SUBMISSION TO THE JOINT SELECT COMMITTEE ON ETHICAL CONDUCT

by

T J Ellis SC
DIRECTOR OF PUBLIC PROSECUTIONS

TABLE OF CONTENTS

Attachments

1. Introduction - A limited submission

This submission is focussed on what most would see as the subsidiary matter for review, namely that contained in paragraph (a) of the Terms of Reference – *"a review of ... the capacity to conduct independent investigations"*.

I believe that the capacity to conduct independent investigations is essential to enforcing ethical conduct through our existing mechanisms, in particular the criminal law, and is a foundation-stone to have in place before more exotic mechanisms are tried, or as an essential feature of more exotic mechanisms. If investigations cannot be conducted reliably, professionally, confidentially and thoroughly when required, then the criminal law loses its deterrent and punitive effects. The criminal law is Parliament's expression of what is unethical, and unacceptable. (I have concentrated this submission on investigations into possible unlawful conduct: I do not purport to comment on the statute-limited investigations carried out by the Ombudsman and the Auditor-General.)

In this submission I argue that Tasmania Police Service (as it is now styled) is unfortunately not able to reliably deliver such investigations concerning (as the Terms of Reference have it) *"elected Parliamentary representatives and servants of the State"* as it does not possess statutory independence, nor does it project the appearance of independence, nor does it display when undertaking such an investigation sufficient independence. I give one current example of the apparent compromise of an investigation of that very nature by the Commissioner of Police. I have edited the account of that so as not to further compromise ongoing investigations, but nevertheless I expect condemnation from some quarters concerning the disclosure of documents sent to me.

As to that, I would (in expectation) simply answer that I believe myself to be answerable to Parliament and hence that aspect of this submission proceeds as fully as I can, consistent with not further compromising any investigation.

2. The Director of Public Prosecutions as investigator

2.1 Investigating the TCC Agreement

The *Director of Public Prosecutions Act 1973* contains no power or function for the Director of Public Prosecutions ("the DPP") to investigate matters. The separation of roles between prosecutors and investigators was deliberate, and the product of successive Government enquiries throughout the Commonwealth which led to the establishment of prosecuting offices independent of investigators (principally police). In particular, the separation of functions ensures that the prosecutor has emotional detachment from the prosecution case, necessary to objectively consider the strength of the prosecution case and the other factors necessary to properly exercise the discretion to prosecute or not, and if so for what charge or charges, and to observe the duty to place all relevant evidence before the court rather than pursue a policy of win at all costs.

In July 2006, the Premier requested me to investigate whether a criminal act or acts may have been committed in connection with the signing of an agreement, or purported agreement, between Bryan Green MHA and John White. That request first came to my attention via the media – a press release was issued saying it would be made. No discussion with me had preceded it.

Lacking the statutory function to investigate, I drafted a direction for the Attorney-General to give me pursuant to s 12 of the *Director of Public Prosecutions Act 1973* ("the DPP Act"). It was limited to directing and requesting me to "*direct and supervise an investigation surrounding the circumstances of the execution of (the subject agreement)*". The Attorney-General gave me that request and direction.

The request and direction I had the Attorney-General give me was designed to seek to conform with one under s 12(f) of the DPP Act:

> *"The functions of the Director are:*
>
> ...
>
> *(f) to carry out such other functions ordinarily performed by a practitioner as the Attorney-General directs or requests".*

I was conscious that it was strongly arguable that the investigation, or direction and supervision of the investigation, of a possible crime was not one ordinarily performed by a (legal) practitioner, and thus the direction might be invalid.

However, it is clear from Hansard that prior to the request, both Opposition parties had been pressing for the matter to be referred to me. The Premier doing so thus represented a concord by all sides of Parliamentary politics that I, rather than Police, investigate the matter.

Therefore, it seemed to me that to insist on the DPP Act being amended or some other Act being passed to allow me to investigate would only delay an investigation leaving the matter to fester and (as delay does) adversely affect the quality of any evidence produced.

Despite my misgivings that it was not a strong "fit" with my statutory functions, in the unusual circumstance of the time, I therefore accepted the request.

(Mr Bryan Green MP, in a calculated slur made under Parliamentary privilege, said on 29 May 2008, *"The DPP has since made it public that he proceeded with the investigation because, and I quote, 'It was supported by all sides of politics'. This has confirmed my view that, in large part, it was political"*. How the support of all sides renders the investigation - or my motives - political rather than apolitical was not explained by Mr Green.)

Lacking investigative expertise and resources, I asked the Commissioner of Police to assist and he promptly made available two experienced detectives of high rank. A little later it was realised that in order to maintain the confidentiality and independence of the investigation those detectives needed to be freed of the reporting and other "chain of command" obligations imposed on them by Police Standing Orders and the Commissioner immediately acceded to my request that they be so freed. Still later, forensic and other technical assistance was made available to the investigation by the Commissioner.

Apart from Mr Green's puzzling accusation that "*it was political*", I am not aware of any criticism of the investigation or investigators, who were professional, thorough and conducted themselves impeccably. Nor did I hear any criticism that the investigation lacked credibility or integrity. Indeed, the matter which this Committee might usefully reflect on is that, publicly at least, from the start no-one was seriously suggesting the Police ought to investigate the matter, nor did the former Commissioner of Police seem in the least perturbed that it should be so. Indeed, as I have noted above, he gave every assistance. I believe the lack of criticism of the "command" structure of the investigation and the lack of any suggestion that such a structure was unnecessary or inappropriate represents a commonly-held realisation, albeit unspoken, that the investigation of possible criminal involvement of the former Deputy Premier and a former Minister of the governing party could not satisfactorily be completed within the existing structure, that the relationship between the Executive and the Police was such that an investigation taking place within that structure would not command adequate confidence and credibility in the eyes of the public, for the reason that Police are not seen as sufficiently independent of Government. I believe that perception is entirely justified, indeed as I argue below, Police and Government have a symbiotic relationship in which each sees an advantage in enmeshing with the other.

2.2 Deficiencies of that model of investigation

Despite the model used in this investigation apparently enjoying more public acceptance than if the matter had been simply referred to the Police for investigation, it is not a model which should be thought to be ideal, or even satisfactory for future permanent use. The chief deficiencies are:

A. The Attorney-General needs to request or direct me under the DPP Act before I can begin any investigation. This is a clear limitation: as subsequent history has shown the Attorney-General is not going to refer to me for investigation every matter he is called on to. There is thus in this model no reliably apolitical trigger for investigation into political matters (or matters involving politicians).

B. The referral for investigation took too long and was too public.

The unchallenged evidence at Mr Green's trials was that in the time between the announcement that the matter had been referred for investigation and the time he was interviewed he had rehearsed himself and others. He had early access to the documentary trail and studied it closely. He also "debriefed" his staff after their interviews and was told by at least one other (David Price, currently I believe the Head of Office of the Minister for Police & Emergency Services) what had been put to him by Police and how he responded to that in interview.

The "lead-in" time between the very public announcement of an investigation and even getting to the stage of commencing it meant that some investigative methods which might have been considered were clearly not going to be effective. Those considerations are not to say that there was necessarily other or different evidence which would have been available had the matter been able to be investigated without the witnesses knowing about it for so long, but it is to say that the quality of the evidence would have been fresher and other investigative tools and

methods may have been utilised. The High Court has said, "*For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry*" (*NCSC v News Corporation Ltd* (1984) 156 CLR 296 per Mason, Wilson & Dawson JJ at 323-324). The tortuous progress of the matter through Parliament to the point where a direction to investigate was given to me meant that there was no element of surprise at all in the investigation.

C. It is undesirable to try to combine prosecuting and investigating functions, for the reasons previously referred to. To combine the functions erodes the credibility and independence of the prosecuting office. Within the investigation I sought to maintain a practical distinction between what the professional investigators did and what I did. Nevertheless, there were occasions when, it having been more convenient that I do some investigative functions I did so, such as take a witness statement. That carried the real risk that I could become a witness in the case. The distinctions between functions is not easy to maintain when the prosecutor at least is the supervisor, repository of progress reports and is involved in strategic direction.

3.1 The Tasmania Police Service is not statutorily independent

In New South Wales in October 1992 both Houses of Parliament adopted resolutions appointing a Joint Select Committee to inquire into "*whether mechanisms of accountability, the existing roles and reporting relationships between the Minister for Police, the Police Board of New South Wales, the Inspector General of Police and the Commissioner of Police are adequate to ensure an efficient, effective and accountable Police Service in New South Wales and to make such recommendations for reform as it considers desirable.*"

The Committee consisted of six members of the Legislative Assembly and four members of the Legislative Council. Its Second Report, focussing on the *Police Service (Management) Amendment Bill 1993* was made on 13 May 1993.

Its final part was headed "***Power of Minister for Police to Give Directions***" and said,

> *"The Committee wishes to record its disquiet that there is a widely held misapprehension that the Minister for Police in this State is unable to direct the Commissioner for Police on operational policing issues. This is not the case and the Committee wishes to emphasise that any such belief is patently wrong.*
>
> *Section 8(1) of the Police Service Act 1990 provides that "The Commissioner is, subject to the direction of the Minister, responsible for the management and control of the Police Service". This is unequivocal and is not to be altered in any way under the Bill which is presently before the Parliament.*
>
> *The Committee is under no doubt that this empowers the Minister to direct the Commissioner on operational issues. The Committee agrees that it is best expressed in the submission of the former Commissioner of Police, Mr John Avery when he said "A strict interpretation of the legislation indicates that the Minister has power to give directions to the Commissioner if that direction does not require the Commissioner to neglect his or her statutory duty by act or omission."*
>
> *The Commissioner and the New South Wales Police Service is and remains accountable through the Minister to the Parliament."*

Of course, what one Committee of another State's Parliament found to be the effect of its legislation is not a binding precedent, even in that State itself. (It is, however, a permissible extrinsic aid to interpretation in that State and, as such, a very powerful one: s 34(1) & (2)(c) *Interpretation Act (NSW) 1987*). However, it undoubtedly serves as the basis of understanding by those affected by it in that State of the effect of s 8(1) of the *Police Service Act 1990* (which is in the same form today, although the Act is now the *Police Act 1990*). That being the basis of organisation of the country's largest Police force in its largest State, it is surprising that our Police Commissioner should be unaware of it, and even more surprising that it should be thought to be the case that the

Tasmanian Parliament was ignorant of it in 2003 when it enacted s 7(1) of the *Police Service Act 2003* in virtually identical form – "*The Commissioner, under the direction of the Minister, is responsible for the efficient, effective and economic management and superintendence of the Police Service.*" As to the Commissioner of Police's view, I include his Media Release of 11 April 2008 and my letter to Mr McKim to which he refers. (Attachments 1 and 2)

Were a court to construe s 7(1) of the *Police Service Act 2003* it would do so in accordance with principles of statutory construction and the *Acts Interpretation Act 1931*. It would not start by asking what was the "*traditional*" role of a Constable (in England) and seeing if that would be able to be fitted into the Act. It is a fact, remarked on recently by the Chief Justice of the High Court, that today the main business of the Courts is statutory construction or interpretation, but that development is not reflected in legal education.[1] Academics, who tend to never have practiced, have no experience in constructing submissions based on principles of statutory interpretation and are unlikely to have even received any education themselves in such principles. Arguments which seek to enforce common law positions or historical developments onto statutes or as a substitute for the plain words of a statute are incorrect (some of the academic writings I cite in this part themselves suffer from that vice).

