASSMENT PROHIBITED

337. In its submissions before the Special Committee of the Legislature, the BCCLA recommended that the declaration against harassment, in s. 65.2 of the *Act* be supported by making harassment a separate disciplinary default in the *Code of Professional Conduct*.[151] In s. 49(2) of his draft Police Complaint Act, the police complaint commissioner proposes an offence, punishable by a fine of up to $50,000, for anyone found guilty of breaching the express prohibition in s. 65.2.

338. It must be noted that while the interviews and the investigative audit revealed instances in which a complainant was either discouraged from making, or persuaded to withdraw, a complaint, the review did not produce any evidence of a complainant being harassed, intimidated or retaliated against for making a complaint. That said, s. 10 of the *Code of Professional Conduct Regulation*[152] makes it an "Abuse of Authority" to harass, intimidate or retaliate against anyone who, *inter alia*, submits a complaint under Part IX. I am satisfied that the range of disciplinary measures under s. 19 of the *Code* are sufficient to deal with any such incident, should it ever occur.

D. SERVICE RECORD OF DISCIPLINE

339. I have previously recommended that s. 65.3(1) be amended to reflect that the service record of discipline not contain reference to any complaint that was informally resolved, without any subsequent corrective or disciplinary measure being imposed, or to any complaint that was finally concluded as either summarily dismissed or unsubstantiated and that s. 65.3 be further amended by adding a subsection that provides for disclosure of a municipal police officer's service record of discipline upon request of a chief constable of any police service to which that officer has made an application for employment.

340. During the interviews we conducted we heard many suggestions regarding expungement of discipline records. The Special Committee of the Legislature also heard many submissions urging the return of an expungement formula such as previously existed in the *Police Act* prior to the 1997 amendments. In particular, the joint submission of the Vancouver Police Union, the BC Federation of Police Officers and the Vancouver Police Officers' Association, presented a persuasive argument to the effect that police officers are less likely to acknowledge or admit making a mistake and accepting minor discipline if they know the record of such a default will have a negative impact on the balance of their career.[153]

341. The Delta Police Department, in a submission prepared specifically for this review, suggests that expungement should not be automatic but rather involve a legitimate review process which would

[151] Supra note 77, p. 6.

[152] Supra note 27.

[153] Supra note 82, p. 127.

be provoked by an application to expunge that could only be made after a pre-determined clearing period.[154]

342. The BCAMCP, in its January 2002 submission to the Special Committee of the Legislature, suggested a scheduled automatic expungement of discipline records based on the severity of the discipline default.[155]

343. I am persuaded by these submissions that there should be a process by which a municipal police officer's record of discipline for a disciplinary default can be expunged after a period of time (the "expungement clearing period") that is commensurate with the severity of the default in question. However, I am of the view that if any additional discipline default were to occur during an expungement clearing period, a new expungement clearing period should be started as of the date the corrective and/or disciplinary measures were imposed in connection with the subsequent discipline default.

344. With respect to whether expungement should be automatic, or subject to a successful application to the chief constable, after the expiration of the expungement clearing period, I favour the view that it should be automatic. With the proviso that a new expungement clearing period must be started, in the event of an intervening disciplinary default, and that such periods be of an appropriate length, I think there is no need to frustrate the expectation of obtaining a clean record, on the part of an officer who has successfully completed the expungement clearing period, by interposing a discretion in the chief constable to deny that relief. Accordingly, I recommend that s. 65.3 of the *Act* be amended by adding a subsection that provides for the automatic expungement of the record of a discipline default from a municipal police officer's service record of discipline, following the expiration of the expungement clearing period provided for. The expungement clearing period for any discipline default for which a disciplinary measure consisting of a written reprimand or less was imposed should be two years. The expungement clearing period for a discipline default for which a disciplinary measure greater than a written reprimand up to and including a direction to work under close supervision should be three years. The expungement clearing period for a discipline default for which a disciplinary measure greater than a direction to work under close supervision, but less than dismissal, was imposed should be five years. There should be no expungement of a record of dismissal. Additionally, I recommend that in the event a municipal police officer commits a further discipline default during an expungement period, that period shall commence to run again from the date upon which disciplinary and/or corrective measures were imposed.

[154] Supra note 60, pp. 8-9.

[155] Supra note 71, pp. 4-5.

X. CODE OF PROFESSIONAL CONDUCT REGULATION

345. The interviews we conducted, together with the audit results, revealed that several amendments should be made to this regulation.

346. From several sources we heard that the heading "Deceit" for s. 7 was offensive given that paragraph (a) thereof is cast in wide enough terms to include an unintentional inaccuracy in an oral or written statement, or an entry in an official document or record. In light of s. 17, which provides that, unless otherwise specified, the mental element required for proof of all disciplinary defaults is that of an intentional or reckless act or omission, this should not pose a serious problem. However, it appears that, from the way it is currently drafted, s. 7(a) has the capacity to confuse the general intent to make an oral or written statement, or an entry in an official document or record, with the specific intent to mislead by including therein false or inaccurate information. Accordingly, I recommend that s. 7 of the *Regulation* be amended by adding the word "intentionally" immediately after the word "officer" in paragraph (a). In the case of an officer who unintentionally makes an inaccurate statement or entry, which then becomes the object of a complaint under Part IX, the appropriate discipline default to be alleged against the respondent would be that described in s. 6 of the *Regulation*, namely, Neglect of Duty by, without lawful excuse, failing to diligently perform his or her duties as a police officer.

