

**THE PARLIAMENTARY JOINT SELECT COMMITTEE ON ETHICAL CONDUCT  
MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON  
WEDNESDAY 10 SEPTEMBER 2008.**

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**Mr TIMOTHY JAMES ELLIS S.C.**, DIRECTOR OF PUBLIC PROSECUTIONS, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

**CHAIR** (Mr Wilkinson) - Thank you for your submission.

**Mr ELLIS** - Thank you for the invitation to make one. I do not really get a chance to participate much in public debate and probably nor should I, everyone would agree, but this is a matter that I have some sort of perspective on, I suppose, by virtue of the job I do, and thank you for the invitation to come today.

When I submitted the submission I realised a couple of things were incorrect and I sent a letter to the Secretary of the Committee correcting those. There are a couple more amendments of a minor nature that I wanted to make and if I have your leave, I have redone the submission to incorporate those. I am happy to take the committee through them; they are minor. If I can do that, here are the copies of the amended ones. On page 3 I have put in for emphasis something to clarify that when I am talking about independent investigations I meant into possible unlawful conduct. I did not mean to cast any aspersions at the Ombudsman or the Auditor-General for the limited statutory investigations they do.

On page 28 and continuing on page 29 I have changed it; it was as to the meetings between the minister and the commissioner. I understood that there was another agenda. I have now discovered that there is an agenda, although it is skeletal, as I pointed out here, and it seems to be one or two words as to the topic and beside it whether it is a publicity or not a publicity occasion, which in fact probably bears out the other point I was making about the degree of management here.

On page 31 I have corrected the factual error that I indicated to Mr Donnelly as to what Mr Burch's foreshadowed disclosure was going to be. I had that the wrong way round.

**Mr McKIM** - Sorry, Mr Ellis, can you just clarify that?

**Mr ELLIS** - Yes. If you look at the second paragraph entitled 'an example of lack of independence' it previously read that Mr Burch indicated to Ms Williams that he had information regarding the magistrate's appointment. In fact the indication was as to the Solicitor-General's appointment and what came unexpectedly was also the allegation concerning the magistrate's appointment, which has been well aired. I just had that the other way round.

At page 33 I suppose you would call it toning down. In the last paragraph I had made reference to statutory declarations. I think on reflection if these are to be public documents and other events might take place it would be better to tone that down a little, which I have done, and the reference is now 'there are assertions from all three people'. I think with that toning down it would undoubtedly be in a fit state to be public.

**Mr McKIM** - So you have just changed that 'statutory declarations' to 'assertions'?

**Mr ELLIS** - Yes, pretty much.

**CHAIR** - If there is any evidence that you want to give in camera as well, please speak up because that can occur.

**Mr ELLIS** - No, I don't think so, thank you. As I have said in the submission, I have been a bit more at liberty, I suppose, in using and putting in here correspondence that has come to me in my work capacity and that might well be criticised but the choice was to make a submission which was half-baked and withholding those things or to make one which, since I do report to parliament and am accountable to parliament, is as full and frank as I could make it, consistently with not upsetting any ongoing investigation. To that end, it has been vetted by the investigators. For my own part, I am satisfied that it doesn't or couldn't upset those investigations, the results of which I am now reviewing.

There is correspondence there that is generated in the normal course of my work and otherwise wouldn't usually be made public, but it has been for that reason in this submission.

Having made the submission in the fullness that I have, I have been a little bit discomfited that so far it hasn't been able to be made public because that has had the effect of depriving me, and I would imagine others who have taken the trouble to make submissions, of a role in this debate. It seems that almost any of the well-known would-be stars from the university can bob up at any time and make a comment but I am virtually precluded to because I don't want to summarise something that I have taken the time to write in full and I don't want to do media grabs about it. So there is possibly a prospect, too, that what I say today will be taken away from the context of what I have taken the trouble to write in full. I understand from talking to you, Mr Chairman, that it might be that that concern will be alleviated in that it might be that there will be an mechanism to make these things public. I certainly hope so. There are other sides to the debate about the independence of the police investigation when it comes to political figures and State servants. I don't mind that both sides of the debate get a full airing in the public, but that of course is up to the committee. I am respecting of course the stipulation that the submissions are the property of the committee and I haven't budged from that, but it does have the effect of depriving one of a voice in the debate.

**CHAIR** - As you are aware, the committee is bound by Standing Orders and if they go against those Standing Orders the committee itself can be in hot water and therefore the documentation that comes before the committee remains the committee's property until either an interim report or the final report has been concluded. If there is an interim report, the documents that are taken into evidence are out there in the open market, so to speak, and they are for debate. I hear what you say. It is different in what happens because a submission that is made by people such as yourself can be changed a small amount and then can go out into the public, even though the major submission is before us and it is the property of the committee.

**Mr ELLIS** - As you know, it occurred to me to change a few words and put it out, but I think that is against the spirit of what you're on about and I am content to wait for the

processes, as long as you understand that point that it is a little of a frustration to have to do so.

As I read this out, I certainly won't be taking up the hour myself. There are a couple of other things I wanted to add. It has occurred to me since making the submission that there is something to be said for a facility in any body that might be set up in not only investigating conduct but reporting on it, even if it falls short of criminal conduct. My submission to the committee, as you know if you've read it, gentlemen, really doesn't amount to a lot more in terms of investigation than that the loop of reporting currently to the Commissioner of Police be closed off and that there be investigators appointed to a truly independent body to make a report. As that body might be multifunctioned - and certainly it has been floated that there might be an educational value in it or something of the kind - it seems to me something to bear in mind as an add-on that matters of concern falling short of criminal conduct might still be properly the subject of comment as a by-product of an investigation. I have an example at the moment where, as is well known, I am looking at the results of investigations into allegations concerning the appointment of the Solicitor-General and the appointment of a magistrate. At the end of that, if there is to be no charge then usually I or the police will make a fairly limited statement to the effect that perhaps there's no reasonable prospect of conviction, and we won't canvas the evidence. It is usually wrong to do so, especially perhaps to make credibility judgments about people when they haven't had a chance to respond to them. So usually it is limited to that, and not a whole dredging and bringing forth of explanations.