3.2 Statutory construction

Section 8A(1) of the *Acts Interpretation Act 1931* is relevant:

> "*In the interpretation of a provision of an Act, an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object.*"

---

[1] The Hon. Murray Gleeson CJ, "Some Legal Scenery", paper delivered in Sydney, 5 October 2007

The *Police Service Act 2003* has as its stated object "*to provide for the establishment and regulation of the Police Service*". "*Establishment*" suggests more than mere continuation, making historical reference to the supposed role of Constables even less appropriate. In terms of regulation, an interpretation which sees the Minister at the pinnacle of command, giving or able to give direction to the Commissioner who is in turn in an hierarchical system in fact follows the scheme, and thus it can be inferred the object, of the Act: s 4 establishes the ranks **in** the Police Service, s 7(1) places the Minister above the Commissioner in the chain of direction, and ss 9 to 15 provide for the appointment in descending order of other officers, from Deputy Commissioner to trainees and junior constables. (Interestingly, **all** appointments of commissioned police officers to a rank are by "*the Governor*", meaning the Governor acting with the advice of the Executive Council - *Acts Interpretation Act 1931*, s 43.) The total number of officers comprising the Police Service is determined by the Minister - *Police Service Act 2003*, s 4(3). These provisions serve to further emphasise the close connection between the Police Service and Executive Government, and the ascendency of the latter.

"*The natural and ordinary meaning of what is actually said in the Act must be the starting point*", per Cooke J, *Reid v Reid* [1979] 1 NZLR 572 at 594. Sometimes referred to as the "Golden Rule" of interpretation is that "*in construing statutes ... the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.*" (per Lord Wensleydale, *Grey v Pearson* (1857) 6 HLC 61 at 106. The same principles are expressed in s 8B of the *Acts Interpretation Act 1931*.

Section 7(1) of the *Police Service Act 2003* is, in its ordinary and natural meaning, quite plain. The Commissioner is under the direction of the Minister. "*Direction*" is also plain. In its ordinary and natural meaning it does not mean "*policy direction*" or "*non-operational direction*". In the context of an

Act providing an hierarchical chain of command and direction, there is even less reason to imply such an unnatural interpretation. The only proper (and necessary) implication is to imply the term "*lawful*" as qualifying "*direction*".

The Commissioner's interpretation (as expressed in Attachment 1) would have the word "*policy*" or "*non-operational*" inserted as qualifying "*direction*" in s 7(1). There is no basis to do that. As Lord Mersey said in *Thompson v Goold & Co* [1910] AC 409 at 420, "*It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of a clear necessity, it is a wrong thing to do.*"

The Commissioner's opinion seems to proceed from a belief that Police (or to be more exact, Police constables) can't be ordered to do anything, by anyone. Therefore, s 7(1) of the *Police Services Act 2003* can't mean what it apparently says. Such reasoning ignores that Parliament is paramount and if it wants to establish its Police service as under Ministerial direction, it can (and, I believe, has). Such reasoning is an impermissible way to interpret a statute. It puts the cart before the horse. It also ignores that whatever Sir Robert Marks said at sometime is neither legal precedent nor likely to have been said in the context of interpretation of the Tasmanian *Police Service Act 2003*.

The high water mark of the sort of rhetoric often used to support the notion of Police as completely independent was by Lord Denning in *R v Metropolitan Police ex parte Blackburn* [1968] QB 116 at 135-136, "*I have no hesitation in holding that, like every constable in the land [the Commissioner of the London Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964, the Secretary of State can call upon him to give a report, or to retire in the interests of efficiency.*" What the second sentence clearly indicates is the "independence" spoken of could be, but had not been except to the limited extent so described, altered by statute. The key to understanding the more extravagant descriptions of police "independence" (meaning "independence" from direction by a Minister) such as Lord Denning's in *Blackburn*, derive from how the Police in England were –

and still largely are - organised at a local level in local districts. The most often quoted passage from Lord Denning's judgment actually acknowledges this in its opening,

> *"The office of Commissioner of Police* ***within the metropolis*** *dates back to 1829 when Sir Robert Peel introduced his disciplined Force. The commissioner was a justice of the peace specially appointed to administer the police force* ***in the metropolis. His constitutional status has never been defined either by statute or by the courts****."*
>
> (Emphasis added - c.f. *Police Service Act 2003* - a State, not local based, force and the Commissioner's position created and defined).

Blackburn's case was against the ***Metropolitan*** *Police Commissioner.* The Tasmanian Commissioner of Police in his media release cited the former Commissioner of the **London Metropolitan** Police, apparently failing to appreciate that his own position was a State-based, not a locally organised one, governed and defined by State legislation explicitly tracing a chain of command commencing not with him but with the Minister.

Precisely that point was made in Canada in 1981 in the McDonald Report (Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (RCMP) Ottawa) at 1011; it commented that Lord Denning's comments had unfortunately been *"constantly transposed to the Canadian scene with no regard to those essential features that distinguish Canadian police forces from their British counterparts"*, and that statutory reference to the Royal Canadian Mounted Police being subject to Ministerial direction *"has to that extent made the English doctrine expounded in Ex parte Blackburn inapplicable to the RCMP."*

The statute which made it inapplicable was s 5(1) of the *Royal Canadian Mounted Police Act* which provided,

> *"The Governor in Council may appoint an officer, to be known as the Commissioner of the Royal Canadian Mounted Police, who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith."*[2]

The Canadian provision is practically identical to the New South Wales and Tasmanian provisions discussed. The Tasmanian Commissioner claims that he is "*bound*" by his oath of office not to obey any direction from the Minister. In fact, the oath (*Police Service Act 2001*, Schedule 1, part 3) contains nothing about following or disobeying lawful instructions. This is just as well, as the logical extension of the Commissioner's argument means that junior officers could pick and choose which directions and orders of senior officers they would obey: that s 35(1) of the *Police Service Act 2003* must be read in the same way he contends s 7(1) is to be read, so that the interpretation would have it that "*A police officer is subject to the direction and control of the Commissioner* ***but not as to operational policing matters***" and s 35(2)(c) would be read, "*A police officer must comply with any lawful direction or lawful order of a senior officer,* ***so long as it is not on an operational policing matter.***"

There is indeed a limited discretion available to every police officer, and its nature in respect to following orders had been judicially commented on in the Tasmanian case of *Innes v Weate* [1984] Tas R 14 at 23 per Cosgrove J,

---

[2] The position in Canada has been the subject of ongoing study and controversy. In 1999 the Canadian Supreme Court in *Campbell v Shirose* rejected an argument that Police in conducting a "reverse sting" operation were agents of the Crown and protected by Crown immunity. The Court gave support to the view that in conducting a criminal investigation the police were independent of executive control. This supports the (Tasmanian) Commissioner's position, although whether the Canadian statute had expressly dealt with the reservation of residual discretion in the way s 83 of the *Police Service Act 2003* appears to, I do not know. That might be a critical point of difference. On the other hand, the view of a three judge panel of the Quebec Court of Appeal in 1980 in *Basilion v Keable* has never been specifically rejected (even though the case itself was reversed on other grounds). It said that unlike the English system, the supposed independence of Police had been abrogated by the statute indicating the Commissioner was at the direction of the Minister.

> *"Nor do I accept the proposition that a constable is clothed with a duty to act once his superiors have ordered him to do so. As I have said, a residual discretion usually resides in the man on the spot." ..."...where the chain of command is so shortened that the police are acting as a group, the individual discretions may merge so as to be exercised solely by the officer-in-charge".*

This *"individual discretion"* of the *"man* (sic) *on the spot"* is surely what s 83 of the *Police Service Act 2003* is directed to:

> *"A police officer has the powers, privileges and duties of a constable at common law or under any other Act or law."*

The existence of that section in the *Police Service Act 2003* makes the Commissioner's argument, which seeks to fit an expanded concept of the constable's privilege of discretion into s 7(1), all the more remote from proper statutory interpretation principles. If Parliament had wanted to reduce the Minister's right of direction of the Commissioner by reference to the constable's discretion (or, as is claimed, his oath) it could have done so explicitly as it has generally in s 83. Section 83 clearly does **not** mean that a constable, notwithstanding the explicit sections of the Act to the contrary, does not have to follow lawful orders. (In fact, s 35(2)(c) says he or she must.) It does mean that the *"on the spot"* discretion to act or not act according to personal assessment of the circumstances is preserved, although if the superior is also *"on the spot"* his or her assessment will prevail. The preservation of that discretion does not affect the existence of the chain of command.

Section 7(1) of the *Police Service Act 2003* is a specific section insofar as it deals with the Commissioner's responsibilities *"under the direction of the Minister"*, whereas s 83 is a general section. It is a principle of statutory interpretation that provisions of general application give way to specific provisions when in conflict – *Refrigerated Express Lines (A'Asia) Pty Ltd v Australian Meat & Live-*

Stock Corp (1980) 29 ALR 333, so the reservation of Police discretion in s 83 cannot cut down the specific subject matter of s 7(1).

As well as having residual discretion "*on the spot*" it is also true that many Police powers are dependent upon the formation by the officer "*on the spot*" himself or herself of certain states of mind. The reverse of this is that the State (absent a special statutory provision such as s 84 of the *Police Service Act 2003*) is not generally vicariously liable for the actions of individual Police. This was recognised in *Enever v R*[1906] 3 CLR 969, per Griffith Chief Justice:

> "*...The powers of a constable, qua peace officer, whether conferred by common law or statute, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. If he arrests on suspicion of felony, the suspicion must be his suspicion, and must be reasonable to him*".

