

THE LEGISLATIVE COUNCIL SELECT COMMITTEE ON PUBLIC SECTOR EXECUTIVE APPOINTMENTS MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON THURSDAY, 16 OCTOBER 2008.

Mr GEOFFREY LEIGH SEALY SC, SOLICITOR-GENERAL, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - The hearing is reconvened. Leigh, thanks very much for responding to our summons to appear before the committee. You've seen our terms of reference.

Mr SEALY - We have had some correspondence about your terms of reference, yes.

CHAIR - Yes, you have. You are aware of the circumstances into which we are inquiring and that correspondence goes to the matter of your query as to our Standing Orders and public comment prior to the committee reporting to the House? -

Mr SEALY - Yes.

CHAIR - As we have just explained to Tim Ellis, because he likewise pointed out that, although he hadn't provided any challenge in writing to the committee, he had raised the matter with us as to the notion of the media being able to report, as best they can recall, the proceedings of such a hearing. As we indicated to Tim, Parliament doesn't operate merely and entirely under Standing Orders but in accordance with custom and practice as well. The custom and practice of not only the Legislative Council but also all of its select committees over a long period, probably forever -

Mr SEALY - Since 1978 as I understand it, Mr Chairman. The Select Committee on Victimless Crime determined to adopt the procedure adopted by the House of Commons in the United Kingdom which was to allow the publication of evidence and documents given before a committee prior to a report to the committee. The effect of, I think, standing order 200 of the Legislative Council prohibits that publication, but, as I understand it, since 1978 both committees of this Chamber and of the House of Assembly and joint committees of both Houses have proceeded otherwise than in accordance with that standing order to the extent that it is now said that a practice has arisen in both Houses to ignore the particular standing order.

I might indicate - as I think I did in writing - that the House of Commons in England has in fact amended its standing orders to bring its practice into accord with the orders but of course I would not presume to give any advice to honourable members about what they might do in the circumstances.

CHAIR - That settled, can I just pose the first question to you as to whether you were aware of the public suggestion at least - well, you probably were aware because it was public - that Mr Estcourt had aspired to the office of Solicitor-General?

Mr SEALY - Can I preface my answers this way, Mr Chairman. You have adverted to the correspondence we have had concerning the terms of reference of this committee. I have formed a view about what I consider to be the breadth of those terms of reference and I

consider the question, with respect, that you have just put to me falls outside those terms of reference.

However, it is my intention, so far as I consider it an appropriate course to adopt, to attempt to answer the questions you put in relation to the matter you are now pursuing on the basis that I do so voluntarily, not on the basis that I accept that the committee is able to compel me to provide answers to those questions. Having said that, my answer to your question is yes, I was aware of suggestions in the public domain that Mr Estcourt aspired to the position of Solicitor-General.

CHAIR - I could make some comment with regard to your assessment of the terms of reference but I do not think that is necessary at this stage. You have indicated that Parliament determines its direction. The committee can, of course, determine how broadly it may have been interpreted or intended. We have not sought legal advice about that so we will proceed.

During the year 2007, did anyone from the executive level of government approach you in connection with the Solicitor-General's position?

Mr SEALY - You mean by the executive levels, someone in the State Service?

CHAIR - No, somebody in the Government, any government member.

Mr SEALY - You mean a member of the governing party?

CHAIR - An elected member of the governing party.

Mr SEALY - A member of the ALP?

CHAIR - Yes.

Mr SEALY - During 2007?

CHAIR - Yes.

Mr SEALY - No.

CHAIR - Or subsequently?

Mr SEALY - The question is a bit ambiguous. Do you mean before or after my appointment?

CHAIR - Before your appointment.

Mr SEALY - No.

CHAIR - Any member of government staff?

Mr SEALY - Yes.

CHAIR - Was that from a ministerial office or from a department?

Mr SEALY - In either late June or July, possibly August but my best guess would be July, I received a telephone call in my chambers from a person who identified herself as Linda Hornsey and asked me was I interested in submitting an expression of interest for appointment to the position of Solicitor-General. I declined to express interest and that is the only contact I had of any relevant kind - relevant to your question - during 2007. I was approached again in 2008.

CHAIR - Yes, we will cover that. Did you find it in any way unusual that Ms Hornsey from DPAC would make such an approach rather than somebody from the Justice department or the Attorney-General's office?

Mr SEALY - I thought it unusual that I had been contacted, but since I had never been contacted about the position of Solicitor-General before by anyone I did not have any view about whether it was usual or unusual. I did not know how those things had been done in the past.