In the case of investigation into public figures and matters pursuant to public powers or governance there might be a case to make a little bit more of what was revealed in the investigation. Whether or not there was criminal conduct in these investigations, I can assure it has revealed, to me at least, an appalling failure of process in both nominated appointments. No-one pretended that the Solicitor-General's appointment was other than the tap-on-the-shoulder style. That method has produced most of the judges of the Supreme Court over the years, and as a way of making appointments that certainly is the way it has been done, but one shouldn't pretend it to be anything more than that. It is not a transparent process, so one can still be unsure as to the criteria and so on. That has nothing to say as to the merit of the appointee. The tap-on-the-shoulder process can and has produced very good appointments; it has produced a few duds as well, though. It must be said that I don't include the present Solicitor-General in the 'dud' category.

With the appointment of the magistrate, perhaps the Attorney-General will ask me to make a different report to him because I will certainly make him aware of what the investigation has revealed. It has investigated the whole of the circumstances surrounding this investigation. It couldn't be fuller, and certainly we got more than your FOI request revealed, Mr McKim, although that didn't seem to have been answered completely by a long shot.

What has been revealed is a failure of process where there was a facade of criteria being compared to CVs, but that didn't happen. There was a confusion of roles where people were having things to do or having things to say about it. One could only wonder about the appropriateness of the Chief Magistrate having what seems to be an unusually large say in the appointment, to the exclusion of anyone else, especially when the Department of Justice has such little connection with the legal profession. Other things are of

concern, particularly when the process - such as it is - is being gone through at the moment with the same figures essentially doing it.

My point was that an investigation can reveal things of concern that are short of criminal behaviour. There still might need to be a facility to get the benefit of having such an investigation given to the body politic, or given to those who have an interest in it, if not made public.

**CHAIR** - Let's say there is, for want of another word, an ethics body set up. Should that ethics body have its own secretariat or should it run through an already existing office, like an ombudsman's office or an auditor-general's office, to vet whether the complaints are worthwhile of further investigation?

**Mr ELLIS** - Certainly what I am proposing in this paper is a vetting process, because all I am really proposing is investigation into possible unlawful conduct. I believe it is Parliament's job to make the laws, not to abrogate that to a body. I was surprised, on the day that the submissions closed, to see that Tony McCall, my old friend from university, had come up with pretty much the same position in an article he wrote in the *Examiner*.

**CHAIR** - He had not read your submission?

**Mr ELLIS** - No, I have not seen Tony for many years. He was making the same point, although from a different direction, in that he does not want a body to become between him and his parliamentarian in making the parliamentarian accountable for ethical things. My view is that Parliament makes the laws and it should make them clear enough so that everyone can follow them. But it is in investigating whether they have been breached that the system falls down a little because of the close statutory and symbiotic affiliations between police and politicians.

**Mr BEST** - So you would not have the view then that there is any role for the Office of the Auditor-General to look at the process in some of these cases because, as you say, they are not matters of law so much as process, given their expertise?

**Mr ELLIS** - There could be. I will come back to finish your question. I am aware that in some other States, auditors-general with similar powers to ours - and ours have a very similar statute to theirs - have been a little more proactive in investigating issues of governance. South Australia in particular, whether that was a good or bad result, the Auditor-General became, it seemed, embroiled in political process and was not above the debate. But an auditor-general certainly does have some function there. I do not know whether it sits too comfortably on an auditor-general, though.

**Mr BEST** - You are proposing some sort of a panel?

**Mr ELLIS** - I am proposing a sort of panel or a person.

**Mr BEST** - So it could have the Auditor-General, for example, or their office involved?

**Mr ELLIS** - You could. The way I am thinking, as a legal person, is that even if this conduct is made out, and even if this complaint is true, is a crime or offence committed, even taking it at its highest? A lot of complaints, or when people think that there is

something suspicious, really come down to that. Some people are saying that if so-and-so intervened in the magistrate selection process then that is a crime. Well it is not. People are allowed to express an opinion on that process and there is no interference.

**Mr BEST** - So you about transparency of process or the proper following of process?

**Mr ELLIS** - Yes.

**Mr BEST** - Then what about the Ombudsman; would you see him on this panel?

**Mr ELLIS** - It could be there as a filtering thing, as a repository, as the person who directs and is reported to as to the police-style investigation. But you get into a little bit of trouble, though, when you try to graft onto an existing structure other duties that are completely new and different, because, for one - and this is no criticism of Mr Allston - he might not be the best man for the new job.

**Mr BEST** - You are saying that you need expertise or something?

**Mr ELLIS** - Yes. To get back to your point, Mr Wilkinson, about a secretariat, I think it needs some secretarial support. What I am proposing is that police forensic facilities, for instance, be shared rather than reproduced. Police powers do not need reproducing. Even things like pay, if you have a different paymaster, might give away what people are working on or where or during what hours.

**CHAIR** - Should it be like your electoral office where that is independent of government, as opposed to a body which really is dependent upon government for the matters that you have just spoken about? If there is this body at arm's length, independent of government, such as your electoral office or an auditor-general, then that would give that perception of independence.

**Mr ELLIS** - Yes. Setting up an independent office requires I think a degree of financial independence. I do not have that, for instance. I do not have financial independence. I wish I did but I do not. It obviously requires administrative independence and independence from being roped into photo opportunities and so on, a lot of which is a matter of the rigour with which the appointee takes the independence task.

