2009 (No.14)

Parliament of Tasmania

LEGISLATIVE COUNCIL

SELECT COMMITTEE

INTERIM REPORT ON

PUBLIC SECTOR EXECUTIVE APPOINTMENTS

Members of the Committee

Hon Paul Harriss MLC (Chair)
Hon Greg Hall MLC
Hon Terry Martin MLC
Hon Jim Wilkinson MLC

Secretary: Dr Colin Huntly

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INTRODUCTION

1. APPOINTMENT AND TERMS OF REFERENCE

The Select Committee on Public Sector Executive Appointments was appointed on Wednesday, 11 June 2008 by the Legislative Council with power to send for persons and papers, with leave to sit during any adjournment of the Council, and with leave to adjourn from place to place, to inquire into and report upon -

(1) Best practice for the appointment of individuals to fill senior Tasmanian public sector executive positions and that the circumstances surrounding the appointment of a magistrate in Tasmania in 2007 be examined; and

(2) any other matters incidental thereto

The membership of the Committee as determined by Order of the Legislative Council was Hon. Paul Harriss MLC (Chair), Hon. Greg Hall MLC; Hon Terry Martin MLC and Hon. Jim Wilkinson MLC.

2. PROCEEDINGS

Advertisements were inserted in the early general news pages of the three daily Tasmanian newspapers on Saturday, 12 July 2008 and receipt of written submissions was conditioned for closure on Friday, 25 July 2008. The Committee has met on 26 occasions thus far. Minutes of these regularly constituted meetings appear at Appendix 1

20 witnesses gave evidence to the Committee in Hobart at public hearings on 16 and 17 September 2008, 16 and 27 October, November 10, 11, 17 and 18**.** A number of these witnesses also provided evidence *in-camera* either at their own request, or at the instance of the Committee. The Chair met with the

Public Sector Standards Commissioner for Western Australia, Dr Ruth Shean, on Monday, 22 September, 2008. In addition, four witnesses appeared before the Committee confidentially and *in-camera*. Witness details are provided at Appendix 2. 10 written submissions were received, one of these was received *in-camera* and another was subsequently withdrawn by the submitter, these are listed in Appendix 3. Documents received into evidence are listed in Appendix.4.

This Committee, at a regularly constituted meeting on Tuesday, 31 March 2009, resolved to make an interim report to the Legislative Council. All avenues of inquiry examined by the Committee that have been concluded are addressed within this interim report. There are a number of avenues of inquiry that the Committee is yet to exhaust. Once these inquiries have been concluded, the Committee will make its final report to the Legislative Council.

Summonses

The Power to Summons

The powers of inquiry enjoyed by the Upper House of another State Parliament, including the power to summons, were the subject of comment by the High Court of Australia in its decision in *Egan v Willis* (1998) 195 CLR 424. All Justices in that decision accepted that the Executive Government is subject to this power. Perhaps the clearest articulation of the necessity for these powers of inquiry can be found in the following extract of the joint judgement of Gaudron, Gummow and Hayne JJ at p 451:

> *A system of responsible government traditionally has been considered to encompass* "the means by which Parliament brings the Executive to account" *so that* "the Executive's primary responsibility in its prosecution of government is owed to Parliament"*. The point was made by Mill, writing in 1861, who spoke of the task of the legislature* "to watch and control the government: to throw the light of publicity on its acts"*. It has been said of the contemporary position in Australia that, whilst* "the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people" *and that* "to secure accountability of government activity is the

very essence of responsible government*". In* Lange v Australian Broadcasting Corporation*, reference was made to those provisions of the Commonwealth Constitution which prescribe the system of responsible government as necessarily implying "*a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament*". The Court added:*

> Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.

Police Files

The Committee took the unusual step of requesting certain files, relating to a non-operational investigation, from the Acting Commissioner of Police, Mr Darren Hine (the **Commissioner of Police**). This was achieved by means of a confidential summons. The issuing of that summons was authorised by the Legislative Council pursuant to the Committee's Order of Reference, Standing Order 241 of the Legislative Council, and ss 1 and 2 of the *Parliamentary Privilege Act 1858*.

The confidential summons was dated, and served in-person, on Thursday, 2 October 2008 without advance notice. This action was taken following publication of a letter to the Commissioner of Police from the Director of Public Prosecutions, Mr Tim Ellis SC (the **DPP**), dated 23 September 2008. That letter is reproduced at Appendix 5. Despite the unprecedented nature of the summons and the fact of its unheralded delivery, the Commissioner of Police received it courteously and with appropriate professional caution. Certain undertakings were made to the Commissioner of Police regarding the confidentiality and safe-custody of the files that were summonsed, and the use to which they would be put by the Committee. At all times the Committee has honoured, and will continue to honour, these undertakings.