Section 83 is entirely consistent with such a view, as is the implication, mentioned earlier, that the "*direction*" the Minister can give must be a lawful one. (Such is explicit in s 35(2)(c) of the *Police Service Act 2030*). To be lawful, it cannot invite a breach of the general law and nor can it invite or purport to direct conduct in breach of s 42 of the Act, the Code of Conduct which is binding on all officers including (by s 52) the Commissioner. At a basic level, this is so because the Minister's power of direction under s 7(1) is a result or creature of Statute: a direction cannot compel a breach of (or be superior to) the very statute which authorised it. It is subordinate to the Statute, not a means of rising above or outside it.

In summary, my submission is that:

1. By s 7(1) of the *Police Service Act 2003* the Commissioner of Police discharges his responsibilities "*under the direction of the Minister*". That means exactly what it says.

2. The Minister's power of direction cannot require the Commissioner to act unlawfully, which includes acting contrary to the Code of Conduct in s 42, nor to exercise or direct to be exercised any of the powers of a Police Officer where the basis of such exercise is absent, nor to refrain from exercising such powers if the Commissioner (as a police officer mindful of the duties of his oath) or those who he directs believe (as police officers) they ought be exercised.

In other words, my position is similar to that of former New South Wales Police Commissioner Avery with which the Joint Select Committee agreed,

> *"The Minister has power to give direction to the Commissioner if that direction does not require the Commissioner to neglect his or her statutory duty by act or omission."*

I raised the issue of whether Police could be said to be an *"independent"* investigative agency as a matter of statutory construction, particularly of the *Police Service Act 2003*. Should the question arise to be litigated in New South Wales I have no doubt that it would be answered in the way I contend because the findings of its Joint Select Committee report would be available as an extrinsic aid to interpretation. Should the question arise to be litigated in this State then I believe it to be highly likely that a *"natural and plain meaning"* interpretation of *"direction"* would prevail, although there is a prospect that the Commissioner's argument might prevail, but I think that unlikely (I will not respond in kind by calling the argument *"misconceived"*).

In a Canadian collection of Canadian essays on police governance, accountability, and independence entitled "Police & Government Relations: Who's Calling the Shots?" (ed. M Beare & T Murray, 2007, University of Toronto Press), Professor Philip Stenning, "Political 'Independence' of the Police" reviewed international police/government arrangements. He wrote (p 187),

"The doctrine of police independence, to the extent that there is any agreement at all about its content, intent, and implications, amounts essentially to a proscription against certain kinds of external (especially political) intervention in, or influence over, decision making by police with respect to a limited range of matters".

"Contrary to the claims of some commentators, it is not a long-established legal doctrine with an accepted or undisputed pedigree. Rather, the historical-legal pedigree claimed for political independence by its most committed proponents has been effectively discredited by almost every legal scholar who has carefully examined it."

Having reviewed the Australian position State by State, including the numerous enquiries that have been held and the cases of *Enever* (supra) and *Attorney-General for New South Wales v Perpetual Trustee Co* [1955] AC 457 which contained obiter dicta supporting a notion of police independence, Professor Stenning wrote (at p 226),

"It would be fair to say, I think, that there has been considerably more reluctance on the part of governments in Australia to embrace any very expansive conception of police independence than has been the case in England and Wales. Specifically, many state governments in Australia have successfully insisted on maintaining quite broad powers of direction and control over their state police services, acknowledging only a limited area of police decision making (specific law enforcement and prosecutorial decisions in particular cases – those "quasi-judicial" decisions of which the 1962 English royal commission wrote) that is recognised as immune from executive direction. Some influential commentators in Australia (e.g. Mr Justice Bright in his 1971 report in South Australia) have not even been prepared to concede that all of these kinds of decisions ought necessarily always to be immune from government direction or influence."

Finally, the Commissioner's suggested interpretation of s 7(1) of the *Police Service Act 2003*, that it "*permits the Minister to give broad policy directions to the Commissioner concerning policy and budget issues*" is incapable of application (without further definition of "*policy*" which, since it doesn't appear in the Act anyway, won't be forthcoming from the Act itself.) A boundary between police policy and police operations is an entirely unstable one.

As an example, is a direction to Police to break a picket line a "*policy*" or an "*operational*" matter? In the Tasmanian case of *R v Commissioner of Police, ex parte North Broken Hill Ltd* (1992) 1 Tas R 99 not to do so was described as a "*policy*" matter, "*The Commissioner's policy to refrain from breaking a picket line cannot be supported, in my opinion.*" (per Wright J, 114). If "*policy*", it is within the area the present Commissioner concedes he can be directed by the Minister. In such a case many would see the distinction between "*policy*" and "*operation*" as illusory. Certainly, as I have sought to argue, it is not one Parliament has made either expressly or by proper and necessary construction.

What is clear is that little, if any, thought has hitherto gone into the wider question of defining the reasonably acceptable balance between government direction and police independence or autonomy. There is little in what the Commissioner of Police has contributed which recognises that Ministerial responsibility for policing matters might well be regarded as a fundamental feature of responsible government and a means of ensuring police do not become a law unto themselves. How to address that is outside the purview of this Committee. I would trust that it is clear that the question deserves better than a recommendation for a "quick fix" such as some modification to the *Police Service Act 2003* to draw the practically useless distinction between "*policy*" and "*operational*" matters which has been advanced. The Committee might be interested to know that in New Zealand in 2001 the *Police Amendment Bill (No. 2)* sought to make specific and detailed provisions defining the areas of responsibility of the Commissioner and the Minister, and

the matters upon which the Minister could and could not give directions to the Commissioner, but the Bill was controversial and failed to progress past the Law and Order Committee.

Postscript: Since writing this section I have acquired on loan an interesting text, "Police & Government, Histories of Policing in Australia" by Professor Mark Finnane, Oxford University Press, Melbourne, 1994. In it, the author makes the same point I have, that unlike in England, the history of policing in Australia is of the emergence in the mid-nineteenth century of centralised police forces, and "*only in Tasmania did a significant degree of local police organisation remain after the 1860s, surviving only to the 1890s.*"

The author says that the "*rhetoric of appeals to ancient English liberties or the common law position of police cannot disguise the quite modern content of the notion, suggesting that we should be mindful of the narrow scope of authority for the claim*".

In Australia police were "*formed into substantial bureaucratic organisations subservient to the will and direction of the commissioner. The constable's original power, constructed judicially in the later nineteenth century, was being simultaneously negated by the demands of hierarchical submission to the authority of the commissioner*", (at 41) the author comments that arguments – such as that advanced by the Commissioner – based on the notion of the '*original powers*' of the constable " '*confused and conflated the status of the force and the status of the individual police officer.' The result was simultaneously to understate the degree to which individual police are in reality subject to lawful direction in exercising their 'original powers' and to diminish the authority of the minister in relation to the police force.*"

4. Independence and the appearance of independence

4.1 A symbiotic relationship

One of the law's better-known aphorisms is that it is of "*fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*". (*R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 at 259, per Lord Hewart CJ)

In the same way, when the "*capacity to conduct independent investigations*" is inquired into, it is necessary not only to address whether such investigations are independent, but whether they are seen to be independent.

I submit that when it comes to investigating government (that is, government ministers, advisors, actions of government, political affiliates of government) Tasmania Police and government are so deliberately intertwined and enmeshed that the appearance of independence cannot be given.

The relationship is a symbiotic one.

The Government, particularly the Police and Emergency Services Minister, has an apparently endless series of "photo opportunities", and media release fodder made available by Police. As examples, the 2006-07 Annual Report of the Department of Police and Emergency Management contained no less than six photographs of the Minister, and the current Minister favours a style of media "opportunity" where he is surrounded by the heavily "brassed" top ranking Police - a DVD showing this style of media "opportunity" is enclosed. (Attachment 3) (Unfortunately I was unable to obtain the footage of the launch of "Project Meridian" - essentially a Police self-examination - in May this year. That launch required virtually all the senior Police officers, who are mainly Hobart-based, to assemble around the Minister in Launceston, which happens to be in the Minister's electorate.)

The message sought to be projected from these "opportunities" is unmistakably that of the Minister at the forefront and leading the "fight against crime". This message is highlighted by the use of words of association ("*we*", "*us*") (almost certainly crafted by the Police, and given to the Minister). An example is enclosed from the Mercury of 26 June 2008 (Attachment 4). The Minister is reported as saying "*The cameras give **us** the ability to make people aware they are being looked at, they need to control their activities and **we** are not going to tolerate any misbehaviour in that area.*"

Ordinary citizens are "*they*" who need to control their activities as "*we*" are not going to tolerate any misbehaviour.

One way in which it seems Police garner Ministerial support is by the communication of information to the Minister, reinforcing the mentality of "*us*" as an elite with access to privileged information denied to "*them*". This seems to be the background to the exchange recently in Estimates Committee B, at which the Commissioner of Police was present (25 June 2008):

"MR COX	*If you go back and historically look at the tragic events that have resulted in fatalities, I suspect that in almost every case, without exception, your pink cars would have made absolutely no difference. It is an educational process. We have people who choose –*
MR HIDDING	*What are you basing that on?*
MR COX	*The statistics that I see that you do not.*
MR HIDDING	*Let us have a look at them.*
MR COX	*I cannot, because I am not allowed to give them to you.*
MR HIDDING	*What nonsense.*

MR COX *Because they are before a coroner, and the Commissioner I am sure will agree with this –*

MR HIDDING *Are these from individual cases?*

MR COX *Yes."*

Presumably, although not in a transcribable form, the Commissioner did agree with Mr Cox, or at least did not correct him. So the notion that statistics, being somehow "*before*" a Coroner (on what basis? as evidence? had there been an order made restricting publication of evidence under s 57 of the *Coroners Act 1995*? It could not be a contempt of court to publish evidence given or to be given in a Coronial hearing: s 66 of the *Coroners Act 1995*) was advanced by the Minister and, at least tacitly, the Commissioner to set the face of "*us*" as holders of secret information against the rest of the world. However, what was thus presented had several logical difficulties. As noted, if the statistics were generated by Police it is difficult to see how, in the absence of an order under s 57 of the *Coroners Act 1995*, they could become "secret", particularly too secret to be advanced in answer to a question by the Shadow Minister to the Minister in Estimates Committee. But, if they had indeed been the subject of a s 57 order, the publication by the Commissioner to the Minister would presumably be in breach of such order. The traffic of information between Police and Government enjoys no special dispensation from (for instance) the duties relating to information imposed by s 42 (the Code of Conduct) of the *Police Service Act 2003*. In other words, if the statistics were indeed so "secret", how and why were they shared with the Minister, especially by an "*independent*" Police Commissioner? I believe the answer is more about binding the Minister to Police by complicity in so-called "secrets" than in any real need to protect genuinely confidential information.