Co-dependence, closeness, arises in a variety of ways. I have set out in this paper that I believe the Tasmanian Police Service, fine job that it does, is not statutorily independent of government in that it is directed by the minister. It does not give the appearance of independence because both it and the minister are at pains, it seems, to not give that appearance, to present themselves to the public as one and the same. I have given an example in there where I believe that there has been perhaps some information given that should not be. What I think is fairly clear is that notwithstanding in what I call the Carter Royal Commission, the commission into Rouse's behaviour back in 1991, the police counsel apparently said to the commissioner that guidelines were in place as to the exchange of information between the commissioner and the minister. No-one knows of them, no-one has seen them.

**CHAIR** - Can I just run you down the path of a framework then, if I might, and I have read your 38-page submission, thanks. In relation to that, we have this person or body in place, a complaint comes before it and the person says, 'That appears to me to be a criminal complaint'. Where do we go from there?

**Mr ELLIS** - It is a criminal complaint and it is involving some of the defined people or events that this body is to investigate - that is, it is to investigate maybe the behaviour of State servants and politicians, or maybe appointments, that sort of thing, reasonably easily defined. It could even be defined, I think, by rounding up also the crimes that are special to that, your interferences with executive power - crimes that are in the Criminal Code, for instance, your local government offences that are in there.

**CHAIR** - They have been tucked away in the back drawer in the Criminal Code for a long time, haven't they?

**Mr ELLIS** - Yes. They have enjoyed a resurgence in popularity that has put me under the pump to deal with them, that is for sure.

**CHAIR** - With that then, if the vetting person deems it to be criminal activity, criminal activity which is in the domain of the Ethics Commission, they would have to get some experienced and good investigators. Do those investigators come from Tasmania Police, are they people who are brought in as paid members of this commission, are they full-time or part-time?

**Mr ELLIS** - One of the problems is envisaging how much work there will be, but you would hope there would not be a huge amount. I would have thought that it would be episodic, that there is going to be a need from time to time for a bigger team than you would keep on board. You might have one or two investigators to run things along and then be able to second either from other police forces or our own, depending on the matter to be investigated. There is an argument - I have not put it in here because it is not in your terms of reference - that such a body might usefully investigate complaints against police as well. We do not have an independent body to do that. How that works at the moment is that I am actually involved in it and have been since I have been appointed and that complaints which involve, in the investigator's view, and this is the weakness in that system, possible criminal behaviour, are investigated by the Police Investigation Unit and then the results are referred to me as to whether charges should proceed. Sometimes I recommend disciplinary proceedings rather than charges.

**Mr McKIM** - You have had an oversight role in at least one high-profile investigation that has been conducted by Tasmania Police recently and you have referred to some details about that investigation in your submission, and I would like to go to those in detail in a minute. In relation to your oversight role, on what basis did you take that role on? Were you requested by the Attorney-General, for example, to do that?

**Mr ELLIS** - The TCC one?

**Mr McKIM** - No, it is in relation to them all.

**Mr ELLIS** - I have had no oversight role. I know there has been confusion about the latest ones and I have never said that I have had an oversight role -

**Mr McKIM** - I know you have not, but others have.

**Mr ELLIS** - and I have not had an oversight role.

**Mr McKIM** - Right.

**Mr ELLIS** - What I have had is a very close connection to those investigations because, as I do in a lot of ones, I have given advice from time to time, when asked for advice. To give advice you often need to get it in context as to what has gone on and what has been investigated so far and therefore I have had a view, which I have expressed, that the investigation was being conducted thoroughly and competently. That does not mean I have overlooked it. For instance, in that advice-giving role, I do not suggest the means by which things might be investigated. I do not say, 'I reckon this is a good job for a phone tap' or something. That is not my job, that is the expertise of the investigators. So I have not been overlooking in any other sense but have been made familiar with it.

As to whether the police should have been investigating that matter, I can assure you there was no practical alternative. It is just not possible to confidentially and secretly get in police from somewhere else, swear them in somehow - and I think the commissioner has to swear them in so there is a problem - and invest them with the powers and keep it all secret from the very person that you are investigating. It cannot be done. If there were another body that would have been a good thing.

**Mr McKIM** - That is a structural weakness you are identifying in our current investigative systems?

**Mr ELLIS** - Yes.

**Mr ROCKLIFF** - Mr Ellis, you mention on page 36 of your submission - and it goes along with Jim's line of questioning - that the weakness of the present system for detecting corrupt or criminal practice is that it is largely complaint-based -

**Mr ELLIS** - Yes.

**Mr ROCKLIFF** - and you recommend that the investigative agency ought to have the ability to conduct ethical audits at its own investigation. Could you please expand on that further and how that process might eventuate?

**Mr ELLIS** - These could be random, these could be on the basis of a wink and nod. Again you have to appoint people who are not likely to abuse their power, as much as you can sort that out in appointment. The weakness with a complaint-based system is that you need someone to be brave enough to make the complaint. We pretty much now have a complaint-based system. Police will not act other than on a complaint and that requires identification of the person complaining. That is a difficulty, especially now, when there is perceived to be that closeness of police and parliamentarians or the police and the minister.

To act and commence an investigation on something which might not have come by way of complaint I think is an important power for any effective body to have. Another side

of it is that when you have complaint-based investigations, you tend to investigate only the incident; you do not get to stand back and say, 'Look, there's a pattern here'. Sometimes we see this with police investigations of police - they are complaint-based. I came in for a lot of criticism from the Police Association about the charging of one officer. That officer had been the subject of complaint about 26 times for often the very same thing. There was a pattern there that the complaint-based system did not really see. That does not mean that he was charged because of that pattern but it does mean that there is a weakness in a complaint-based system in that sometimes you can legitimately say, 'There's a lot of smoke here, I'm going to have a look and see whether there is any fire'.