The evidentiary quality of the Police files provided to this Committee was of a very high order. This, together with the considerable investigative analysis that had been undertaken by Police, greatly assisted the Committee in its task and through it, the Legislative Council and people of Tasmania. The Committee particularly commends the professionalism, courtesy and integrity of Acting Commissioner Hine in his careful balancing of confidentiality and public interest in this matter. In accordance with undertakings made by the Committee to the Commissioner of Police, this report contains selected extracts of the material contained within the summonsed Police files only where it is directly relevant to the Committee's line of inquiry. Pursuant to Sessional Order 3 and Standing Order 202, the Committee will not report to the Legislative Council any of the evidence contained within the summonsed Police files that is not directly relevant to its Order of Reference.

The Solicitor General & DPP

In addition to the summons issued to the Commissioner of Police, this Committee issued a summons to Mr Stephen Estcourt QC during his *in-camera* hearing, at a point in time at which he wished to clarify that he was being placed under compulsion to answer a lawful question put to him by the Chair. The Solicitor-General, Mr Leigh Sealy SC (the **Solicitor-General**) declined the Committee's initial invitation to attend on the Committee in the absence of a summons. The Committee obliged the Solicitor-General with a summons, served upon him personally at his chambers. The DPP initially accepted the invitation of the Committee to attend on the Committee. However, on reflection the DPP advised the Committee that he required a summons. The Committee obliged the DPP with a summons served at his chambers. The Committee notes that, while it is the usual practice to invite witnesses to attend Select Committees, it is understood that certain professionals and public servants require a summons to attend as a matter of course.

Specific Non-Ministerial Witnesses

In light of this Committee's wish to expedite its proceedings, at a regularly constituted meeting of the Committee on Thursday, 16 October 2008,

summonses were issued for the attendance of Mr Simon Cooper, Ms Linda Hornsey, Ms Lisa Hutton, Ms Stephanie Shadbolt and Mr Michael Hawkes. The Committee authorised the utilisation of the services of a professional Process Server in this instance. As a matter of courtesy, the Chair personally attempted to make contact with the above individuals to provide them with advance notice of the summons. However, this was not possible in every case. The Committee notes that there is nothing in the customs or usages of the Legislative Council requiring advance warning of a summons for persons or papers. Indeed, on occasion, there may be compelling reasons for service to be effected without notice. This will always be a matter of judgement for a Committee dependent solely on the circumstances of the day.

Documents Summonsed

The last summonses to be issued by the Committee during this phase of the inquiry were served on Mr Rhys Edwards, Secretary for the Department of Premier and Cabinet for the delivery of papers by close of business on Thursday, 29 January 2009, and on the Premier as Minister for Education for the delivery of a document by noon on Wednesday, 25 March 2009. The first of these summonses was issued at a regularly constituted meeting of the Committee on Wednesday, 28 January 2009 and served on Mr Edwards that same day at his Departmental Offices. The Chair, Hon Paul Harriss MLC, was an apology at the relevant meeting and, pursuant to Standing Order 184 Hon Jim Wilkinson MLC was elected as Chair of the meeting. The meeting authorised the interim Chair to sign a summons, to be served on Mr Edwards, for the delivery of the instruments of appointment for former Secretary for the Department of Premier and Cabinet, Ms Linda Hornsey, and Secretary for the Department of Justice, Ms Lisa Hutton. Despite the unheralded delivery of the summons and the unusually tight delivery deadline, Mr Edwards was discharged from the summons at 11.00am on Thursday, 29 January 2009. The Committee acknowledges the professionalism and courtesy of Mr Edwards and his staff in facilitating the work of the Committee. The second of this final round of summonses was issued at a regularly constituted meeting of the Committee on Friday, 20 March 2009 and served on the Premier and Minister for Education by email on Tuesday, 24 March 2009. The document

so summonsed was a legal opinion provided by the Solicitor-General to the Minister relating to the *Archives Act 1983*. Given that, outside of Parliamentary proceedings such a document would have been afforded legal professional privilege, it was determined to receive it *in-camera* pursuant to Sessional Order 3 and Standing Order 202. The Premier and Minister for Education advised this Committee on Wednesday, 25 March 2009 that he had determined to resist the summons for the document on the basis of legal professional privilege. Given the need to finalise this Interim Report and have it tabled before the Legislative Council, the Committee resolved to refer this matter to the Legislative Council for its determination in the event that the Minister for Education failed to comply with the Order as at the date of tabling.