CHAIR - So in your response to that contact by Ms Hornsey, did you have a lengthy conversation or was it a short conversation? Were you summarily dismissed or -

Mr SEALY - Yes, it was relatively brief.

Mr MARTIN - Why were you surprised to be contacted?

Mr SEALY - I was surprised that I was under consideration for appointment to that position.

Mr MARTIN - You did not think you were up to the job?

Mr SEALY - I still do not know whether I am up to the job.

Mr MARTIN - Do you think someone else was front-runner for the job?

Mr SEALY - As I have already said, there were strong rumours within the profession that it was likely that Stephen Estcourt would be appointed Solicitor-General. As I have said on other occasions, both publicly and privately, my own view was that he was eminently qualified for that position. Certainly in the circles in which I moved in the profession that was the generally held view.

CHAIR - You have indicated to me that it was generally held in the profession that Stephen Estcourt was on the inside rail.

Mr SEALY - Yes.

CHAIR - Had that been the suggestion for a long period of time?

Mr SEALY - Look, you are testing me now. My recollection is that at some point the *Mercury* newspaper reported a story in which it said more or less unconditionally that Stephen Estcourt would be appointed Solicitor-General. My memory would be that that was some time in the fourth quarter of 2007 - that is, some time after September 2007. It

might have been before that because I was overseas for all of September and October last year so it may well have been before that time that the *Mercury* published that story. Certainly from that time I think the general expectation in the profession was that Mr Estcourt would be appointed Solicitor-General.

CHAIR - Did you have any conversations with Stephen after it was published in the newspaper that he was likely to get that job?

Mr SEALY - I certainly would have had conversations with him. Whether I had any conversations about whether he was to be appointed, I cannot say. I imagine that we had conversations predicated on the assumption that it was likely at some future time he would no longer be in the same chambers I was in because he would be appointed Solicitor-General, yes. However, I cannot recall a specific conversation in which he said to me that he was to be appointed Solicitor-General, or that he was not.

Mr MARTIN - You were in the same chambers?

Mr SEALY - The Malthouse Chambers. There were at that stage I think nine barristers in those chambers.

CHAIR - That being the case, that you had these discussions about the likelihood or possibility that he might not be in the chambers into the future, did he give you that understanding that -

Mr SEALY - No.

CHAIR - You had formed your view?

Mr SEALY - He had made no secret of the fact that he desired the appointment of Solicitor-General. From at least September 2007 it was generally accepted within the profession, or at least within the members of the profession with whom I had contact, that the overwhelming probability is that Mr Estcourt would be appointed.

Mr HALL - Mr Sealy, in regard to the conversation you had with Ms Hornsey, what was her reaction when you said that you weren't interested, I think you said at the time.

Mr SEALY - Well, what I said was that I had declined to express interest.

Mr HALL - Was she affronted?

Mr SEALY - No. She thanked me. I should say that the reason I declined to express interest was personal and I advanced that reason to her but I don't consider that reason to be a matter of any relevance to the inquiries of this committee. Having advanced that reason, she thanked me for doing that and the call terminated.

Mr MARTIN - Sometime in 2008 you were then re-approached by someone in government. When was that?

Mr SEALY - Yes. Well, firstly by Mr Evan Rolley's office - Mr Rolley then, I think, occupied the same position as Ms Hornsey had some months previously.

CHAIR - By his office or by him?

Mr SEALY - By someone from his office seeking to meet with me. Subsequently I had telephone and then personal contact with Mr Rolley and that was in about the third week of January.

CHAIR - With regard Ms Hornsey's telephone conversation with you, did she indicate from whom the invitation was coming or just that she was inviting you to express interest?

Mr SEALY - Not as I recall. She may or may not have said that she'd been requested to ask or she may have said that she was ringing to inquire whether I was interested in lodging an expression of interest for appointments to the position of Solicitor-General. I didn't know and I've never met Ms Hornsey and, on the assumption that the caller was indeed Ms Hornsey, I assumed that she was making the call on behalf of the department of which she was Secretary.

CHAIR - Were you cautious at all, given that you'd never met her and never spoken with her? It could have been anybody just trying to cause mischief.

Mr SEALY - Indeed it could, yes.

Mr WILKINSON - Or 107.3.

Laughter.

Mr SEALY - Indeed it could have been a prank call and I didn't entirely discount that possibility. No, in view of the fact that, as I say, I declined the invitation at that stage it really wasn't a matter of much moment whether it was a genuine inquiry or not.