**Mr BEST** - You mentioned earlier about independence and your own office in a sense of independence in signing off on financial matters. I might be out of order so pull me up if I overstep the boundary, but the recent event that happened within your office -

**Mr ELLIS** - Mr Shirley?

**Mr BEST** - Yes. Do you mind if I ask you about that?

**Mr ELLIS** - No, not at all.

**Mr BEST** - Was that as a result of this independence of your finances? You might not want to comment and it is okay if you don't.

**Mr ELLIS** - No, it had nothing to do with my finances. We were running, and I think we are a bad fit for it, the confiscation of profits. We are a bad fit for it because we are a criminal prosecution body and here we are trying to chase up civil debts and manage money. Unfortunately Mr Shirley had developed a gambling habit and he saw a weakness in the system; well, it was not in the system because it was never part of his job to collect cash money but he started to collect cash moneys from police stations and gamble it and manipulate the system. Well, no-one told me he was collecting cash moneys. So that has nothing to do with it. That is the unfortunate sort of thing that happens, I am afraid; in ultimately nearly every organisation someone tickles the till and you can never build a system so good that you can say that no-one is going to tickle the till and take advantage.

**Mr BEST** - So it was not received moneys?

**Mr ELLIS** - No, it was not do with -

**Mr MARTIN** - Mr Ellis, you give an example of lack of independence, referring to the investigation into the allegations with the appointment of the Solicitor-General.

**Mr ELLIS** - Do I?

**Mr MARTIN** - Sorry?

**Mr ELLIS** - I am not quite sure I am following that I have given that as an example.

**Mr MARTIN** - In section 5 on page 33.



**Mr ELLIS** - Sure, okay.

**Mr MARTIN** - I just need to clarify if I am reading this right. You wrote to the Deputy Commissioner on 21 May and you attach a copy of that letter which is attachment 9.

**Mr ELLIS** - Yes.

**Mr MARTIN** - You ask in that letter what I would think are a number of significant questions that would greatly influence the position which you are making in relation to this. Am I reading this right? You mention, 'I received no reply to that letter and I understand that the Commissioner has refused to advise the Deputy Commissioner of the answers'.

**Mr ELLIS** - That is right. That is the letter that I was referring to.

**Mr MARTIN** - That is still applicable today?

**Mr ELLIS** - Yes.

**Mr McKIM** - And by 'Commissioner' you mean Mr Johnston?

**Mr ELLIS** - Yes.

**Mr McKIM** - And by 'Deputy Commissioner' you mean Mr Hine?

**Mr ELLIS** - Yes.

**Mr MARTIN** - So you still have not received a reply?

**Mr ELLIS** - No, not to all those questions. There has been an investigation that involves some of those questions but that is not to say that the answers have all come from the Commissioner of Police.

**Mr MARTIN** - Right.

**Mr ELLIS** - Or that answers have come at all from some points.

**Mr McKIM** - You have said in your submission to the committee that Mr Burch's statutory declaration named two other people besides Mr Estcourt and that they were both government members. Just to confirm, do you mean they are both government members of parliament?

**Mr ELLIS** - Obviously government members is what I meant - members of parliament.

**Mr McKIM** - That is what you meant by government members?

**Mr ELLIS** - Yes.

**Mr McKIM** - Of course you have made a decision, I assume a proactive decision, not to name those people in the interests of natural justice.

**Mr ELLIS** - Mr Estcourt's name was in the public domain. He put it there.

**Mr McKIM** - That is right. That is why I have mentioned his name today.

**Mr ELLIS** - And I have already said something else from the public domain, that services rendered to Mr Green are involved in it so I have taken that from a financial review. Apart from that I will leave it there because -

**Mr McKIM** - That's fine, I understand that.

**Mr ELLIS** - Yes, natural justice - whatever you like.

**Mr McKIM** - Due process?

**Mr ELLIS** - Yes.

**Mr McKIM** - Possible reputational harm. I just wanted to be clear that they were members of parliament.

Also in relation to your submission, you have raised concerns about potential delays in a police investigation in that the original information relating to the situation as regards to Mr Estcourt was provided by Mr Burch on 20 September 2007 and then you have said that when you saw the file it became apparent that there was no evidence of any investigative steps made earlier than 8 April 2008.

**Mr ELLIS** - Yes.

**Mr McKIM** - That is a six-odd month delay there?

**Mr ELLIS** - Yes. That is by way on contrast. It is there as to the commissioner's public release that there had been an investigation. That made me think, 'What investigation? Have I got the full material?' There were reasons that those two matters were not investigated until Mr Green's trials were over, and they were not over until March, I think.

**Mr McKIM** - You have said in your submission that you were 'astonished and disturbed' to see that the commissioner had given the minister forewarning of the investigation into the Solicitor-General allegation. Why were you 'astonished and disturbed'?

**Mr ELLIS** - As I set out earlier in the submission, it is one of the precepts of investigation that so far as possible you don't tell the suspect that they're being investigated or what for until you need to. This was given direct to government.

**Mr McKIM** - And you've been clear in your submission that there are now assertions from all three persons who had been named as having been involved in the Solicitor-General allegation, and you have in brackets (an allegation they deny), that by the evening of

9 April this year they knew the allegation had been made and that it was to be investigated by the police.

**Mr ELLIS** - It was 11 April - I think you are reading from the old version.

**Mr McKIM** - Has that changed in your new submission?

**Mr ELLIS** - Yes. I think it would be best if we threw away the old one.

**Mr McKIM** - Okay, so it is 11 April. The point remains that they had made assertions that by 11 April they knew the allegation and that it was to be investigated by police.