Attendance of Members of the House of Assembly

This Committee, at a regularly constituted meeting on Thursday, 16 October 2008, resolved that Mr Steven Kons MP appear before the Committee; "*to provide evidence in relation to best practice for the appointment of individuals to fill senior Tasmanian public sector executive positions, the circumstances surrounding the appointment of a Magistrate in Tasmania in 2007 and a number of matters incidental thereto*".

Accordingly, in a manner consistent with Legislative Council Standing Order 243, this Committee further resolved to adopt a Special Report to the Legislative Council acquainting the Council with its resolution regarding Mr Steven Kons MP, and requesting the Legislative Council to send a message to the House of Assembly requesting that House to grant leave for Mr Kons to appear before the Committee.

Hon Jim Wilkinson MLC presented a Special Report from this Committee to the Legislative Council on Wednesday, 22 October 2008. On Tuesday, 28 October 2008, Hon Paul Harriss MLC, Chair of the Committee, moved successfully for the Legislative Council to request the House of Assembly to grant leave for Mr Steven Kons MP to appear before the Committee. On Wednesday, 29 October 2008 the House of Assembly granted leave in the

terms requested by the Chair's motion in the Legislative Council. The Committee then proceeded to extend an invitation to Mr Steven Kons MP to attend upon the Committee in letters dated Thursday, 30 October 2008 and Thursday, 5 March 2009. Mr Kons freely consented to appear before the Committee without compulsion on Tuesday 11 November 2008 and *in-camera* on Friday 20 March 2009.

It is worth commenting briefly on the reason for the special procedures adopted with respect to Mr Kons' appearances before the Committee. The above procedures adopted by this Committee are provided for in Standing Orders 196, 199 and 243 of the Legislative Council. There are equivalent procedures to these in the Standing Orders of the House of Assembly. These formal procedures are not required in the event that a Member of the Legislative Assembly should decide of their own volition to seek to give evidence before a Committee of the Legislative Council. However, regardless of the way in which a Member of one House comes to appear before a committee of the other, each House recognises that the first responsibility of a Member is to the House to which they have been elected.

The formal procedures reflect the convention at the heart of the bi-cameral parliamentary system that there should be comity between the Houses. That is, each House is answerable directly to the electorate and not one to the other. The jurisdiction of one House over its own affairs is absolute and independent from any interference from the other. The conduct of the affairs of the Parliament is also beyond the jurisdiction of the Courts by virtue of Article 9 of the Bill of Rights 1688 which reads:

> *That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.*

Put simply, each House is master of its own destiny and must answer directly to the people of Tasmania.

The Committee notes that there is a view that the wording of section 1 of the *Parliamentary Privileges Act 1858* is such that the summonsing power of the

Houses is an absolute power against which the only immunities are provided for in s 12 of the same Act. These provisions read as follows (underlining added for emphasis):

> ***Power to order attendance of persons***
>
> *Each House of Parliament, and any committee of either House duly authorized by the House to send for persons and papers, is hereby empowered to order any person to attend before the House or before such committee, as the case may be, and also to produce to such House or committee any paper, book, record, or other document in the possession or power of such person; and all persons are hereby required to obey any such order.*

Section 12 of the *Parliamentary Privilege Act 1858* is as follows:

> ***Privileges of Parliament not affected***
>
> *Nothing in this Act contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect any power or privilege possessed by either House of Parliament before the passing of this Act in any manner whatsoever.*

As a matter of law therefore, the; *"power or privilege possessed by either House of Parliament before the passing of"* the *Parliamentary Privilege Act 1858* would be a very real issue for the Courts, should a constitutional dispute on this matter ever result in litigation. It should be remembered that, prior to 1858, such matters as; the personal involvement of the Sovereign in selecting Ministers from inside and outside of the Parliament; Prime Ministers sitting in either House; Governments being appointed with minorities and majorities in the Lower House; even Upper House control over seats in the Lower House; were all questions in varying degrees of flux between the Great Reform Acts of 1832 and 1867. It should also be remembered that, since the Privy Council decision in the appeal from the Supreme Court of Van Diemen's Land in *Fenton v Hampton* (1858) 11 Moo PC 347, 14 ER 727 the law of the Parliament of this State, as part of the broader Constitutional framework, has undergone considerable phases of change, adaptation and development. The present; "post-*Australia Act 1986*" phase is far removed from the partially

elected single-chamber colonial constitutional reality that pertained in December of 1858.