CHAIR - Terry, back to the matter of where I interrupted with regard to 2008.

Mr MARTIN - So, that was in January was it?

Mr SEALY - Mr Rolley's office contacted me, yes.

Mr MARTIN - What transpired then?

Mr SEALY - Sorry?

Mr MARTIN - You were contacted and did you meet with Mr Rolley?

Mr SEALY - Mr Rolley asked me again, would I be prepared to express interest in the appointment. I indicated to him that I'd been approached on a previous occasion and had declined at that time. It was apparent that he was aware of that and we then had a discussion, after which I agreed to give consideration to lodging an expression of interest. I subsequently informed him, two or three days later, that I was prepared to lodge an expression of interest.

Mr MARTIN - What changed your mind, given your previous decision?

Mr SEALY - There had been a change in my personal circumstances.

Mr MARTIN - And they are not relevant to the -

Mr SEALY - I don't believe so, no.

CHAIR - We respect that; if it's a personal matter. I think we should respect that and will.

Mr MARTIN - Yes, no problems with that. You indicated to him then - and that's still January, isn't it?

Mr SEALY - Yes.

Mr MARTIN - And your appointment was being duly made at some stage.

Mr SEALY - Yes, it was quite shortly after that. I couldn't tell you the precise date. The appointment was effective as of 3 March but the instrument of appointment is dated some time before that. I couldn't tell you the precise date and I don't have it with me.

Mr MARTIN - Did you have any discussions with Mr Estcourt?

Mr SEALY - With Mr Estcourt?

Mr MARTIN - Yes, given the previous situation.

Mr SEALY - No, not until the day of the announcement of my appointment. I had a discussion with Mr Estcourt on that day.

Mr MARTIN - I am just trying to think of the chronology. The allegations that were made would not have been public at that stage.

Mr SEALY - I was not aware and had never heard of the allegation, and I take it by the 'allegation' you mean the suggestion -

Mr MARTIN - By Mr Burch.

Mr SEALY - that there was some arrangement or understanding between Mr Estcourt and Mr Bryan Green. I had never heard that suggested until sometime shortly after I took up my appointment on 3 March. My best belief is that I heard it from the Director of Public Prosecutions, that it was he who informed me that such an allegation had been made.

Mr MARTIN - And was it public by that stage?

Mr SEALY - I do not imagine it was, unless I had been in a form of isolation. If it had been in the newspaper I expect I would have known of it, but my clear recollection is that - and I say, for what it is worth, I greeted it with great incredulity - I was first told by the Director of Public Prosecutions that such an allegation had been made.

Mr MARTIN - Why would the DPP have told you?

Mr SEALY - I have made a written statement about these events at a time when my memory was much fresher than it now is - but I am inclined to say it was by way of indicating to me that there was in existence an investigation into that matter and it was likely that I would be required to make a statement about it. Which I did.

Mr MARTIN - Was that in a formal capacity?

Mr SEALY - Yes, a formal statement to police about -

Mr MARTIN - Mr Ellis telling you about the issue, was that in a formal situation or informal?

Mr SEALY - Well it happened in the office. I believe that he came to inform that there was in existence an investigation into the allegation which he outlined and that I should expect to be contacted by the police for the purposes of providing a statement to police in relation to what, if anything, I knew about the allegation.

CHAIR - In terms of the law, is that not a little unusual given that of recent days the public has been made aware of the charges against Jack Johnston for disclosing official secrets because an investigation was under way. Did you have any role to play in the investigation and should you have been made aware of those circumstances by anybody?

Mr SEALY - Well the first question - did I have any role to play in the investigation - the answer to that question in hindsight must be yes because I made a statement to the investigating officers. If you mean was I actively involved in the prosecution of the investigation, then the answer to that question is no. Your second question seeks an opinion on a question of law, and it involves two propositions. The first is whether or not the disclosure to me, on the date on which it occurred, of the existence of an investigation was a matter which it was the duty of the DPP to keep secret and, if so, whether or not, notwithstanding that fact, he was authorised to disclose that fact to me. I have not applied my mind to that question but it must have been the case. I do not know when the existence of such an investigation became a matter of public knowledge but plainly a large number of people who were contacted and investigated in relation to the matter would have been aware of the existence of the investigation because of that fact for several weeks prior to it becoming public knowledge that there was an investigation in place.

CHAIR - Can I conclude from your comments just now that you were not aware of when it might have become public knowledge and yet you have indicated to the committee that Mr Ellis had told you about the allegations or the statement by Mr Burch and that it is likely you would be required to make a statement to police? Could I conclude that it was not yet public knowledge?