It is specious to claim even the appearance of independence when the Minister (and, by extension, the Government) and Police contrive to present a front which is not just united, but practically inseparable.

For **Tasmania Police** the symbiotic relationship with Government has proven highly beneficial, as its own website "*Celebrating Our Successes*" http://www.police.tas.gov.au/_data/assets/pdf_file/0013/25051/TasmaniaPolice_10yrsOn.pdf shows.

Reviewing 1996-1997 to 2006-2007, the publication boasts a 19% increase in the number of police officers, a 24% increase in State Service employees, and a 79% increase in total Department Budget, from $88m in 1996-97 to $157m in 2006-07. The budget for the Department in 2008-09 "*hits a new high in excess of $194 million*" (Mr Cox, Estimates Committee B, 25 June 2008). So, as an entity competing for funds with other Government agencies, the relationship with Government has seen Police very well looked after. That extends to officers, who (unlike most on the Government payroll) enjoy the nation's best salaries and conditions.

Police also enjoy a prime role as a driver for legislative change. With an allocation this year for $3,441,000 for "*Ministerial Services, External Information and Policy Advice*" one would expect a high level of activity. The Tasmania Police publication to which I earlier referred, "*10 Years On*", highlights its success in "*Legislative Reform*", and says "*The Department has been proactive in its advice to Government in legislative reform*". It then lists 20 Acts and Regulations either exemplifying that proposition or its claim that it has "*had considerable influence and input into legislation administered by other Agencies*". The list underestimates the influence Tasmania Police has over legislation: if one were to count the individual legislative accretions to Police powers over the past decade, they would be far more numerous than the publication acknowledges. There have been few, if any, additional oversight mechanisms to account for the use of those powers.

Police proposals almost invariably promote increased Police powers (without expanded oversight mechanisms), more punitive sentences for offenders, and are usually accompanied by demands for additional resourcing or seek to

offload less glamorous obligations to other areas. Such has been the ease with which the Police Service has been able to have Government implement its wishes there is apparently some public confusion as to whether it alone can increase penalties. Attached is a copy of "The Mercury" of 22 July 2008, "*Drug Driving Crackdown - Stiffer penalties being considered*" (Attachment 5). The article begins,

> "*Stiffer penalties may be on the way for drivers caught under the influence of drugs.*
>
> *The tougher penalties will be considered during a review of a new law allowing Tasmania Police to use steering wheel swabs to test for drugs.*
>
> *"It is highly likely that heavier penalties will be part of that", assistant police commissioner, Scott Tilyard said."*

Although not entirely clear who would be doing the "*review*", the tenor of the article was that Police would, and the result was "*highly likely*" to be heavier penalties. Perhaps Assistant Commissioner Tilyard was misquoted, or taken out of context, but this part of this submission seeks to deal with the perception that the relationship of Police and Government is too close to say a Police investigation of Government is "*independent*".

Perhaps also Mr Tilyard was neither misquoted nor taken out of context and spoke in a way symptomatic of the Police tail wagging the Government dog for so long and with so little resistance it does not consider itself obliged to do more than to put up a proposal in order to have it accepted. An experience I had recently suggests this might be the case. In April 2007 I became concerned that the system of capturing when a person had breached a suspended sentence by committing another offence or crime, and an application had to be made to the Court which imposed the suspended sentence to revoke or substitute it, was not working (the system was that my Office would refer to Police Prosecution Services those matters we came

across which would require an application to the Magistrates' Court, and Prosecution Services would forward to us for action matters where a person had incurred a summary conviction during the term of suspension of a sentence imposed in the Supreme Court, which would require an application to the Supreme Court). I wrote to the Assistant Commissioner (Crime & Operations) and suggested an electronic capturing system ought to be investigated.

In May 2007, having received no reply I wrote again and was told investigations were being made. I heard no more until I followed it up again in 2008. I was told by the DPP Liaison Officer that the matter had been referred to the Executive Support area, but the Liaison Officer had not been told with what result.

On further enquiry I discovered that the Commissioner, as Secretary of the Department of Police and Emergency Management, had in September 2007 under cover of a brief letter sent a complete Cabinet Minute, requiring for completion only the Attorney-General's signature, to the Secretary of the Department of Justice. The minute recommended that Judges and Magistrates themselves be responsible for identifying breaches and initiating proceedings for same, thus turning judicial officers into prosecutors. Neither document mentioned electronic capture explicitly, the DPEM letter saying only "*A short term processing solution cannot be identified without significant cost implications to the Department of Police & Emergency Management.*" The Draft Cabinet Minute identified only two options, of which that was not one. Police doing any extra work or incurring any expense was not an option. The Draft Minute is attached (Attachment 6).

I am informed that no other agency puts to the Department of Justice its proposals for legislative change in Justice's portfolio in the form of a Cabinet Minute, except in cases requiring two Ministerial signatures, and where there has been prior agreement. Doing so smacks of confidence, if not arrogance.

The symbiotic relationship between Police and Government brings benefits to both parties but gives the appearance that, far from being independent, they are one and the same. Margaret E Beare in "The Ongoing History of Politics in Policing" in Police and Government Relations, supra, wrote of "*the contradiction of the police wanting political independence and then actively seeking political roles and/or identifying their interest with the interests of their political masters. Likewise, the politicians appreciate the influence and strength that the police can offer to their issues. In combination, the notion of "independence" is pretty shallow.*"

The lack of the appearance of independence is reinforced by the process, or rather lack of it, in the appointment of the Commissioner.

The present Commissioner of Police was appointed by direct selection of Cabinet. The Premier is reported as saying "*Well there was no justification or need to advertise the position*". Such a process, or lack of it, is an obvious impediment to Tasmania Police being regarded as having "*the capacity to conduct independent investigations*" when such investigations involve Government. It can fairly be said that the Commissioner of Police owes his position directly to political patronage. It might also be reasonably thought that if there had been displays of true independence in the sense of acting contrary to Government's wishes (it is idle to think these would need to take the form of directions if the Deputy Commissioner were adept at "reading the winds") or coming into any conflict with Government (in particular the Minister and the Premier) those incidents would be unlikely to lead to appointment as Commissioner. It might also be reasonably thought that paying good attention to photo opportunities for Ministers and "*tough on crime*" speeches for them would hardly diminish a Deputy Commissioner's prospects of being appointed Commissioner or, having had that appointment, having the term renewed or extended.

None of the above should be controversial when the focus is on the appearance of independence.

4.2 The Ipperwash Inquiry and the Carter Royal Commission – Exchanges between Police and Government

In 1995 Dudley George was shot by a police officer during a First Nations protest at Ipperwash Provincial Park, Ontario, and later died. Ontario Provincial Police had initially taken a patient and low-key approach to managing the protest, but abruptly changed tactics to become less compromising and more forceful. The Premier of Ontario was accused of having in some way instructed police to remove the Natives from the park. An inquiry was established in November 2003, the Honourable Sidney B Linden was appointed Commissioner. His final report was made public on 31 May 2007. In his conclusions, he said:

> *"Another fundamental problem in police/government relations at Ipperwash is that key decisions were neither transparent nor accountable. A large part of the Inquiry was devoted to discovering what transpired at several Interministerial Committee meetings and at the "dining room meeting on September 6, 1995."... "This is the meeting where former Attorney-General testified that he heard Premier Harris say "I want the fucking Indians out of the park."...*
>
> *"Governments and elected officials must be publicly accountable for their role in important decisions and meetings."*
>
> *"It is impossible to hold individuals or institutions responsible for their actions unless what happened and who participated in key decisions is clear. Secrecy or the lack of transparency is a breeding ground for abuse of power, public cynicism, and attacks on the legitimacy of important public institutions. Secrecy or lack of transparency in police/government relations may conceal inappropriate government interference or give the appearance of inappropriate interference."*

In Tasmania, the Commissioner of Police frequently meets the Minister for Police and Emergency Management, usually at the Minister's office. I believe he has on several occasions similarly met the Premier. The meetings are not

usually minuted, and never fully recorded. There is not always a written agenda. When there is one it appears (according to an example I have seen) to be skeletal with the topics only set out as a word or phrase with "publicity" or not noted alongside. It will be said in defence of this practice that there is nothing sinister or abnormal. The Commissioner is also the Secretary of the Department, and Secretaries often meet with their Ministers (this dual role of the Commissioner is in fact another barrier to Tasmania Police's investigations being "*independent*"). That may be so, but the passage quoted above from the Ipperwash Inquiry is also true - such secrecy or lack of transparency may conceal or give the appearance of inappropriate interference.

In 1991 the Report of the Royal Commission into an Attempt to Bribe a Member of the House of Assembly; and Other Matters delivered by Commissioner W J Carter said at 529:

> *"There were no ministerial instructions, nor were any qualifications or guidelines imposed by the Minister that were designed to protect the confidentiality of the information communicated by the Police to the Minister's office.*
>
> *It appears that this was a matter left to the discretion of the staff member guided by "the general rule in ministerial office that" all information is treated with "a great deal of confidence."*
>
> *While not doubting the integrity of Wilson, who treated the information as confidential, or of Brown, both the practice of conveying information relating to Police investigations and the absence of confidentiality requirements are of concern."*[3]

---

[3] In the case of Mr Burch's disclosures, I formed the view that his employment as Ministerial advisor - by Crown prerogative - imposed no legal duty of confidentiality on him, and a contractual requirement of confidentiality was not sufficient to make his disclosures - if other than to Police - a crime under s 110 of the *Criminal Code* (Disclosure of Official Secrets). I

Later, at 536, he said:

> *"There are aspects of this evidence which were a cause of concern, not the least of which was that a high-ranking Police officer passed information to the Minister's office about the bribe attempt, whilst the attempt was both in train and being investigated despite the fact that the apparent intention behind the bribe attempt was to benefit the then government.*
>
> *This information was passed to others at least by Brown, the Minister's private secretary.*
>
> *Therefore the integrity of the investigation was put at risk. At worst, information that the matter was the subject of a Police investigation could well have come to the knowledge of those who were in the very course of perpetuating this serious criminal offence."*
>
> (at 537) *"The Commission was informed by Counsel for the Tasmania Police that new guidelines have now been put in place which are designed to regulate the transfer of sensitive Police information to the Minister's office."*

Necessarily discreet enquiries I have made suggest the existence of such guidelines is unknown.