**Mr ELLIS** - And that was still a point at which the person to head the investigation had not been tasked and no investigation plan had been drawn up.

**Mr McKIM** - And in your view it is highly inappropriate that that information was known to those people?

**Mr ELLIS** - I think so.

**Mr McKIM** - You have also said that you can't think of any legitimate reason to alert persons who are to be investigated of the allegation against them, and that remains your view?

**Mr ELLIS** - That's right.

**Mr BEST** - Do you see that then as a fault with the existing process?

**Mr ELLIS** - Yes. It is an example, I think, that the tasks of the police and the rights, if they exist, to know of government have not been sufficiently been given attention to. It is, I think, a matter of concern that the response of government to me saying that the structure of the Police Service Act is that the service is under the direction of the minister is to say, 'No, we've got nothing to do with it'. You think, 'Who is running it? Why did Parliament enact that?' The point I make about statutory interpretation in the way the courts do it is that that is the way to look at it. Parliament passes the laws and the courts interpret them. That is our system. The Police Commissioner's argument, at least in public, was, 'Because constables were independent in England, therefore I'm independent, therefore no-one can tell me what to do', in effect. Therefore one presumes that that section of the Police Service Act doesn't mean what it says. The High Court has been at pains to say that that is no way to go about statutory interpretation. You start with the statute - you don't start with the situation. I have put in the submission something that the now former Chief Justice Gleason says to that - and I know you'll be following all my references, Mr Wilkinson -

**CHAIR** - You've done extremely well.

**Mr ELLIS** - It has come to my attention now that Justice Kirby on 13 March in a talk in Sydney has said the same thing.

**CHAIR** - It surprises me you have to read it out.

**Mr ELLIS** - He said that for the past decade the High Court has been telling the lawyers of Australia that where statute has entered a field of law it is the duty of lawyers to begin their lawyering with the text of the enactment, not past enactments, not judicial dicta, the legislative words. Harvard Law School, which in the nineteenth century pioneered the case book method of instruction involving close attention to judicial expositions of law, has lately replaced this with a course in statutory interpretation. Australian law schools must do likewise. He gives a reference - and I have tendered this to you - to Central Bayside medical practice and the State Revenue, Victoria, 2006, 228, Commonwealth Law Reports 168. That is why I get irritated when the people who have never taught, or never even stood in front of a court with statutory interpretation arguments, have their two bob's worth and say, 'Oh well, police constables in England were such and such and therefore it follows such and such'. It is entirely the wrong way around to approach the question, as you would know.

**CHAIR** - Correct. Can I go down the line of where we were a while ago. The investigators say that here is criminal activity and that if there is criminal activity then that should be investigated by the police or by these investigators. The investigators could be seconded police, as you quite rightly say. Who, then, governs the investigation? Is the investigation governed by you and the police or is it governed by -

**Mr ELLIS** - Not me. By the ethics commissioner or the board of the ethics commission or the board of whatever you like to call it. Not me.

**CHAIR** - But it has to come back to you in the end, of course, if there is a criminal charge to be laid. So running you down that path, if I might, the investigators investigate the matter, they then report back to the person or the body -

**Mr ELLIS** - The body, the whatever, yes.

**CHAIR** - and that body then makes a recommendation that that person should be charged?

**Mr ELLIS** - No. That's my job.

**CHAIR** - Right, okay.

**Mr ELLIS** - That is why it is important not to get your investigators confused with your prosecutors. Obviously the argument applies to the 90 per cent of prosecutions in this State that are taking place at the Magistrates Court. Most States have gone over to an independent prosecution service of magistrate court matters, but ours hasn't. I think my prospects of getting that through would be fairly remote.

**CHAIR** - Right. So the body then makes the submission or the people in charge say a person should be charged, and then they hand the file over to -

**Mr ELLIS** - No, they don't say they should be charged. They say this is a matter which is worth investigating because there is enough here to make us think that if it's true a criminal offence may have been committed. Then when they have investigated it, because they are the investigator they shouldn't assess their own results, they pass it to me or my office to say, 'Is that evidence that we've collected in this investigation

sufficient to prosecute?', and we make that decision in a way that is separate from the investigators. But because I think we don't have a sufficiently independent investigation service, I think we have to set one up outside the present structure.

**CHAIR** - What happens if, as you say, it doesn't amount to criminality? It might be unethical, immoral, or whatever you want to call it. What happens in that area?

**Mr ELLIS** - That is the thing I have been dwelling on since I wrote the submission, that there is, in that case, a good argument for it then to go back from me and say, 'No, not prosecuting'. Whether I suggest it or not doesn't seem to be important, but have the ability in that body or person who is the investigator or the ethics commissioner, or whatever, to say, 'No, but there are still sufficient matters of concern as to governance here, it would be a waste of time not to bring them to either the public's or the minister's or someone's attention'. There is that good to be got out of it; I think you can squeeze a lemon and there's still some good to be got out of a thorough investigation of some matters. The present investigations seem to me to be examples of it.

**CHAIR** - So does it become a name-and-shame argument, then?

**Mr ELLIS** - Well, that's the other question, isn't it - how public do you make these things. I must say I am not a big fan of the ICAC-style investigation of hauling some person in to publicly answer questions about conduct that no-one knows and can define is a crime or an offence at the time they are questioned.

**CHAIR** - But it's an area that troubles me because investigations are taking place. For example's sake, you have a person who shouldn't be charged but obviously acted wrongly - not to that criminal extent of beyond reasonable doubt, but certainly there's a lot of suspicion there which on the civil standard might get you over the line. To me, there should be something in place with regard to that person - not during investigation but after investigation and after the recommendation has been made - for that person to be hauled over the coals so people see that work is being done and that this person has been chastised accordingly.