Mr SEALY - Yes, I suppose so, assuming my recollection is correct and the Director of Public Prosecutions told me of the existence of the allegation on the same day that he indicated to me that I might be required to make a statement. Then it would be the case that I was not otherwise aware of the allegation and therefore that it was not, to my knowledge at least, publicly known.

CHAIR - Are you aware as to how the DPP concluded that you might be required to make a statement? Isn't that a judgment for the police to make in their investigations as to whom they interview before they hand the files over to the DPP?

Mr SEALY - The answer to your first question is no. The answer to your second question is that I am aware that from time to time during the course of the investigation police officers sought advice from the Director of Public Prosecutions in relation to matters, the detail of which I have no knowledge. But indeed a letter from me, I think, to the Premier has been tabled in the House of the Assembly in which I detail a conversation I had with Mr Ellis in which he advised me that he had been advising the detectives who were conducting the investigation, from time to time. So to answer your question: no, it is a matter of no surprise that the Director of Public Prosecutions was providing advice from time to time to the police officers.

CHAIR - Okay.

Mr WILKINSON - I was just going to get on to best practices for appointment of individuals to fill senior Tasmanian public sector executive positions.

Mr SEALY - Yes.

Mr WILKINSON - Do you have a view on that? If so, what is your view?

Mr SEALY - I would have to say when I originally received a letter I had no view and I expressed the fact that I had no view but it seemed to me in the circumstances incumbent upon me to perhaps give some thought to the issue before I appeared before the committee. Can I say the terms of reference refer to, I think, senior executive positions in the public service but I took the liberty of reading *Hansard* and the debate which preceded the passing of the resolution which authorised the establishment of this committee. It seems plain enough that what is intended to be inquired into are not appointments in the Senior Executive Service of the State Service but rather the appointment of statutory officers such as Solicitor-General, Director of Public Prosecutions and the appointment of judicial officers including judges of the Supreme Court, and magistrates. That it is what I take to be the purview of this inquiry.

So in relation to that issue, without necessarily expressing a view, I hope I can make one or two useful observations. The first is that if one spends any time at all on the Internet looking at the sorts of regimes that exist in other comparable jurisdictions for the appointment of, particularly, judicial officers - the one thing that is most striking is the disparity in the procedures that exist. In one sense I suppose that is not surprising because in a jurisdiction like, for example, England and Wales where they have a judicial selection committee or commission, that commission is responsible for some hundreds of appointments each year whereas in a jurisdiction like Tasmania there may be one or perhaps two appointments in any one year at most, and in some years none. To me it seems reasonably clear that the establishment of a judicial appointments standing body would not be a solution that would readily commend itself in Tasmania. The New Zealand model still represents what might be regarded as the traditional common law model where recommendations are made by the Attorney-General to the Cabinet after consultation by the Attorney-General with whomever he chooses to consult. I should say that it is said in New Zealand that for the purposes of that process there has arisen a

convention that the Attorney-General scrupulously acts in a non-partisan and non-political way.

I say with the greatest of respect to this State's constitutional traditions and the nation's more generally that attorneys-general in this day and age in this country are perhaps less independent than they formerly were. I would readily accept the criticism of the New Zealand model in this jurisdiction that as things presently stand the Attorney-General alone might not be regarded as being sufficiently independent for the purposes of making recommendations to the executive.

I mean only to point out that there is a very wide range of solutions to this problem and different jurisdictions have adopted different solutions. It is not the case that there is necessarily one simple solution and it may be the process which is suitable for the appointment of judicial officers is not necessarily suitable for the appointment of solicitors-general or DPPs or other statutory officers.

Mr WILKINSON - Should there be the one policy for both or do you believe that there should be some changes or differences?

Mr SEALY - I suppose that in a sense that puts the cart before the horse. I think the only way you could test that would be to have a hypothetical model and then see if you could apply it successfully to the various positions you are looking at filling.

Mr WILKINSON - It would be fair to say, that in most positions there are certain people who would be more adequately suited to it than a vast number of others and it depends who gets the tick as to who goes in those positions. Would it be fair to say that?

Mr SEALY - One way I would characterise it is to say it is a bit like buying a new car - not that I have ever bought a new car but it is a bit how I imagine buying a new car might be. There are probably at least three or four models that you isolate as being likely candidates and in the end you make a choice about which car you buy. Sometimes you have some misgivings about whether you should have bought the other one after you have driven one for a while, but at the time you make the best choice you can. It may not always be a rational choice, there may be some almost imponderable feature of one of those cars that you like at the time that is decisive in the making of the judgment. I don't think that the process of making choices between individuals, where you have established that all of those individuals have the necessary formal qualifications to fulfil a role, is very different.