I do not seek to argue that there should not be any exchange of information between the responsible Minister and Police; indeed accountability (as distinct from control) requires that. The Minister ought to be able to inform Parliament concerning incidents, decisions taken and the directives given to Police[4].

However, such exchange should not jeopardise ongoing investigations, and when it comes to investigation into Government even revealing the existence

---

expect the same applies to the current prerogative appointees in the office of the Minister for Police and Emergency Services, including the current Head of Office.

[4] That the Commissioner asserts there has never been a direction *"on an operational policy matter"* might be of concern. In the report of the Fitzgerald Inquiry (1989), it was said at 8.9.4: *"The Minister can **and should** give directions to the Commissioner on any matter concerning the superintendence, management and administration of the Force."* (emphasis added)

of such an investigation may well jeopardise or compromise such an investigation. The recipient of such information has no present legally enforceable duty to retain confidentiality, even if disclosure by Police had been a breach of the duty to maintain appropriate confidentiality imposed by s 42(4) (the Code of Conduct) of the *Police Service Act 2003*. At present exchanges appear to be ad hoc, unregulated, secret and unrecorded.

5. An example of lack of independence

In September 2007 Ms Jane Williams, Crown Counsel then assisting me in the then upcoming trial of Mr Bryan Green MHA and Mr John White, was told by Mr Nigel Burch, Advisor to the Attorney-General, that he had certain information regarding the proposed appointment of the Solicitor-General. At my suggestion she asked him to detail it in a statement to Police. It might be noted at this point that Mr Burch's employment was outside the *State Service Act 2000* (it was by Crown prerogative). He was thus not a "*public officer*" as defined in the *Public Interest Disclosures Act 2002*, nor a "*contractor*" as his contract of employment was with the Premier, who in turn was not a "*public body*". His disclosure was thus outside the severely limited scope of that Act.

Mr Burch made a statutory declaration to Police on the 20th of September 2007. It contained the allegations of how Mr Simon Cooper's appointment as a Magistrate did not proceed ("the Magistrate allegation").

Those allegations have since become well known and aired in Parliament.

Additionally the statutory declaration contained a hearsay on hearsay allegation concerning an appointment which did not proceed to the office of Solicitor-General ("the Solicitor-General allegation"). Mr Stephen Estcourt QC has named himself as one of the subjects of investigation. The Australian Financial Review, of 18 July 2008, identified him as being "*swept up in a police investigation believed to involve allegations a member of the former Tasmanian Government promised him the solicitor-general post if he were willing to*

waive legal fees owed to him by former deputy premier Bryan Green". The statutory declaration of Mr Burch named two other people besides Mr Estcourt, both Government members, as involved.

The Detective to whom the declaration was made and given, prepared and gave a report to the Commissioner concerning the circumstances of how it came into being. The Commissioner and I discussed the matter and decided that the allegations would not be acted on until the trial of Mr Bryan Green was completed. I had no more to do with the matter, and in fact had not seen the declaration, although I was made aware of its contents.

The statutory declaration was originally stored in the Glenorchy CIB safe but in December 2007 was transferred in a sealed envelope to the Commissioner's safe.

On the 8th of May 2008, I received from the Deputy Commissioner of Police an investigation file relating to the alleged removal of documents from the office of the former Attorney-General for opinions on evidentiary matters and whether, if a crime was revealed to have taken place, it should be prosecuted.

When I saw the file it became apparent that apart from the covering report which was prepared by the Detective who originally took Mr Burch's statutory declaration, there was no evidence of any investigative steps made earlier than the 8th of April 2008. It was on Saturday, 5th of April 2008 that the Mercury first published an account of the Magistrate allegation. On the same day the then Deputy Premier had issued a media release labelling the story *"pure fantasy"*. I was concerned that some material which might be of significance was being withheld from me, because in his media release of the 11th of April 2008 (Attachment 1) the Commissioner of Police had said that:

> *" 'Tasmania Police had already commenced an investigation in relation to the documents referred to by the Solicitor-General. This was initiated some time ago at the request of another party', Mr Johnston said."*

> *" 'The early investigation has been for the purpose of determining whether or not any crime or offence had been committed and this latest request will form part of that investigation.' "*

As there was no evidence of any investigation *"initiated some time ago"* in the materials given to me, I asked the Deputy Commissioner for more information about the *"investigation"*, who requested it, who ran it, and what evidence had been gathered by it. I asked for all other relevant material, including briefings.

I was sent further material, which included the attached Briefing Note of the 9th of April 2008 from the Commissioner to the Minister (Attachment 7 with the names and ranks of the Detectives then assigned – which appear clearly on the original - deleted), and the attached Question Time Brief of the same date by the same author (Attachment 8). I was astonished and disturbed to see that the Commissioner had given the Minister forewarning of the investigation into the Solicitor-General allegation when that allegation had not publicly surfaced and even before (according to the Running Sheets also sent) an officer was selected and tasked to lead the investigation, much less before any Investigation Plan could be prepared. The names and ranks of two of the Detectives to be involved were given, quite inappropriately in my view.

I wrote to the Deputy Commissioner on the 21st of May 2008 – I attach a copy of that letter (Attachment 9). One sentence and one paragraph have been deleted as they identify the two Government members named in the Solicitor-General allegation and the names of the officers investigating it.

I received no reply to that letter, and I understand the Commissioner has refused to advise the Deputy Commissioner of the answers. There are assertions from all three persons who had been named as having been involved in the Solicitor-General allegation (an allegation they deny) that by or before the 11th of April 2008 they knew the allegation had been made and that it was to be investigated by Police. At that time the officer to head the

investigation still had not been tasked, and no investigation plan had been prepared.

I cannot think of any legitimate reason to alert persons to be investigated of the allegation against them, that it was going to be investigated and who would be investigating.

6. Recommendations

As I stated at the outset this is a limited submission, focussing on the investigation aspect. I am unsure of what is meant by an "*Ethics Commission*" in the Terms of Reference, as although I am aware something to be called that has been called for by Sir Max Bingham, and several United States' states have one, I do not believe the model is so homogeneous that the phrase is a term of art, possessing a certain meaning.

Most United States' Ethics Commissions seem to follow the enactment of a specific public ethics law, and then have some educative, investigative and (often) advisory functions. Many appear to have a prime, and some an exclusive, focus on political campaign issues.

The model of statute declaring ethical standards first, commission second has appeal. It might be contrasted with, for example, the New South Wales Independent Commission Against Corruption, which operates from broad definitions of corrupt conduct which are part of the establishing Act of the Commission. As such, it seems that so broad are the definitions that ICAC becomes a kind of judge in its own cause of what it will investigate and what it will report on. On one view of it, ICAC thereby becomes a law and an ad hoc law making body unto itself.

By contrast, some of the essential features of the criminal law are:

(1) the elements of what will be criminal conduct, including the state of mind required to amount to it, will be decided in advance by a democratically elected legislature;

(2) the law is (or should be) expressed in a way which the citizen can understand before being involved any behaviour which might be criminal;

(3) the trial of criminal conduct takes place in an open forum before impartial judicial officers and, in the case of very serious crime, a jury of citizens.

I believe that if proper attention is given by the legislature to seeing that its criminal laws are sufficiently comprehensive and comprehensible, then so long as there are independent and effective investigative and prosecutorial agencies, unethical conduct and misconduct (that is, criminal conduct) can be tried and, if found, punished within existing mechanisms.

To have independence and effectiveness in the investigation of possible criminal conduct of elected Parliamentary representatives (which I would extend to Local Government representatives) and State (and local) servants (including those who are in Government Business Enterprises and similar) there needs to be:

(a) An organisation statutorily independent of Government (but accountable to Parliament) which has as one of its functions the investigation of crimes and offences which may have been committed by Government (including Local Government officers and employees, and including quasi-Government employees and officers).

(b) A head of the organisation (or panel of people) who is or are independent of Government, which in turn requires:

(i) a merit-based selection process preceded at least by the calling for written expressions of interest;

(ii) sufficient remuneration to attract persons of substance;

(iii) an appointment for a term at least exceeding the life of one House of Assembly.

That person (or panel) would have the ability to assess whether the complaint or information of conduct could amount to criminal conduct (that is, to act as a gatekeeper to investigation) and the ability to oversee an investigation. I do not think the latter capacity needs the ability to micro-manage investigations but rather to offer general strategic advice and be the ultimate reporting repository. Accountability would be to Parliament.

(c) An adequate, expert and properly remunerated staff. I believe the body would require a team of investigators - not a large team but an expert one. One model worth considering would be to make secondment from Tasmania Police attractive and not career-stultifying. Offering a rotation of, say, two or three years at a salary appropriate to rank plus a premium might ensure sufficient attraction. Officers seconded would retain their Police powers, but the reporting "ladder" would be closed off. Existing Police forensic and other facilities would be made available when required, with an embargo on information gleaned by those providing such services

(d) The results of any investigation would need all to go to my Office, whether summary or indictable crime is involved, for assessment as to suitability for prosecution, and for prosecution.

The independent investigative agency ought to have the ability to conduct ethical audits at its own instigation. A weakness of the present mechanism for detecting corrupt (criminal) practices is that it is

complaint-based. An effective body should be able to initiate audits and to investigate anything revealed (subject again to the head, or panel, approving the investigation as one which might reveal evidence of criminal conduct).

(e) Resourcing is a matter which needs to be addressed at the outset, as a truly independent body quickly becomes an "orphan". That has been the experience of my office, and of DPP offices throughout the country. Lacking any immediately apparent political use to Government (e.g. photo opportunities, shared "secret" information and the willingness to do what is wanted without having to be directed) they tend to become under-resourced to the point where mistakes are made more often than not and there is public disquiet. Then a massive injection of funds is required (this pattern has been gone through in Western Australia, South Australia and Queensland in the last four years). It would be better to ensure adequate funding from the start, and a formula to continue it. This does not necessarily mean a large impost to Government: since what is required is something to do what Police ought to have done, one would expect savings to be found - perhaps by the application of external controls and external work/value assessments - from the Police budget itself to establish a truly independent and effective investigative body.