**Mr ELLIS** - Yes. I don't think it's fair to do it on the basis of a lower standard, and I don't think you are suggesting that, to say, 'I don't know whether we can persuade a court beyond reasonable doubt that this person committed a crime, but they look to have so we'll put them up for public humiliation and examination'. What I am talking about is really that different conduct or other conduct might deserve inquiry or being brought to the attention of people or censure - not because it does not amount to a crime but because it is poor ethically. You can go in and sense it is useless; these people should not continue to be put in charge of processes to appoint people until they can do it a bit better than that - that sort of lesson that might be learnt.

**CHAIR** - Who does that? Does the ethics commissioner do that?

**Mr ELLIS** - I think that is back to your commissioner then, yes. There is a temptation for the commissioner to get a case of the sour grapes. They do the investigation and investigators invest their hopes in the end that there will be a prosecution. This is one of the reasons you need to have a separation between investigators and prosecutors because, as we apparently saw in the Hanif case, they will gee it up, they will want charges to be

brought. So if it comes to me and there are no charges brought and it goes back, you have to have a person with a lot of integrity not to have a case of the sour grapes and use powers, if you give them those powers, to castigate the suspect and because you cannot catch them the other way you will catch them this way.

**CHAIR** - A way around that could well be that it goes back to a Parliamentary Privileges Committee, and there is one now, as you know. It could be up to a body of a number of people who would be independent of the investigation to make what they will of the comments of the commissioner. That could be one way around it.

**Mr ELLIS** - It could be one way, yes. It could be one way for the commissioner, and we will call him the commissioner even though it might not be one person, to refer the results of the investigation to the Ombudsman - not for the Ombudsman to do another investigation on top of it but to assess the result of the investigation from the point of view of governance or whatever - or even the Auditor-General.

**Mr BEST** - In Parliament, say, where a falsified document or a statutory declaration was brought in or someone did not declare a conflict of interest or something like that -

**Mr ELLIS** - In Parliament it is up to Parliament, Mr Best.

**Mr BEST** - But do you think there is a process there where, if something were unethical, somebody would explain why that is not appropriate?

**Mr ELLIS** - No. I think your examples of what happens in Parliament is for the Parliament to regulate. That has always been the case. I cannot see any changing of that.

**Mr BEST** - So you see this as more of a departmental thing than a parliamentary process?

**Mr ELLIS** - I think departmental and to do with executive government rather than parliamentary standards.

**Mr MARTIN** - Just coming back to my previous question about the letter to the acting commissioner on 21 May -

**Mr McKIM** - He was deputy at that time, I think.

**Mr MARTIN** - Yes, he would have been at that time.

This letter was a clear example of the need for another independent investigative body. I would like you to expand on page 4 of that letter a little bit. It reads:

'The refusal to answer my legitimate questions concerning the timing and existence of investigations claimed to have been initiated is, to my mind, disturbing. There seems to be asserted to have been investigations into Mr Burch's allegations (which were of course not allegations of the removal of documents) and another investigation into the removal of documents, with the impression being sought to be given ... that its or their initiation pre-dated 8 April' -

and so on.

**Mr ELLIS** - It is a pretty long sentence, I am afraid.

**Mr MARTIN** - It is; I will not read it all out. The point you are making there is that you said earlier that there is no-one else at the moment other than Tasmania Police that could possibly carry this out. I have enormous praise for the police force we have and the deputy commissioner but my concern all along has been that it puts them in a very difficult position, or anyone, in fact, when they are asked to investigate their boss.

**Mr ELLIS** - And doesn't he know it. I do not think I would be giving any secrets away to say that it was the most difficult time for those who perceived it their duty to do the investigation.

**Mr MARTIN** - You do not think there is anyone else who could have carried out the investigation?

**Mr ELLIS** - No, not in our existing structures.

**Mr McKIM** - Do you think it has been a fair process for Mr Johnston?

**Mr ELLIS** - Yes.

**Mr McKIM** - You do - being investigated by people of whom, until recently, he was their boss and he may once again be their boss in the future? Do you think that is fair?

**Mr ELLIS** - If anything, that goes his way.

**Mr McKIM** - Even though they may have been passed over for his job, which you have said was basically a political appointment?

**Mr ELLIS** - We do not know who was passed over and who was not because there was no process.

**Mr McKIM** - I just said they 'may' have been - because there was no process, exactly.

**Mr ELLIS** - I do not think that is a failure of natural justice. The fact is that there needed to be an investigation of the commissioner. It fell to the deputy commissioner as the next in line. There does not seem to me to be any sensible alternative to that in the structures that were then present, and the need to keep the investigation, so far as it could be, from the attention of the commissioner while it was being conducted.

**Mr MARTIN** - You go on to say at the end that paragraph that there seems to have been disclosure of Mr Burch's allocations to those that they were made against. According to unchallenged evidence, the former minister under investigation used the time before interview to rehearse himself and others, which suggests that such a forewarning may effect the quality of any evidence produced by investigation.

**Mr ELLIS** - Yes.

**Mr MARTIN** - The bottom line here is that you passed all these questions on to the person in charge of the investigation.

**Mr ELLIS** - No, there was not an investigation of the commissioner at that time.

**Mr MARTIN** - No, but there has been since and you still have not received a reply to any of these questions.

**Mr ELLIS** - Yes. These are asked to the deputy commissioner because it was to the deputy commissioner that I was corresponding. This is not unusual. He had asked for my opinion on materials given to me and in those materials there seemed to be a gap. They seemed to be at odds with what the commissioner himself had put out in public, namely that there had been an investigation going on for some time. I said, 'Where is the material for that?' because I do not like to give an opinion where I think there is material missing. So I corresponded with the deputy commissioner, fully knowing and expecting that he would have to go to the commissioner for a response to that because I was not then in correspondence with the commissioner about this matter. I was in correspondence with the deputy commissioner.