Mr WILKINSON - Are you aware of the process for appointing Federal magistrates?

Mr SEALY - Not the detail of it but I understand it involves calling for applications, a formal interview procedure and that sort of thing.

Mr WILKINSON - And interviews with the same set of questions, the same matter that you have to decide how to solve so everybody can be judged on the same criteria.

Mr SEALY - Yes, I am aware of that. At the end of the day, I don't think we are going to find the Holy Grail which is the perfect system of appointment. All of them are likely to be flawed in one way or another. Can I say two things? First, with respect, I don't think

we should fall for what I would regard as a false alternative between a system of advertisement and a system of what someone called 'the tap on the shoulder', or head hunting might be a better term. I do not see why both those systems cannot co-exist, why you cannot have a system that calls for advertisement while at the same time allowing the selection authority to approach particular individuals.

Mr WILKINSON - You might not have applied if you had to go through a selection process as far as having to express your interest in the job.

Mr SEALY - That is so. It stands to reason from the evidence I gave earlier that if there had been an advertisement placed in the middle of 2007 I would not have been an applicant. Some people would say that is a very good thing but -

Mr WILKINSON - That has not been the evidence to date.

Mr SEALY - I do not think any system should actively discourage the appointing authority from making its own inquiries and trying to isolate for itself. There is no reason the two cannot work in tandem.

The second observation I would make is pretty fundamental. If you look at the whole range of arrangements that are in place throughout the common law world or comparable political entities there is, with the possible exception of Senate confirmation hearings under the United States constitution, no power of veto over certain appointments.

Mr MARTIN - There was a wonderful episode of West Wing.

Mr SEALY - Was there? Members of the committee would probably well remember some of the more spectacular, including the black American Supreme Court judge who was -

Mr MARTIN - Thomas.

Mr SEALY - Thomas, thank you, who was cross-examined for several days up hill and down dale about his sexual proclivities before he was finally confirmed. Whether or not that is a process to which people ought to be exposed is a matter of political judgment ultimately. There is an argument that good people might refuse to expose themselves to such a process and so never become available for appointment.

Mr WILKINSON - The argument could be that good people are often humble people and humble people might be the best people for the job.

Mr SEALY - I am aware - and one can only go on what one is told - of at least three or four people who currently hold judicial office, not all of them in this State, who have openly said that had it been necessary to respond to an advertisement and to write their own CV saying just how good they were -

Mr HALL - Blow their bags, yes.

Mr SEALY - Yes, that they simply would not have done it, that it is distasteful. From one view you can say that is a bit precious, but from the point of view of the public interest it

means that people who are possibly well qualified for those positions are effectively excluded from consideration by a process that they are not comfortable with.

Mr WILKINSON - Nelson Mandela would not have put himself up to be a leader of South Africa, you might argue when you read his book.

Mr SEALY - Yes.

Mr WILKINSON - If you were the person to advise this committee as to the best process, you would suggest a dual process, the application proceedings, plus the tap on the shoulder process to get the pool.

Mr SEALY - Yes.

Mr WILKINSON - Once you have the pool, should there be a process and if so, what should that process be?

Mr SEALY - That brings me to the second point. If one looks at the range of options that are presently in use around the world with the possible exception of the United States Senate confirmation process, you will find that they are all processes by which a recommendation is made to the Executive. That is to say, it is a process which ultimately leaves the final decision with the executive. I think the English system is probably the most prescriptive in the sense that it makes a recommendation to the Lord Chancellor and the Lord Chancellor is free to either accept or reject the recommendation but he may not appoint anyone who is not recommended.

Mr WILKINSON - Should there also be a condition precedent that if the recommendation of this committee to the Executive is Leigh Sealy, but the Executive disagrees with the recommendation and puts forward another candidate, should there then be a written reason why they have not agreed with Leigh Sealy being the appropriate person but rather Bill Brown? Then it is fully transparent. No-one can argue.

Mr SEALY - Yes that is true. On the other hand, again, you may discourage people from making application for fear that the reasons for their inadequacy are made public. I would not relish the prospect of applying for a job, being selected for it but then being rejected and the reasons for my rejection made public. It would be a positive discouragement to my applying in the first place.

Mr WILKINSON - Okay. So should there be written reasons but given to a body, whoever they might be, like in camera?