T J Ellis SC
DIRECTOR OF PUBLIC PROSECUTIONS

30 July 2008

Attachment 1

FOR A SAFER TASMANIA

Tasmania Police

Media Release

Date: 11 April 2008

Contact: Yvette Stubbs
☎ 0362 302867

MR 08114

POLICE CONFIRM INVESTIGATION

The Commissioner of Police, Mr Jack Johnston, today confirmed that he had received a request from the Solicitor-General to conduct an investigation into the removal of documents from the office of the former Attorney-General, Mr Steven Kons.

"Tasmania Police had already commenced an investigation in relation to the documents referred to by the Solicitor-General. This was initiated some time ago at the request of another party", Mr Johnston said.

"The early investigation has been for the purposes of determining whether or not any crime or offence has been committed and this latest request will form part of that investigation."

Mr Johnston also challenged the accuracy of statements made by the Director of Public Prosecutions in relation to the independence of Tasmania Police.

"I have become aware of a letter from the Director of Public Prosecutions addressed to the Honourable N McKim MP in which he raises issues regarding the discharge of my responsibilities", Mr Johnston said.

Mr Johnston said that any suggestion that Tasmania Police is subject to the direction of the Minister of Police in relation to the investigation of crimes or decisions in relation to the prosecution of crimes is misconceived.

"To go into the legal niceties of this issue would be complex but I would like to quote Sir Robert Mark, former Commissioner of the London Metropolitan Police who said,

> **"The operational freedom of the police from political or bureaucratic interference is essential to their acceptability and to the preservation of democracy ...**

23/5/08

the public trust the police a great deal more than politicians in government or opposition".

"I am not aware of any occasion in my career when a Minister of the Government had issued a direction to the Commissioner of the day on an operational policing matter. I, like any other police officer, would be bound by my oath of office not to obey any such direction," Mr Johnston said.

The following information is available to give some context to the above comments.

Section 7 (1) of the Police Service Act provides that the Commissioner, subject to the direction of the Minister, is responsible for the efficient, effective and economic management and superintendence of the Police Service.

Section 7 (1) permits the Minister to give broad policy directions to the Commissioner concerning policy and budget issues. It does not permit direction concerning criminal investigations or the exercise of the prosecutorial discretion.

Moreover, the Commissioner of Police, like all other police officers, would be bound by his oath of office not to obey any such direction.

In strict constitutional terms, the Police do not hold any special position in relation to the separation of powers between the three arms of government (Parliament, the Executive and the Judiciary) whose powers are seen as separate and independent from each other.

While police fall within the Executive arm, police services in the western world, including Australia have, since the establishment of the first organised police force in England, developed an independence of action which has been accepted and enshrined in convention and in law.

The foundation of this independence is the office of Constable.

In Enever v The King (1906) 3 CLR 969 the High Court recognised that police officers are not agents or servants of the State, that they have original, not delegated authority and exercise common law and statutory powers independent of any influence by the Government.

PLEASE NOTE THAT POLICE WILL MAKE NO FURTHER COMMENT ON THIS MATTER.

23/5/08

Attachment 2

TASMANIA

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

INQUIRIES: Mr T J Ellis SC
OUR REF:
YOUR REF:

COPY

11 April, 2008

The Honourable N McKim MP
C/- Parliament House
Hobart Tasmania 7000

Dear Mr McKim

You have asked me to investigate certain matters. I confirm my advice on meeting you today, that I have no investigative function or power. My functions are set out in Section 12 of the *Director of Public Prosecutions Act 1973*. They do not include investigation.

The functions do include "*(f) to carry out such other functions ordinarily performed by a practitioner as the Attorney-General directs or requests.*" On 17 July 2006 I received a request and direction from the Attorney-General "*to direct and supervise an investigation surrounding the circumstances of the execution of an agreement or purported agreement styled* "Service Level Agreement" *in 2006 between the Honourable Bryan Green MHA and Mr John White.*" It was unprecedented that I receive such a request and direction.

I had misgivings that to direct and supervise an investigation would not be a function ordinarily performed by a (legal) practitioner, but acceded to the request nevertheless for two reasons:

1. It was clear that all parties represented in Parliament wanted there to be such an investigation, and therefore if it became necessary special legislation would probably have been enacted to enable it. The passage of such legislation would have delayed and thus further compromised any investigation, and prolonged the political crisis which prompted it.

2. The State of Tasmania lacks any independent investigative body. I have the utmost respect for Tasmania Police, and do not doubt its integrity as an organisation, but the plain fact is that the Commissioner of Police discharges his responsibilities "*under the direction of the Minister*" - s 7(1) of the *Police Service Act 2003* ("*Minister*" appears to mean the Premier - see parts 9 and 10 of the *Administrative Arrangements Order 2008*). As the structure of the Police Service is hierarchical it follows that the entire service is, as is the Commissioner, under the direction of the Minister.

15 MURRAY ST, HOBART, TASMANIA 7000 TELEPHONE (03) 6233 6649 FAX (03) 6234 2892
GPO Box 825 DX 15 EMAIL: dpp.reception@justice.tas.gov.au

> It is thus inaccurate to speak of an "*independent*" Police service, just as it is to speak (as I have heard said today) of some "*separation of powers*" concerning Police.

For those reasons, I accepted the request in that unique matter. If there were to be a similar request which did not enjoy the apparent unanimous support of the House of Assembly, then I would have to give further consideration whether the direction and supervision of an investigation is indeed a function "*ordinarily performed by a practitioner*".

Putting that question to one side, clearly only the Attorney-General can make a valid request and/or direction that I investigate a matter, otherwise it is certainly no part of my function. I am disappointed to see it attributed to the Attorney-General in today's press the following: "*The DPP is an independent person – any person can bring matters before the DPP.*" If he was accurately quoted, and if he intended to indicate that anyone could ask me to investigate a matter and I could choose whether or not I did, he was wrong and I will write to him to correct his impression.

For the above reasons, I cannot accept your request to investigate a matter.

Yours faithfully

T J Ellis SC
DIRECTOR OF PUBLIC PROSECUTIONS

15 MURRAY ST, HOBART, TASMANIA 7000 TELEPHONE (03) 6233 6649 FAX (03) 6234 2892
E-mail: dpp.lawclerks@justice.tas.gov.au

Police zoom in on central city crime

MARK WORLEY

BE warned people of Hobart, you are being watched.

Police Minister Jim Cox put the public on notice yesterday when he unveiled the new closed-circuit television facility at the Hobart Police Station.

The facility is a room holding six large television monitors, which broadcast live footage streamed in from more than about 20 cameras around Hobart.

The majority of footage broadcast is from the central business district and waterfront areas but some shopping centres, including Northgate, are also observed.

"The cameras give us the ability to make people aware they are being looked at, they need to control their activities and we are not going to tolerate any misbehaviour in that area," Mr Cox said.

"If you are not doing anything wrong then there is nothing to worry about.

"I will not tolerate alcohol-fuelled thuggery on our streets and neither should anyone else."

The police upgraded 15 existing CC-TV cameras around Hobart last week, to link in with their new camera recording and playback system.

EAGLE EYE: Police Minister Jim Cox inspects the monitors in the new closed-circuit television facility at the Hobart Police Station.
Picture: RAOUL KOCHANOWSKI

Three new cameras were also installed near a controversial taxi rank in Montpelier St at Salamanca. The new CC-TV system, which will be monitored intermittently by Tasmania Police, was created because of a recent rise in violent and anti-social behaviour on the waterfront at night.

Police Commissioner Jack Johnston said the cameras would assist police officers who were under immense pressure dealing with the waterfront problem.

"There is absolutely no doubt that police officers are getting quite fed up with being punching bags, being spat on and having to deal with those who are unable to handle their alcohol," Mr Johnston said.

Mr Cox also announced yesterday that an alcohol forum will be held in Hobart on July 17.

Attachment 4

Drug driving crackdown

Stiffer penalties being considered

BRUCE MOUNSTER

STIFFER penalties may be on the way for drivers caught under the influence of drugs.

The tougher penalties will be considered during a review of a new law allowing Tasmania Police to use steering wheel swabs to test for drugs.

"It is highly likely that heavier penalties will be part of that," assistant police commissioner Scott Tilyard said.

The existing penalty for driving under the influence of drugs is a $200 fine and three months' disqualification — less severe than most alcohol offences.

Mr Tilyard said the steering wheel swabs would make it easier for police to nab offenders.

Steering wheel swabs were cheaper and quicker than the old saliva tests, so more tests could be done. If a swab test was positive, a saliva test could be used as a follow-up.

Mr Tilyard said the saliva tests cost about $40 and delayed drivers for five to 10 minutes.

SAFETY FOCUS: Scott Tilyard, Tasmania Police

He also detailed results of drug driving tests since 2005.

Mr Tilyard said 1132 drivers were subjected to saliva tests.

Of those, 344 were directed to provide blood samples for lab tests to confirm or rule out the presence of drugs.

Of those, cannabis was found in 190 samples, methamphetamine 135, ecstasy 16, morphine 12, amphetamine 3 and cocaine 1.

Mr Tilyard said a further 52 samples were awaiting lab analysis and 13 drivers had refused to provide blood samples, incurring a $600 to $3600 fine, one to three years' disqualification and in some cases prison for as long as 12 months.

Most of the 1132 drivers tested had been selected while police conducted random alcohol breath tests.

Mr Tilyard said positive steering wheel swabs or saliva tests did not provide grounds for police officers to search vehicles for drugs.

"This is purely for road safety," he said.

"People who drive with illicit drugs in their body create a significant road-safety risk to both themselves and other road users."

Attachment 5

Attachment 6

1. PURPOSE

1.1 To seek Cabinet approval for the drafting of legislation to amend the *Sentencing Act 1997* to:

- provide consistency, fairness and uniformity for procedures involving a breach of suspended sentence;
- reinforce the deterrent value of suspended sentences by expediting the process of breaching suspended sentences through the courts; and
- empower the courts to initiate proceedings in relation to a breach of suspended sentence.

2. RECOMMENDATION

2.1 I RECOMMEND that Cabinet approve drafting of amendments to the *Sentencing Act 1997* to:

a) Provide that a court must initiate proceedings relating to a breach of suspended sentence if the court convicts an offender of an offence that was committed whilst a suspended sentence was in force;

b) Provide that if the court that initiates the proceedings relating to a breach of suspended sentence, has like jurisdiction to the court that imposed the suspended sentence, the first court must deal with the offender for the breach;

c) Provide that if the court that initiates proceedings relating to a breach of suspended sentence, is of lower jurisdiction to the court that made the order, the first court must transfer proceedings to the court that imposed the suspended sentence;

d) Provide that if the court that initiates the proceedings relating to a breach of suspended sentence, has higher jurisdiction than the court that imposed the suspended sentence, the first court must deal with the offender for the breach of suspended sentence unless the court considers that it would be in the interests of justice to transfer the matter to the original court that imposed the suspended sentence; and

e) Retain the application procedure, by an authorised person, for a breach of a condition of a suspended sentence, other than by the commission of an offence.