**Mr MARTIN** - In the file that you have been given now, which is the completion of the investigation that pursued after this, you still have not received answers in that file to any of these questions you have asked of Tasmania Police?

**Mr ELLIS** - No, not direct answers in the sense that now we will go back and answer your letter, because what has been investigated are the circumstances. These are basically, in some respect, rhetorical questions without trying to find out the basis of certain statements, trying to find out, for instance, what was the initial investigation, who conducted it, with what result and where is the evidence produced. I know that now. No-one has to go back and write me a letter about it because I have the result of the investigation and I can see what was done.

**Mr McKIM** - You had a view on 21 May this year that you were not prepared to give Tasmania Police advice about whether you believed that the matter should be prosecuted because you believed matters were being withheld from you which were capable of affecting that judgment. Are you saying that is now no longer the case, that you do not believe matters are being withheld from you by Tasmania Police and which are capable of affecting your judgment on that matter?

**Mr ELLIS** - Yes, I now have the answers. That is right. I might have been then given the result of the investigation to date. It is just that we had this allegation that there had been investigation and I could see no evidence of it. It probably turns out that there had not been an investigation.

**Mr McKIM** - Are we talking there about the delay between Mr Burch giving the information and the investigation commencing?

**Mr ELLIS** - Yes.



**Mr McKIM** - You have stated that that related to the Supreme Court trials that were under way at the time. Do you think it is appropriate that that investigation did not start until when it did?

**Mr ELLIS** - When the allegations were made I had a discussion with the then Commissioner of Police, Mr McCreadie, and we agreed that it would have the potential to upset Mr Green's trial should those matters be investigated at that point. That was particularly concerning the magistrate appointment. Concerning the Solicitor-General appointment, there was also a thought that it might be a good idea to wait and see what happened. In any event, the understanding we reached was that at the end of Mr Green's trials the matters would be investigated. Mr Green's trials came to an end and, so far as I can see, the matters weren't immediately started for investigation at that point. Then it was raised, as you know, in the *Mercury* and in Parliament and then a release was put out saying, 'These have been under investigation for some time'. That alerted my suspicion.

**Mr McKIM** - Right. Then why wasn't the investigation commenced immediately subsequent to Mr Green's second trial and your publicly announced decision that you wouldn't be seeking to proceed with any further action against him? Why wasn't the police investigation commenced immediately? You may not know why.

**Mr ELLIS** - I am not in a position to answer. I have nothing further to do with it.

**Mr McKIM** - What is your view on the fact that it wasn't immediately commenced?

**Mr ELLIS** - It doesn't seem to have been immediately commenced. I can tell you that from the investigation of the investigation. I don't think it is appropriate that I express a view as to that here and now because other things might come of it.

**Mr ROCKLIFF** - Back to the ethics commission and your submission, in terms of accountability of the ethics commission itself, some of the concerns expressed by some people are that it may replicate a body in other States and cost Tasmanian taxpayers a considerable amount of money. In terms of financial accountability, do you expect an account of what the ethics commission did in the previous 12 months, and what was investigated and reported on, either by complaint or their initiated investigation?

**Mr ELLIS** - I think so. I think there should be an accounting to Parliament at least by way of an annual report, or semi-annual or quarterly report. There should be an oversight of the finances, with maybe the Auditor-General looking at those. In terms of saying what was investigated, there is a problem. Let us say something was investigated but there was nothing in it. Is it fair to the subject of that investigation to be plastered everywhere and perhaps abused under parliamentary privilege? It doesn't strike me as fair. For instance, when I report to Parliament I note that in a lot of cases we discontinue or discharge. I don't think it would be fair to set out the allegation and who it was against and so on. These are public matters probably anyway. The people have been brought before the courts most of the time and then discharged at that point, so there's no point in going over it again. That is the trouble with ICACs; they destroy reputations where perhaps they don't deserve to be destroyed.

**CHAIR** - That is why, isn't it, that the investigations at those preliminary stages, and right up until the person is charged, should remain confidential as best you can?

**Mr ELLIS** - I think so, yes. From the point of view of good investigating procedure they should be anyway.

**CHAIR** - That is one of the complaints; if you had somebody else in to do the investigations recently then they wouldn't have been confidential.

**Mr ELLIS** - I stop short of thinking it is a good idea to abrogate people's right to silence in order to have the compulsory examination, especially for things that are less serious than some of the crimes they're going to be retained for. I don't like that aspect of an ICAC, but that is obviously a decision for you people as to how you want to set it up.

**Mr McKIM** - You can construct a mechanism, can you not, to ensure that allegations made and investigations that might flow from them are actually kept confidential and in camera, if you like, until a certain point in the investigation because of any other decision that might have been made.

**Mr ELLIS** - Yes, I think your legislation can be prescriptive enough to do that.

**Mr McKIM** - I note that the time has nearly expired, Mr Ellis, and thanks very much for coming in. In the letter you wrote to me on 11 April, which was the first that certainly had been drawn to my attention and I think to the public's attention that you had a view that there was no separation of powers between Government and Tasmania Police, and you have obviously reinforced that view in your submission to this committee, are you aware that the Solicitor-General has given contrary advice to the Government?

**Mr ELLIS** - I think he has made the same mistake on statutory interpretation, but there we are. We have different views.

**Mr McKIM** - Just to be clear, you disagree with Mr Sealy's advice to the Government on this matter?

**Mr ELLIS** - Yes.

**Mr MARTIN** - One of the issues that has been raised publicly about what we are investigating is the giving of retrospective powers to such a body. Have you a view on that?