Mr SEALY - That is one solution.

Mr WILKINSON - Is that a fair solution and is that a solution that would stop you from applying?

Mr SEALY - **I did not apply.**

Mr WILKINSON - Would it?

Mr SEALY - Well I cannot say whether that would have been a decisive factor in whether one would have applied for any given position. The point I am trying to make is, and it is probably quite a serious legal point, that there may be some doubt whether the Executive can put itself in a position to bind itself to the decision of some other group. In fact, as a matter of law the Executive always has to have discretion to appoint or not appoint because after all that is what governments are elected to do. The debate is about what process we have for producing a recommendation to the Government and what are the consequences for the Government of not following that recommendation. The answer to that of course is that they will be political. If for no good reason a government rejects an otherwise sound recommendation which has been produced by an agreed system then the Government will have to wear the political odium of that and may very well have to explain its reasons for making a decision other than that which was put to it.

You see even under the English system, as I understand it, the identity of the recommended person is not made public. So the public does not know that Jim Wilkinson, for example, applied for the position of District Court Judge but was rejected by the Government on the footing that he was too lazy, for example. That is the spectre that that kind of process gives rise to, so Jim Wilkinson will say, 'I am not going to put myself up for that sort of exposure so I simply will not bother to apply for the job'. So someone admirably suited to the task may be actively discouraged by the selection process. As I say I have not thought about this long and deeply enough to have any conclusive view but it is a complex issue and I am inclined to think that we are better off with a system with quite a bit of flexibility in it rather than a very prescriptive system. That is not say that you cannot have a flexible system that also has some degree of accountability attached to it, what I now think we commonly called transparency.

Mr WILKINSON - The words are being used quite regularly without any real definitions behind them.

Mr SEALY - One finds that whatever edifice or process you erect to come up with a recommendation, nearly every government has concluded that they will have the final say, that they will not be bound by whatever the recommendation process is. You then say, okay if the Government is free not to adopt the recommendation then what does that tell us about the sort of process we have? Doesn't that lead to the conclusion that you have no process at all? Why bother having a process if they are not going to take any notice of it? That is not the answer. There needs to be some sort of process but, as I say, I have no settled view about what that process might be. It might be a different process for the appointment of a Solicitor-General than it is for the appointment of a Supreme Court judge or for magistrates because all of those positions arguably require different qualities. It may be you need different processes to try to maximise the prospects of obtaining a sound appointment because at the end of the day if there is not agreement about anything else there is, I think, universal agreement that appointments of this sort should be and should be seen to be based on merit.

Mr WILKINSON - I hear what you say about if it became public as to why a person or people didn't get the job. The people involved, through no fault of their own, would really had to suffer the humility of having their names hauled across the coals.

Mr SEALY - Absolutely, and it continues to this day for no good reason.

Mr WILKINSON - That's right.

Mr MARTIN - For the sake of completeness, because we've asked other witnesses for the same information, were you ever made aware of the processes that went on within Government to finish up with you as the appointment?

Mr SEALY - Other than the formal processes, no. I was aware that there was a decision of the Cabinet and an Executive Council meeting which resulted in the execution of an instrument of appointment by His Excellency.

Mr MARTIN - You don't know whether there was a short list of applicants?

Mr SEALY - No, is the short answer. There were stories around as to the identity of others who may have been approached but I have no personal knowledge of who, if anyone else, might have been approached in relation to the position.

Mr MARTIN - Mr Rolley never outlined that to you?

Mr SEALY - No. Mr Rolley never said to me that I was being offered the job. He only ever indicated to me that I was being asked to express interest in the appointment and subsequently he informed me that -

Mr MARTIN - You expressed interest in writing?

Mr SEALY - No, orally, but at some point I was required to submit a document in the nature of a curriculum vitae. It was prior, I think, to a Cabinet decision but I didn't understand it to be an application as such, merely a sort of CV.

Mr MARTIN - You are not aware of any of your colleagues in the industry who were asked to do the same thing?

Mr SEALY - No.

Mr MARTIN - Also, just for the sake of completeness, going back to the fact that Mr Ellis told you that you were likely to be interviewed -

Mr SEALY - I may be wrong about this. I have back in my office a copy of the declaration I made at the time, so let's not treat it as an accepted fact that the day that I first learned of the allegation was the day I believe I was told by Mr Ellis that I would be likely to be required to make or be asked to make a statement to the police, but I believe that to be so.

Mr MARTIN - Can you remember whether you'd passed that information on to anyone else?

