Criminal and disciplinary interviews – can they do both?

By Tony Hargreaves, the Principal of Tony Hargreaves & Partners, the preferred solicitors of The Police Association

It is standard advice to Police Officers that before they attend the Ethical Standards Department for an interview, they need to ascertain whether they are going to be treated as a witness, a suspect for a criminal offence, or alternatively whether they will receive a direction pursuant to Section 86Q of the Police Regulation Act 1958 ("the Act") to answer questions in a disciplinary interview.

In my opinion, once the Ethical Standards Department commences an investigation into a member and conducts a record of interview where the provisions of Section 464 of the *Crimes Act 1958* are administered, a Section 86Q interview cannot be conducted until either all criminal charges against a member have been concluded, or alternatively, a decision is made by the Victoria Police Force that the member is not to be charged with any criminal offences.

Historically, the Ethical Standards Department has not sought to use the powers conferred upon it by Section 86Q of the Act once a criminal interview has been conducted. Recent events demonstrate that there may have been a change in policy.

Section 86Q(1) specifically abrogates the rights of a member to decline to answer questions, or to refuse to furnish relevant information or produce relevant documents on the basis of potential self incrimination. It is important to note that the powers conferred by Section 86Q are specifically designed for disciplinary rather than criminal investigations.

However, Section 86Q(3) gives a limited "use" immunity as it provides that any answer given, document produced or information furnished, pursuant to a direction, is inadmissible before any Court or any person acting judicially, save for charges of perjury or disciplinary offences.

Accordingly, an interview conducted pursuant to Section 86Q of the *Police Regulation Act 1958* constitutes a coercive examination. A member declining to comply with a direction given in a Section 86Q interview is subject to a penalty.

In the case of *Hammond -v- the Commonwealth*, the High Court dealt with the appropriateness of the conduct of a coercive examination in circumstances where there are concurrent criminal proceedings. That case concerned a Royal Commission into the existence of malpractice in the meat industry and concurrent criminal charges against Mr Hammond for exporting a prohibited export contrary to the provisions of the *Commonwealth Crimes Act* (1914).

The applicable provisions of the *Royal Commissions Act 1902* made it an offence to refuse to answer questions put to a witness by any of the Commissioners and further that "use" immunity would be provided with respect to a witness' evidence given at a Royal Commission. That means that evidence given cannot be "used" in any subsequent criminal prosecution, except for prosecutions for perjury. Both of these elements are common with the provisions of Section 86Q of the *Police Regulation Act 1958*.

The majority of the High Court unanimously held that to conduct a parallel non-judicial inquiry into the very matters which constitute the basis of criminal proceedings against the proposed witnesses constitute an interference with the due administration of criminal justice in the witness' case. Gibbs CJ stated:-

"Once it is accepted that the Plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence for which he is charged, it seems to me inescapably to follow in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the Plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence."

His Honour went on to say:-

"…if during the course of Commissioners' inquiries into allegations that a person had been guilty of criminal conduct, a criminal prosecution was commenced against that person based on those allegations, the continuance of the inquiry would, generally speaking, amount to a contempt of Court, and the proper course would be to adjourn the inquiry until the disposal of the criminal proceeding."

The Federal Court recently considered the same issue of a concurrent non-judicial inquiry and a criminal investigation. In *Hak Song RA -v- Australia Crime Commission*, Merkel J considered an application for injunctive relief against the examination of a number of crew members of the well publicized North Korean cargo vessel the "Pong Su". The proposed witnesses were members of the Pong Su who were no longer charged with committing criminal offences, as they had been discharged at their Committal. In that case, the Commonwealth Director of Public Prosecutions had formally advised that there was no intention to institute further proceedings in respect of any of the proposed witnesses.

Merkel J found that the proposed examination of those persons discharged at Committal did not interfere with or prejudice the existence of judicial power in circumstances where the proposed witnesses were not themselves subject to pending or proposed criminal proceedings. However, Merkel J cited, with approval, High Court authority from the case of *Pioneer Concrete (Vic) Pty Ltd -v- Trade Practices Commission*, in which Gibbs CJ observed:-

"…no doubt it is right to say that the power conferred by this Section might in some cases be used so as to improperly interfere with judicial proceedings. I am inclined to think that if the power were used to assist the party in proceedings already pending, in a way that would give such a party advantages which the rules of procedure would otherwise deny him, there would be a contempt of Court… The power is a drastic power and is capable of abuse and must be exercised with care."

In concluding that the examinations in the case of *Hak Song RA -v- Australia Crime Commission* should proceed, Merkel J stated:-

"…by seeking to ensure the examination will not prejudice Defendants of any impending criminal trials, the provisions leave little scope for the argument that the examinations proposed in the present case have the tendency to interfere with the judicial power. Of course, if the applicants were themselves subject to the current criminal proceedings that may raise the issues considered in Hammond, but that is not the situation in the present case."

The powers conferred upon the Police pursuant to Section 86Q of the Act are coercive and drastic. The member's right to decline to answer questions, furnish information or produce documents on the basis of potential self-incrimination are specifically abrogated. The Section was introduced as a result of the High Court decision of *Police Service Board and Anor -v- Morris and Martin*, where the High Court held, in interpreting a previous regulation, that a Police Officer ought not be permitted to decline to answer questions in a disciplinary interview. The rationale was that a civilized society cannot operate without a properly regulated Police Force, and that rests *"heavily upon the community's confidence in the integrity of the members of the Police Force, upon their assiduous performance of duty and upon the judicious exercise of their powers"*.

The High Court stated that a Police Force could not be properly managed if those in command of it could not properly regulate it because rights against self-incrimination could be exercised in disciplinary matters.

However, in my opinion, it would be an abuse of the powers conferred upon the Ethical Standards Department, and a possible contempt of Court, if the powers conferred upon the Police by Section 86Q of the Act, were used to obtain, in a coercive manner, evidence for criminal rather than disciplinary proceedings. The power ought not be exercised for evidence gathering purposes.

Accordingly, members who are the subject of an interview in which the provisions of Section 464 of the *Crimes Act 1958* are administered, should urgently seek legal advice in the event that it is suggested that they then be interviewed for disciplinary matters pursuant to Section 86Q of the Act.

Legal advise can be obtained from the Association 24/7 by telephoning our office on (03) 9495 6899. If your call is received after hours you will be referred to other numbers.

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Your Association has recently requested the Occupational Heath, Safety and Welfare Coordinating Committee to place "semi-automatic weapons' on its agenda. We have also written to every Assistant Commissioner seeking that they provide semi-automatic weapons to members.

A less than adequate response will prompt us to escalate our lobbying and campaigning on this issue to both the Force and the government.

TASERS (aka Stun Guns)

As some members will be aware, the Special Operations Group began using tasers on a trial basis in 2004.

The Association is disappointed that the use of tasers remains confined to the SOG and that its use is not extended to general duties policing.

Given our stance on this issue, the Association has recently written to all five regional Assistant Commissioners requesting their agreement to trial tasers at all 24-hour police stations in their regions similar to a trial currently taking place in Western Australia.