**Mr ELLIS** - Yes, I could not see why you would not.

**Mr BEST** - In relation to that letter of 21 May - and I am just trying to get it right in my head because from what I understand what you have said here today, your role was not in overview but you came in at certain times or provide advice where you think -

**Mr ELLIS** - At this point, perhaps to clarify that, the files had been sent to me for an opinion as to one of those matters, if anyone should be prosecuted and, if so, for what.

**Mr BEST** - I understand that, but it was a continuous process or did you think that was it? You actually thought in your own mind, 'That's all I'm getting'. Did you actually believe that or did you feel that it was part of an ongoing process?

**Mr ELLIS** - I thought that if what had been said publicly about an ongoing investigation was right then I had not got it and I asked for it, and then it was not forthcoming.

**Mr BEST** - But that would not be out of the ordinary, there would be occasions where there would be things ongoing and you would be furnished with things as they could be furnished.

**Mr ELLIS** - Yes.

**Mr BEST** - Do you know what I am saying?

**Mr ELLIS** - No, not when I am asked to -

**Mr BEST** - It would be pointless giving you part of something, would it not, and expecting your opinion on part of something?

**Mr ELLIS** - Yes. Well, I will not do that.

**Mr BEST** - No.

**Mr ELLIS** - To draw a contrast, for instance, and maybe it illustrates a lack of independence, I do not know, but in the Richard Butler matter, police investigated bargaining for public office by taking Mr Lennon's view of it and taking it to the Solicitor-General and getting opinions of that. I would not do that. I was not asked, but no way would I be giving an opinion on an investigation that has only taken the word of one of three people who were apparently witnesses or participants.

**Mr McKIM** - So you do not think that matter was investigated appropriately?

**Mr ELLIS** - Well, I do not think it was investigated, as far as I know.

**Mr BEST** - Sorry, I am quite happy to hand the baton over, but I just wanted to get to the bottom end of this and that is that it is not extraordinary, though, for you to have part of an investigation, in a sense, on the understanding that it is ongoing and then have the final report and then for you to give your opinion about what should occur.

**Mr ELLIS** - What is not extraordinary is for me to be asked to give legal advice in the course of an investigation. That can be on a lot of things, such as whether a warrant is available in circumstances, what a section of the Criminal Code means, whether the circumstances as seen to be emerging would fit that section of the Criminal Code or not. They are all interim advices, if you like. When the investigation is complete or thought by the investigators to be complete, they often charge the person involved. I do not see it at that point, I wish I did often because by the time I do see it, as Mr Wilkinson would know, we have a look at it and it was not a case that should have been charged and the person is discharged. They work their way up and we finally get the police file when they are committed for trial in the Supreme Court. Then there is the example such as here where no-one has been charged and because I suppose it is a sensitive matter or whatever, for whatever reason, they say, 'We think we've finished the investigation, in your opinion, is there a case for someone to be charged and, if so, for what?' That is the

point that it was presented to me at the time I wrote the letter in May. It was being said, 'Here is the completion of the investigation, what is your opinion?' I said, 'If that is the completion of the investigation I want to know that I have all the material before I give such an opinion.'

**Mr BEST** - It is my opinion; to me it seems quite political how you have drafted this letter to the deputy -

**Mr ELLIS** - How do you mean?

**Mr BEST** - Just some of the comments that are in there.

**Mr ELLIS** - Which ones?

**Mr BEST** - There is a lot of comment almost in complaint form, which is fair enough, I suppose.

**Mr ELLIS** - Tell me what is political, Mr Best, please.

**Mr BEST** - You are saying that there is a refusal to answer legitimate questions but you are still waiting upon a final report. Is that normal? You do not always get the final report -

**Mr ELLIS** - It is not normal, it is extraordinary. Usually we requisition the police and say, 'Can you look at this, look at that, or answer this question?' and they will do it. And it is extraordinary that I am basically told that I am not going to get an answer.

**Mr BEST** - Why do you think that you did not get one? You must have an opinion?

**Mr ELLIS** - I probably do but it would not be the appropriate time to express it, or the place.

**Mr MARTIN** - Oh go on.

*Laughter.*

**CHAIR** - Would it be fair to say that it would be wrong to make a recommendation without having all the evidence before you so that you can properly make that recommendation?

**Mr ELLIS** - Yes.

**CHAIR** - You need all the evidence there to make a recommendation.

**Mr ELLIS** - As it turns out, it is exactly the thing that the Commonwealth DPP has been criticised for in the Hanif matter by taking the police at their word that the investigation is complete to that point and giving an opinion when probably they should have been a bit more alert to the fact that the investigation may not have been completed. So I have not fallen into that trap, it seems.

**Mr MARTIN** - Remembering the fact that a member of the Government was asking you that question gives you the green light to go in, doesn't it?

*Laughter.*

**Mr McKIM** - Just to be clear -

**Mr ELLIS** - There are still matters concerning the commissioner under consideration and that is why it wouldn't be right to answer questions.

**Mr McKIM** - Just to be clear for natural justice for you, you have had an allegation made against you today by a member of the committee that a letter you drafted to the deputy commissioner was political and you have rejected that out of hand, have you not?

**Mr ELLIS** - It is pretty much on the one of Mr Green's that I mention in the submission, that somehow, with all parties apparently agreed that I should investigate a matter, it is a political decision on my part to do so.

**Mr McKIM** - But you have rejected Mr Best's assertion that that letter was political, that you were being political?

**Mr ELLIS** - Yes. I do not even know in which way he was suggesting it was.

**Mr McKIM** - Me neither.

**CHAIR** - Are there any other final questions to the DPP? Tim, thank you very much for coming along and especially your submission because it is obviously well thought out and it must have taken you some time to put that together.

**Mr ELLIS** - I do not have a research officer or policy adviser or anyone so all errors are mine.

**THE WITNESS WITHDREW.**