Mr SEALY - That there was an investigation in place or that I had been asked to make a statement or might be asked to make a statement - what aspect of that?

Mr MARTIN - All of it.

Mr SEALY - Any of it?

Mr MARTIN - Yes.

Mr SEALY - Not that I recall, certainly not to anyone outside the staff of my office and possibly not even to anyone within the staff of my office at that time.

Mr HALL - You've obviously come from private enterprise into now being a very important person, of course.

Mr SEALY - Holding a very important office.

Laughter.

Mr HALL - It has been put to us that in terms of filling senior public service roles there has been nepotism and it has been rife within the system. Would you like to make any comment on that? You have worked in the private sector but you have been in Hobart for many years. Have you seen examples of that? Would you say that is a statement of fact?

Mr SEALY - Within government, you mean?

CHAIR - Yes, within the public service per se.

Mr SEALY - Within the State Service you mean, appointments covered by the State Service Act?

CHAIR - Yes.

Mr SEALY - No. My own personal experience of those sorts of appointments is very, very limited. What I can say is that there is a very well understood process that applies for application and recommendations in relation to the appointment of people within the State Service. If there has been nepotism or favouritism or corruption then that has happened in the face of a well-established procedure. The point I make is that merely having a procedure does not of itself guarantee fair and meritorious appointments. There is required to be, I think, a commitment to honesty by those responsible in making those appointments, because it is easy to fudge. All of us have probably sat on a selection committee, whether it is a football team or a chook raffle. It is easy enough to fudge the reasons for putting up your preferred candidate for whatever that position is. So the mere existence of a process does not guarantee its fairness. The best guarantee of that is to ensure that the people who have control of the process are fair and honest. It might be the Attorney-General or it might be a commission of appointed people. Either way you only get good results if you have good people.

Mr WILKINSON - Of course the other side of the coin is that in private practice you know who you want as a solicitor so you go out and get that person. One could argue, if you are the devil's advocate, what is the difference? It would seem that the Government said that to you. They thought that you were the person to do the job. They would have done their homework prior to that and you got the invitation to come and join us.

Mr SEALY - I do not know what process the Government may have followed in relation to my appointment. So far as I am aware the position was not publicly advertised. I may be wrong about that but I am not aware of its having been publicly advertised. Otherwise I do not know what process was followed. The point you make is a valid one. In private industry decisions about employment and the poaching of employees are common. It is made upon people's assessment of the capacities of other people. The difference perhaps is that the Crown operates under somewhat tighter strictures. Because all of us under the Crown, in a sense, undertake a trust on behalf of the public, we do not necessarily have the same freedoms of choice as private individuals might have.

Mr WILKINSON - And you are not mixing with them each day, are you? You are not seeing them in action each day.

Mr SEALY - Yes, that is a point. In terms of legal appointments I think you make a very valid point. I mean no criticism of any individual, it is just a fact of the way the world had developed, but formerly attorneys-general generally had closer day-to-day contact with the legal profession than is common these days, so it is now more difficult for an attorney-general to form a personal opinion about the relative merits of individual practitioners because they may be largely unknown to them. So if the attorney were to be the appointing authority it is likely that, even if there were no legislative requirement, the attorney would want and need advice from a panel of people who were close to the profession and who knew who could cut the mustard and who could not.

Mr MARTIN - As a member of the legal fraternity, would you expect to have been contacted for this job by someone from Premier and Cabinet or by someone from the Attorney-General's office?

Mr SEALY - I would not have been expecting to be contacted at all - that is the first answer. I suppose it would be fair to say that I would have understood, perhaps wrongly, but at least historically, that appointments of judicial and independent statutory officers, to do with the law at any rate, would have been made on the recommendation of the Attorney-General.

Mr MARTIN - That is what I would have thought.

Mr SEALY - I cannot say whether my appointment was made on the recommendation of the Attorney-General or not. An inference might arise from the fact of the identity of the people who contacted me but I do not know who made what recommendation to whom and how.

Mr HALL - The Auditor-General, as you are aware, has made some fairly scathing comments in regard to the payouts to sacked senior bureaucrats. Does that indicate to you a lack of process probably in the first place in the manner in which they were appointed or put on contract? Does that ring any alarm bells for you?

Mr SEALY - How can I best answer that question -

Mr MARTIN - Honestly.