3. BACKGROUND

3.1 In April 2007, a report was received from the Director of Public Prosecutions, Mr Tim Ellis, in relation to problems associated with the current process of breaching suspended sentences. The current manner in which breaches are detected involves police prosecutors or DPP Counsel manually detecting the breaches and then making the appropriate application to the relevant court.

3.2 The process for Tasmania Police involves manual detection via conviction databases, which can take anywhere up to 3 months as new convictions are added to the system. A report is then sent to Police Prosecution Services notifying them of the breach of suspended sentence. The relevant court files are then obtained and an application is prepared to initiate breach proceedings. The application is then lodged with the relevant court. A copy of the application is then sent out to be served on the defendant.

3.3 The current process for breaching a suspended sentence is laborious and protracted. On the 25th July 2007, in handing down sentence for a breach of suspended sentence, Magistrate Webster was very critical of the processes involved regarding breach of suspended sentence applications. Magistrate Webster raised the issue that breach applications are usually made long after the breach has occurred. As a consequence, imposing the suspended sentence is of little deterrent value and could be considered unjust to the defendant.

4. ISSUES AND SUPPORTING INFORMATION

The current procedure for breaching a suspended sentence requires an application to be lodged by an authorised person. An authorised person is defined as "DPP, police officer or probation officer". The legislation deflects the responsibility of breaching a suspended sentence away from the justice system who were responsible for administering the sentence initially.

Legislation in South Australia, Queensland and Western Australia does not require an application to breach a suspended sentence. Where a court convicts an offender of an offence that constitutes a breach of suspended sentence, the court must automatically proceed with the breach.

At the time of conviction, the Magistrate or Judge is given access to the offender's prior convictions. This allows them to determine if the offender is breaching a suspended sentence.

4.1 EMPOWER COURTS TO INITIATE BREACH PROCEEDINGS

Section 27 of the *Sentencing Act 1997* (the Act) relates to breaches of orders suspending sentences. Currently, to breach a suspended sentence, an application is required to be completed by an authorised person under the Act. This process is required whether the offender has breached a condition of the suspended sentence or committed another offence punishable by imprisonment (referred to as the 'new offence').

It is proposed to allow a court to initiate breach proceedings when dealing with an offender in relation to a conviction for a new offence. Upon conviction, the court is allowed access to the offender's prior convictions, which allow the court to determine if a suspended sentence has been breached by the new offence.

This amendment will provide that a Magistrate or Judge must initiate breach of suspended sentence proceedings if the court is satisfied that the new offence was committed during the operational period of the suspended sentence. This

amendment will be similar to section 146 of the Queensland *Penalties and Sentences Act 1992.*

4.2 COURT JURISDICTION

In allowing courts to initiate breach proceedings, an amendment is also required to enable proceedings to be transferred to a court that has the appropriate jurisdiction to deal with the breach.

In situations where a court convicts an offender of a new offence, which breaches a suspended sentence made by a court of like jurisdiction, the first court must initiate and deal with the breach of suspended sentence.

If a court who convicts an offender of a new offence is of higher jurisdiction to the court that imposed the suspended sentence, the first court may deal with the breach of suspended sentence, unless the court considers that it would be in the interests of justice for the offender to be dealt by the original court.

Where a court of lower jurisdiction convicts an offender of a new offence, and the court is of lower jurisdiction to the court that imposed the suspended sentence, the lower court must transfer proceedings for the breach of suspended sentence to the higher court.

4.3 RETAIN APPLICATION PROCEDURE FOR BREACH OF CONDITION OF SUSPENDED SENTENCE

The amendments to the Act should not remove the application procedure to allow proceedings to be initiated when an offender breaches a condition of a suspended sentence. As some conditions of suspended sentences do not, on their own, constitute offences, the application procedure is still required to allow these breaches to be brought before the court.

Such a breach may include an offender consuming alcohol when a condition of his suspended sentence requires that he refrain from consuming any alcohol.

5. Options

5.1 Option **1** - Do Nothing

This option is **not recommended.** The current application process for breaching suspended sentences is not working. If an offence was serious enough to warrant a suspended sentence of imprisonment, a breach of the suspended sentence should be dealt with expeditiously to ensure public safety and reinforce the deterrent value of suspended sentences. This cannot occur when the process relies upon manual identification of breaches and a lengthy application process.

5.2 **Option 2** - Provide approval for the drafting of legislation to amend the *Sentencing Act 1997 to:*

- provide consistency, fairness and uniformity for procedures involving a breach of suspended sentence;
- reinforce the deterrent value of suspended sentences by expediting the process of breaching suspended sentences through the courts;
- empower the courts to initiate proceedings in relation to breaches of suspended sentences.

Option 2 is the **preferred option.** The purpose of a suspended sentence is to signify the seriousness of the offence and the consequences of re-offending. They provide the offender with the opportunity to avoid the sentence of imprisonment subject to strict conditions, which must be complied with. In the circumstances of a breach of suspended sentence, the breach process should provide the defendant and community with timely justice.

Amendment would ensure that the breach of suspended sentence is initiated at the time of conviction for a subsequent offence. It would provide consistency, fairness and uniformity in processing breaches of suspended sentences.

Steven Kons
MINISTER FOR JUSTICE

September 2007

6. LIST OF ANNEXURE

6.1 Financial Impact Statement

6.2 Economic and Employment Impact Statement

6.3 Social/Community Impact Statement

6.4 Legislative and Regulatory Impact Statement

6.5 Inter-governmental Relations Statement

6.6 Communications and Community Consultation Strategy

6.7 Consultation Statement

6.8 Other Attachments

6. **Financial Impact Statement** **ANNEXURE 6.1**

A. Consolidated Fund (Amounts shown in $,000s)	This Year 2007/08 $,000	Year 1 2008/09 $,000	Recurrent 2009/2010 onwards $,000
Additional Expenditure Program: Salaries Recurrent Non-Salary Administered Payments Building Construction Program Other Capital			
(1)	0	0	0
Reduced Expenditure Program: Salaries Recurrent Non-Salary Building Construction Program Other Capital			
(2)	0	Nil	Nil
Net Expenditure Effect (1)-(2)=(3)		Nil	Nil
Additional Receipts Item: Increase in Commonwealth Receipts (4)			Nil
Reduced Receipts Item:(5)		Nil	Nil
Net revenue Effect (4)-(5)=(6)	0		
AGGREGATE COST (BENEFIT) (3)-(6)	0	0	0

Explanations:

The amendment proposed will not require the expenditure of additional funds.

6.2 Economic and Employment Impact Statement

The proposed amendment to the *Sentencing Act 1997* is likely to have little economic and employment impact on the State of Tasmania

6.3 Social / Community Impact Statement

The proposed amendments are intended to improve the court process for breaching suspended sentences to allow these matters to be dealt with in a just, timely and cost effective manner.

6.4 Legislative and Regulatory Impact Statement

The legislative and regulatory impact on the public will be minimal.

6.5 Inter-government Relations Statement

There are no significant implications for other Government Departments or Local Government.

6.6 Communications and Community Consultation Strategy

There will be a need for a media statement for both written and electronic media outlets upon tabling of the Bill and once enactment has occurred.

6.7 Consultation Statement

Department of Premier and Cabinet, Department of Police and Emergency Management and Department of Treasury and Finance are to be consulted.

6.8 Other Attachments

6.8.1 Legislation checklist
6.8.2 Communication Strategy

ANNEXURE 6.8.1

Agency: Department of Justice

Name of proposed Bill: *Sentencing Amendment Bill 2007*

Reason for Bill	o To improve the efficiency of the justice system o To introduce contemporary legislation
Deadlines	
Priority	
Drafting Task	Simple drafting task
Major obstacles	Nil
Resources	DOJ will consult with various stakeholders
OPC involvement to date	Nil

ANNEXURE 6.8.2

COMMUNICATIONS & COMMUNITY CONSULTATION STRATEGY

Amendment to the Sentencing Act 1997

Background:

The current procedure for breaching a suspended sentence requires an application to be lodged in court by an authorised person. An authorised person is defined as "DPP, police officer or probation officer". This process is laborious and protracted, and has recently been subject to criticism from a Magistrate. Due to the time involved in the application process, breach applications are usually made long after the breach has occurred. As a consequence, imposing the suspended sentence is of little deterrent value and could be considered unjust to the defendant.

The amendments seek to empower Magistrates and Judges to instigate proceedings for a breach of suspended sentence at the time of conviction for an offence which constitutes a breach. This process is logical and provides consistency, fairness and uniformity in processing breaches of suspended sentences.

Objectives:

To amend the *Sentencing Act 1997* to provide consistency, fairness and uniformity for procedures involving a breach of suspended sentence.

Key message:

These amendments seek to improve the efficiency of the justice system to provide consistent, fair and timely justice.

Supporting messages: Not required

Target audience:

Secondary audiences:

Risks:

Likely critics: Not known

How is the message to be communicated?

Who is the officer responsible:

Media announcements	Yes/No
Media releases	Yes/No
3rd party endorsement	Yes/No
Direct mail	Yes/No
TV advertising	Yes/No

Radio advertising	Yes/No
Press advertisements	Yes/No
Pamphlet/brochure	Yes/No
Public events/meetings	Yes/No
Web pages	Yes/No
Talk back radio/Letters to the Editor	Yes/No
Question and answer	Yes/No
Other	Yes/No

Communication vehicle details

Media announcements:

Announcement on Bill being introduced to Parliament

When: TBA
Mood: N/A
Invited guests: N/A
Media release: No
Third party endorsement: Not required
Stakeholder briefings: No
Press/radio/television advertising: No
Pamphlet/brochures: No
Web sites: No
Talk back radio, Letters to the Editor: No
Question and answer: No
Other options: Nil
Has the Communications Manager been consulted?