While such a reading of section 1 of the *Parliamentary Privilege Act 1858* is conceivable, this Committee accepts that the difficulties presented by such a construction are immense. Given that this provision has never been brought before the Courts, it would appear that, to date, an appropriately pragmatic and politically sensible application of the theoretical powers of the Houses, and their Committees, has been observed in practice.

Attendance of Former Members of the House of Assembly

This Committee resolved to take evidence from former Member of the House of Assembly and immediate past Premier, Hon Paul Lennon. The Committee considered the implications that such a resolution might have (if any) on comity between the Houses. However, the Committee formed the view that, once a person ceases to be a Member, there can be no risk to comity in the summonsing of that person before either of the Houses. Each House recognises only its Members and officers on the one hand, and; "*strangers*" on the other. There can be no intermediate state of being.

The immunity afforded to proceedings in Parliament by the Bill of Rights 1688 prevents those proceedings being questioned in any; "*court or place out of parliament*" and do not, therefore, preclude parliamentary scrutiny. It is also worth noting that on a previous occasion, two former members of the House of Representatives (namely; former Prime Minister Hawke, and former Commonwealth Treasurer Kerin), were summonsed by a Senate Select Committee in 1994, and attended on that Committee under summons.[1] In addition, in Victoria it is accepted that the Legislative Council has the power to

[1] See: http://www.aph.gov.au/Senate/committee/history/fopm_ctte/percentageplayers/02ch2.pdf at para 2.16 - 2.18.

summons former Assembly members who are also former Ministers, even former Premiers and Treasurers.[2]

Once a person ceases to be a Minister, they are still bound for life by their Executive Councillor's oath. By convention this oath is shown deference and respect by the Courts regarding Cabinet Confidentiality. This is recognised as being essential to the proper functioning of our representative democracy.[3] However, the Committee notes that increasingly the Courts <u>will</u> allow disclosure of Cabinet documents where those documents do not record or disclose the actual deliberations of Cabinet (*Commonwealth v Construction, Forestry, Mining and Energy Union* (2000) 171 ALR 379; *NTEIU v the Commonwealth* (2001) 111 FCR 583; see also, *Secretary, Department of Infrastructure v Asher* (2007) VSCA 272). In addition, Courts and Parliament alike must be careful to ensure that, in such matters, the Executive Government is not judge in its own cause.

The importance of these principles are also carefully weighed in a parliamentary context. While the Parliament is not bound by judicial decisions of Courts, it is free to consider how the principles articulated in a judicial context might inform its own practice when dealing with related matters involving the public interest. It should always be remembered that scrutiny is a core function of the Parliament in our system of Government. This fact was articulated clearly by the High Court of Australia in its decision in the case of *Egan v Willis* (1998) 195 CLR 424. The most succinct judgement on this point was delivered by Justice McHugh wherein his Honour stated:[4]

> *In* Stockdale*, Lord Denman CJ described the House of Commons as "*the grand inquest of the nation*". In* Howard v Gosset*, Coleridge J said that "*the Commons are, in the words of Lord Coke, the general inquisitors of the realm*". These statements summarise one of the most important functions of a House in a legislature under the Westminster system, namely, that it is the function of the Houses of Parliament to obtain information as to the state of*

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2 Victoria, Legislative Council, *Hansard*, Wednesday, 20 March 2002 at p 71 - 72.

3 *R v Turnbull* [1958] T.S.R. 80 at 85.

4 At p 475. (Underlining added for emphasis).

> *affairs in their jurisdiction so that they can, where necessary, criticise the ways in which public affairs are being administered and public money is being spent. The Crown through its Ministers governs. Under the system of responsible government, those Ministers are responsible to the Parliament. For that system to work effectively, for the Administration to retain the confidence of the Parliament, the Houses of Parliament must have access to information relating to public affairs and public finance which is in the possession of the government of the day.* (Underlining added).

This Committee has taken the firm view that rigorous accountability and scrutiny of the Executive Government is essential to comity between the Houses. This is particularly so given that one of the accepted roles of the Legislative Council as a separate and equal House of Parliament is as a House of review.

Interpretation of the Committee's Order of Reference

A number of witnesses before this Committee sought to challenge how the Committee has interpreted its terms of reference during the conduct of this inquiry. This was even alluded to in a media release issued by the President of the Tasmanian Law Society. On each occasion, the Chair has reinforced the Committee's right to interpret its terms of reference according to its own deliberations, subject always to an Order of the Legislative Council. This is in full accordance with the law, customs and usages of the Legislative Council (Erskine-May, The Law, Privileges, Proceedings and Usage of Parliament 1989, 618-619).[5] In the event that the Order of Reference to any committee proves to be unduly restrictive to its inquiries, Legislative Council Standing Order 198 provides a mechanism for such a committee to report that matter to the Legislative Council, seeking an extension to its Order of Reference. A request of that nature would clearly be in order and would also accord with the law, customs and usages of the Legislative Council (Erskine-May, The Law, Privileges, Proceedings and Usage of Parliament 1989, 618-620).