347. A frequent comment by discipline authorities and professional standards officers we interviewed was that the gap from suspension without pay for not more than five scheduled working days to reduction in rank or dismissal was too great and does not provide sufficient flexibility to impose appropriate disciplinary measures in some cases. An example offered was the recent case involving several Vancouver police constables who were given consecutive five day suspensions without pay in respect of several substantiated discipline defaults, notwithstanding that no apparent authority exists in s. 19 to impose consecutive disciplinary or corrective measures.

348. In my view, the authority to impose both multiple and consecutive disciplinary or corrective measures is implicit in s. 19. Thus, for example, an officer who is found to have committed more than one discipline default can quite properly receive a suspension without pay on each, the cumulative total of which could properly exceed five scheduled working days. Similarly, an officer who is found to have committed only one discipline default, which evidences a need for both corrective and disciplinary measures, could, for example, be required to undergo counselling or training in addition to any disciplinary measure imposed. That said, I accept the unanimous view point expressed by those who spoke to us on the matter, that s. 19(1)(d) should be amended to provide for suspension without pay for up to, but not more than, 30 scheduled working days, and I so recommend.

349. As noted, the audit revealed a significant number of instances in which a substantiated complaint resulted in a recorded disposition of "managerial advice" or "advice as to future conduct." While this disposition is not provided for in the *Regulation*, no adverse comment by the office of the police complaint commissioner was noted. The explanation for this form of what was seen to be a corrective rather than a disciplinary disposition, was that in many circumstances a verbal reprimand, which has little if any corrective quality, was considered too harsh a disposition.

350. Sections 19(2) and (3) emphasize a corrective rather than a disciplinary approach in the ultimate disposition of a substantiated complaint, subject only to the need to maintain both the integrity of police discipline within the police department itself and public confidence in the complaint process. Thus, it seems to me that the low end of the so-called discipline or corrective scale should provide for a corrective measure that is a suitable disposition for the least serious discipline defaults. The scale, as set forth in s. 19(1) does not currently provide for such a measure. Accordingly, I recommend that s. 19(1) of the *Regulation* be amended to add, as paragraph (j), the corrective measure of "advice as to future conduct", a descriptive definition which, in my view, is preferable to "managerial advice" which has little, if any, meaning.

XI. CONCLUSION

351. When Chief Constable Battershill, of the Victoria City Police Department, appeared before the Special Committee of the Legislature, on May 8, 2002, he said, in part:

> It is going to take some time for civilian oversight to develop in this province. Police are starting to accept a model with civilian oversight and I think we have come a long way in the past three years.[156]

352. The results of this review demonstrate that there is still some distance to go before one-quarter of the population in British Columbia can be fully confident that all complaints against their municipal police officers will be thoroughly investigated and processed to a proper conclusion. But the results also demonstrate that the complaint process and oversight model that was adopted in this province, when Part IX was implemented in 1998, has the potential to produce that level of confidence. What is needed to achieve it, is the complete acceptance of the concept of civilian oversight by municipal police officers of all ranks, and greater more effective powers of oversight vested in the office of the police complaint commissioner. With one caveat, it is my belief that the additional oversight powers which I have recommended, if fully implemented and exercised, will be sufficient to ensure that all complaints against municipal police officers are fully and properly processed. The caveat is that, without full acceptance by the police of the legitimacy of the concept itself, no amount of civilian oversight will suffice to produce the desired result. If, as Chief Constable Battershill stated in 2002, the police were then starting to accept civilian oversight, it must now be said some four years later that there is no justification for any further delay in that acceptance.

353. Acceptance of civilian oversight by the police is not something that can be legislated. But what can be legislated is an entirely different model for processing complaints against the police, one that removes that process in its entirety from their control, placing the responsibility for investigation in the hands of a completely independent investigative force and the responsibility for adjudicating the results of those investigations, and imposing discipline, in the hands of an independent civilian agency. While there is a strong argument to be made, that the processing of complaints against the police is an essential element of the entire discipline structure which is so essential to the day-to-day operation of an effective police service, and that as such the complaint process should therefore remain the responsibility of police management, that argument can prevail only so long as there exists a demonstrated willingness on the part of such management, and all who serve below, to fully accept the authority of civilian oversight. With that in mind and, if the recommendations contained in this report are implemented, I recommend

[156] British Columbia, Legislative Assembly. Hansard. (May 8, 2002) "Special Committee to Review the Police Complaint Process." p. 416.

that a further audit of a random sample of closed complaint files, similar to that which was conducted as part of this review, be undertaken three years following the date of such implementation, with a view to determining whether the Part IX complaint process and civilian oversight model should be retained in this province.