Yes ☐

No ☒ **Reason:** Not required

Additional information/comments:

Attachment 7

COPY

MINISTER FOR POLICE AND EMERGENCY MANAGEMENT

I enclose:

[ ] Prepared/draft reply for correspondence dated
Your request dated

[ ] Question Time Brief

[X] Briefing Note
Request dated

[ ] Correspondence to Cabinet Office

[ ] Other - Cabinet Minute

SUBJECT: **ALLEGATION RELATING TO THE APPOINTMENT OF TWO PUBLIC POSITIONS**

J Johnston
COMMISSIONER OF POLICE

9 April 2008

23/5/08

BRIEFING NOTE

MINISTER FOR POLICE AND EMERGENCY MANAGEMENT

SUBJECT: **ALLEGATION RELATING TO THE APPOINTMENT OF TWO PUBLIC POSITIONS**

BACKGROUND:

- On 20 September 2007, a statutory declaration was completed and provided to police which alleged impropriety in what was believed to be the intended appointment of a magistrate and of the Solicitor-General.

- Upon receipt of this material, discussions were held between the office of the Director of Public Prosecutions and the Commissioner of Police (Richard McCreadie) and these led to the commencement of an investigation.

- It was identified that there were significant links between this allegation and the ongoing prosecution of Mr B Green MHA and a real possibility existed that to continue the investigation could potentially prejudice that trial. The Commissioner of Police and the DPP agreed that the investigation should be deferred pending the resolution of the proceedings againsts Mr Green.

- The trial of Mr Green did not produce a result and the DPP has decided to discontinue the prosecution.

- I decided that the deferred investigation should be resumed and directed the Acting Deputy Commissioner to conduct it in a timely fashion. He has assigned [redacted] and [redacted] to complete a preliminary investigation to determine whether or not an offence has been committed. In this process the advice of the Director of Public Prosecutions will be sought.

J Johnston
COMMISSIONER OF POLICE

9 April 08

23/5/08

Attachment 8

JJ:DFB

MINISTER FOR POLICE AND EMERGENCY MANAGEMENT

I enclose:

[ ] Prepared/draft reply for correspondence dated
Your request dated
Your tracking number

[x] Question Time Brief

[ ] Briefing Note
Request dated

[ ] Minute

[ ] Other

COMMENT:

SUBJECT: ALLEGATIONS RELATING TO THE APPOINTMENT OF TWO PUBLIC POSITIONS

J Johnston
COMMISSIONER OF POLICE

9 April 2008

23/5/08

QUESTION TIME BRIEF

Hon Jim Cox, MP
Minister for Police and Emergency Management

SUBJECT : **ALLEGATIONS RELATING TO THE APPOINTMENT OF TWO PUBLIC POSITIONS**

SUGGESTED RESPONSE

Mr Speaker, this morning I asked my staff to raise with the Commissioner of Police the issue of the article on page 2 of today's Mercury under the headline, "Allegations of police probe into destroyed papers", which reported observations made by the Opposition yesterday.

I am informed that Tasmania Police received a report on 20 September 2007 making allegations regarding what was claimed to be impropriety in proposed appointments to be made by the Government. The material was referred to the then Commissioner of Police, Mr Richard McCreadie, who after an initial investigation of the matter decided to defer the further investigation of the allegations until after the re-trial of Mr Green MHA. This decision was taken in consultation with the Director of Public Prosecutions, Mr Tim Ellis, amid concerns that such an investigation or any attending publicity could have a prejudicial affect on that trial.

23/5/07

Mr Speaker, the current Commissioner decided to continue the investigation to determine whether or not any offence has been disclosed.

Mr Speaker, I can unequivocally state that I have not previously received any advice from the Commissioner regarding the existence of this allegation. I fully respect the need for an appropriate separation between the independent and impartial police investigation of matters such as this and any suggestion of political involvement in an operational policing matter.

Mr Speaker, I have been informed that the Commissioner of Police will obtain advice from the Director of Public Prosecutions in due course as to whether or not an offence or crime has been disclosed and whether or not in those circumstances a more complete investigation is necessary.

23/5/08

Attachment 9

TASMANIA

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

INQUIRIES:
OUR REF: 21600
YOUR REF: A08/10736 AD1662

COPY

21 May, 2008

Deputy Commissioner D L Hine
Commissioner's Office
47 Liverpool Street
Hobart Tasmania 7000

Dear Deputy Commissioner

PREMIER'S REFERRAL VIA SOLICITOR-GENERAL; N BURCH

As discussed on 20 May 2008, and as foreshadowed in my earlier letter on this matter, I am not willing to provide the second part of the advice you sought, namely "whether I believe the matter should be prosecuted" as I believe there are matters being withheld from me which are capable of affecting that judgment. (By the way, I regard your request as not raising a matter of legal advice but of **my** reaction and judgment as Director of Public Prosecutions, and an indication of how I would exercise my entitlements under Section 12(1)(a)(ii) and (iii) of the *Director of Public Prosecutions Act 1973* in the event a prosecution is instituted. If you take a different view, I invite you to advise and explain how that is reached.)

I wrote to you on 9 May 2008 inter alia that "*The Commissioner was reported on 12 April 2008 as saying an inquiry into this matter was "already under way at the request of another unnamed party". I cannot find any reference to the fact of such an inquiry, who requested it and when, who ran it and what evidence had been gathered by it. These are all matters I should be informed of as they have the capacity to affect my consideration of the advice you seek. Kindly let me have that extra material ...*"

That request for information has not been answered.

You did send me, as requested, written briefings and media releases. That material has served to heighten my discomfort. In particular:

1. The Police Media Release of 11 April 2008, no doubt authorised and vetted by the Commissioner, did indeed say, in specific reference to "*an investigation into the removal of documents from the office of the former Attorney-General*",
   "*Tasmania Police had already commenced an investigation in relation to the documents referred to by the Solicitor-General. This was initiated some time ago at the request of another party.*

15 MURRAY ST, HOBART, TASMANIA 7000 TELEPHONE (03) 6233 6649 FAX (03) 6234 2892
GPO Box 825 DX 15 EMAIL: dpp.reception@justice.tas.gov.au

The early investigation has been for the purposes of determining whether or not any crime or offence has been committed and this latest request will form part of that investigation."

As that later investigation was into the **removal** of shredded documents, this cannot relate to any earlier claimed investigation into Mr Burch's own allegations, I would have thought. In any event, Mr Burch himself plainly made no such request, so the question would remain: who did?

2. Mr Burch had provided a statutory declaration to Police on 20 September 2007, which was given to the former Commissioner of Police on 26 September 2007. It detailed two allegations, one concerning the circumstances of Mr Kons shredding a signed recommendation of Mr S Cooper as Magistrate, and one concerning the appointment of a new Solicitor-General. .**[Sentence deleted]**

3. The matter of the shredding of the Cooper recommendation was raised in Parliament on 8 April 2008. The next day, 9 April 2008, the Commissioner gave the Minister for Police and Emergency Management a Question Time Brief in which he suggested the Minister say in Parliament,

"Mr Speaker, this morning I asked my staff to raise with the Commissioner of Police the issue of the article on page 2 of today's Mercury under the headline "Allegations of police probe into destroyed papers"*, which reported observations made by the Opposition yesterday.*

I am informed that Tasmania Police received a report on 20 September 2007 making allegations regarding what was claimed to be impropriety in proposed appointments [1] (my emphasis added) *to be made by the Government. The material was referred to the then Commissioner of Police, who* ***after an initial investigation of the matter*** [2] *(my emphasis) decided to defer further investigation ...*

Mr Speaker, the current Commissioner ***decided*** [3] (my emphasis) *to continue the investigation to determine whether or not any offence had been disclosed. Mr Speaker,* ***I*** [4] (my emphasis) *can unequivocally state that* ***I*** [4] (my emphasis) *have not previously received any advice from the Commissioner regarding the existence of this allegation."*

There then followed, words concerning the independence of the police investigation which it was proposed the Minister would say.

The questions arising from that I have emphasised and numbered are:

1 Why was the fact of an allegation of impropriety in appointments in the plural conveyed to the Minister?

This was not a slip, as the Briefing Note from the Commissioner of the same date to the same Minister said, *"On 20 September 2007 a statutory declaration was completed and provided to police which alleged impropriety in what was believed to be the intended appointment of a magistrate and of the Solicitor-General"*.

So far as I am aware, the allegation concerning the appointment of a magistrate was all that had been made public. I would have thought the Minister for Police would be keen to know, if it was then revealed to him for the first time, what exactly was the allegation concerning the appointment of the Solicitor-General. Was he then told? Had he been earlier told? Had others in Government been earlier told?

2 What was the initial investigation? Who conducted it? With what result? Where is the evidence produced?

3 When did he so decide? This seems to be portrayed as an independent decision. Is it therefore a decision made on some different occasion than that portrayed in the media release of 11 April 2008 that the investigation into the removal of documents was initiated *"some time ago at the request of another party"* and was *"for the purposes of determining whether or not any crime or offence had been committed."* I'm not sure how that is supposed to differ from the current Commissioner's *"decision"* to see *"whether or not any offence had been disclosed"*. I would have thought the first in time was wider in terms than the second.

Again, there is a repetition in the Briefing Note of the same date: *"I decided that the deferred investigation should be resumed and directed the Acting Deputy Commissioner to conduct it in a timely fashion.* **[Sentences deleted]**

When were you directed?

Again, this is being portrayed as an independent decision on the part of the Commissioner, but is it not the case that the Commissioner had already spoken to members of Government by the time you were directed?

4 I must wonder why the Commissioner felt it necessary to have the Minister state this. He had only been Minister since 12 February 2008. Had the previous Minister, or the Premier (to whom the office of the Commissioner of Police is assigned under the Administrative Arrangements Order (No. 2) 2008, and its predecessors) been advised of the allegations? When? By whom? Why?

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 (*"some time ago"*) that its or their initiation pre-dated 8 April 2008 and were neither at the request of the Minister for Police (who was to be claimed to be ignorant of Mr Burch's allegations until 9 April 2008) nor the Premier (as the investigation requested by him via the Solicitor-General was going to *"form part"* of an investigation already initiated at the request of an unnamed person). There seems to have been disclosure of both Mr Burch's allegations to those they were made against. The experience in the TCC matter, where according to unchallenged evidence, the former Minister under investigation used the time before interview to rehearse himself and others, would suggest such forewarning may affect the quality of any evidence produced by investigation.

I invite your response, or your advice that you do not intend to respond either because you have been so instructed or cannot obtain the information (although in the case of when you were directed, as referred to in the Briefing Note of 9 April 2008, you have the information). None of these matters should require any time to investigate if you are going to respond, and therefore if I have no response by close of business this Friday, 23 May 2008, I will assume I will be getting no response.

Yours sincerely

T J Ellis SC
DIRECTOR OF PUBLIC PROSECUTIONS