Mr SEALY - Indeed, that goes without saying. In some cases that may be so. I am not to be understood to be referring to any particular cases, but it is clear that the instruments of appointment used by the Government should always be under constant review to ensure that they contain provisions which are fair and reasonable and which properly protect the Crown's interests and those of its employees. It is also true that many circumstances arise in the course of employment relationships which the parties do not foresee, that result in the termination of those arrangements in circumstances which are not covered by the instrument and in circumstances in which some compensation is thought to be payable or deserved.

I can tell you that my own view is that a government ought never make a payment for the purposes of seeking to obscure the true circumstances of the termination of the employment. But I could not say to you that circumstances never exist where it is inappropriate sometimes to pay amounts by way of compensation for various reasons.

I must say it is a vexed question as to whether or not the detail of those sorts of payments should be made public. There is a clear public interest in the public knowing the circumstances of those payments, but sometimes there is a legitimate private interest for an individual, not merely so that people do not know how much he or she may have received in particular circumstances, but simply as an issue of privacy that individuals do not necessarily want that information made available.

The Government also has an interest, I should say, in some circumstances. The public has an interest in some circumstances in the details of some of these settlements not being made known, because when they do become known that kind of sets a benchmark - people say, oh, he got *x*, why should I not get *y* and the circumstances may be quite different.

There are legitimate circumstances where confidentiality can be respected, but as a general rule I would accept that governments ought never to pay money for any improper purpose - that is to say, to buy the silence of a party. Quite apart from anything else they genuinely turn out to be a bad bargain because some way or another members of the fourth estate always seem to find out and so in my view it is money thrown away in any event.

Mr MARTIN - It's pretty unusual for a government to pay compensation for someone to resign, isn't it?

Mr SEALY - For resigning?

Mr MARTIN - Yes.

Mr SEALY - Ordinarily, although some instruments of appointment I have seen do make provision for certain payments in the event of resignation, usually relocation payments and things of that sort. Again, there is a bit of a definitional problem here. People tend to throw the term 'ex gratia payment' about with a bit of imprecision. An ex gratia payment is technically one that is paid literally out of grace - that is, where there is no legal obligation to pay, and so a payment made pursuant to an instrument where there is an entitlement upon termination would not be properly called ex gratia; it is a contractual obligation.

Mr MARTIN - Do you see any situation where ex gratia payments are appropriate?

Mr SEALY - Are you talking in the employment context only?

Mr MARTIN - Yes. Where a person has officially resigned and he receives an ex gratia payment.

Mr SEALY - Okay, so you are posing to me a situation in which a person resigns -

Mr MARTIN - Yes.

Mr SEALY - their employment with the Government and receives a payment in addition to that to which they are strictly entitled under their instrument of appointment?

Mr MARTIN - That is right, yes.

Mr SEALY - I suppose the best I can say about that is ordinarily not, but there might be some circumstances in which it is justified. Someone might, for example, resign their employment because of circumstances in their workplace that they regard as intolerable to continue in and there is an acceptance by government, for example, that those circumstances are the result of the conduct of some person within the Government and so in a sense it is almost a constructive termination of the employment. Although the employee is resigning, in effect, infrequently the obvious justification for making such payments is that the Government foresees the possibility of some legal liability and an amount is paid in return for, and properly in return for, a release from that liability.

Now, of course, that can always be controversial because minds might differ about what would be an appropriate sum to compromise the liability. That is particularly so in cases where there is personal injury involved because it is very difficult to make an objective assessment about what is an appropriate sum by way of compensation when you don't know the full medical history of the person involved and then we get into the difficulties about publishing those sorts of details. I think most of us would agree that it probably would not be appropriate to, for example, publish the contents of psychiatric reports -

Mr MARTIN - No.

Mr SEALY - which are said to justify payment of compensation to somebody.

Mr MARTIN - Agreed.

Mr SEALY - Those issues are very difficult and, as I say, I suppose it is easier to say than to do. We ought all conduct ourselves in such a way that the public has faith in the way that we do our job. It is by inspiring that faith that we will act lawfully, all of us, that we inspire confidence in the community and we might not be having the debate we are having today if everyone was a little more confident about the way everyone was doing their job.

Mr MARTIN - Absolutely.

CHAIR - Members there has been a slight shred of relevance to all of that with regard payouts. I accept that it was linked to the appropriateness of the appointments in the first place which may have obviated all sorts of payouts.

Leigh, we thank you for being here and over the last less than a month addressing your mind to matters of best practice when you previously did not have a view, as you communicated to us in writing. We thank you for that and we shall say farewell as we get to the stage of wrapping up but we will stay here for a little longer.

Mr SEALY - Thank you, gentlemen.

THE WITNESS WITHDREW.