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[5] Erskine May there clearly states; "*The interpretation of the order of reference of a select committee is, however, a matter for the committee.*"

Finally on this question, this Committee notes that any Member of the Legislative Council is free to give notice of motion relating to the conduct of a Select Committee of the Legislative Council, or relating to the way such a committee interprets its Order of Reference. At no stage during the conduct of the present inquiry has any Member of the Legislative Council moved a motion of that nature with respect to this Committee.

Hearing Procedure

It is the long established custom of Select Committees of the Legislative Council to hold hearings in the presence of a public Gallery. In fact, to a certain extent, it is regarded as the default position for hearings. In addition, this is in accordance with the practice of the Legislative Council itself, the proceedings of which are at all times open to any member of the public who wishes to take the opportunity, subject to available space, of taking their place in the public Gallery.

Nevertheless, it is true that Select Committees often take evidence in private session for a variety of reasons. Regardless of how a Select Committee takes evidence, the over-riding requirement is that it must make its report to the Legislative Council including all evidence, except that which has attracted confidential status. There is no other forum or entity to which Select Committees of the Legislative Council are accountable to report. Importantly, it is also stressed that a Select Committee is restricted to reporting only on the evidence available to it.

At the commencement of its hearings, given that some of the investigations might be of a sensitive nature, this Committee carefully considered whether or not all hearings should be *in-camera*. The Committee formed the view that a number of the matters that were the subject of its inquiry had suffered as the result of a lack of transparency, accountability and due process. The Committee therefore proceeded on the usual basis for Select Committees, that is to say hearings were held in the presence of the public Gallery except where;

1) The submission of a witness to present their evidence *in-camera* was agreed to by the Committee;
2) The Committee formed the view that a particular line of inquiry was more appropriately held *in-camera*; or
3) In the interests of justice, the nature of the evidence sought by the Committee required that it be taken *in-camera*.

EXECUTIVE SUMMARY

1. APPOINTMENT OF A MAGISTRATE

The appointment of a Magistrate in 2007 is a useful case-study from which much can be learned about the processes of public sector executive appointments. Pursuant to an Order of the Legislative Council, this Committee proceeded to investigate the circumstances surrounding the appointment on the basis that public confidence in such processes was, and remains, a matter of significant public interest. By virtue of its authority, the Committee took the unusual step of calling for certain non-operational police files that were of relevance to its inquiry. Those files, together with a considerable amount of fresh evidence taken by this Committee, has allowed the circumstances surrounding the relevant appointment to be more fully understood.

What is now known is that key individuals involved in the process, namely; the former Premier, the former Attorney-General, the former Secretary for the Department of Premier and Cabinet, and the Secretary for the Department of Justice, cannot agree on the reasons for Mr Simon Cooper's initial precedence as the preferred candidate for appointment. Neither can these individuals agree about why Mr Cooper was ruled out of contention at the last minute. It is also certain that there was an inadequate document trail to assist in clarifying the uncertainty caused by the inconsistent testimony of these key witnesses. Perhaps even more concerning though is the fact that the Committee is unable to identify precisely who gave the instruction to prepare the replacement Cabinet nomination documents naming Mr Glenn Hay, another of the three shortlisted candidates. This was despite the Committee hearing from all those who possessed the authority to issue the instruction. All that can be known is that the relevant instruction did not come from then Attorney-General Mr Steven Kons MP, although he willingly signed that final recommendation and submitted it to Cabinet.

There is significant circumstantial evidence suggestive of a link between Mr Cooper's involvement in the RPDC Pulp Mill Assessment process and the treatment he received in the process of appointing a Magistrate in 2007. The agency which he then controlled released a document under FOI to an opposition MP, who then tabled it in the House of Assembly causing acute personal inconvenience to Ms Linda Hornsey. Given that fact, Ms Hornsey should have recused herself from any involvement in a selection process involving Mr Cooper on the basis of an apparent conflict of interest.

During the course of its inquiries, this Committee has heard evidence which raises questions about precisely when the Government became aware of the intention of Gunns Ltd to withdraw from the RPDC Pulp Mill Assessment process. These questions relate to certain evidence of then Premier Hon Paul Lennon before a Legislative Council Estimates Committee in 2007, and are beyond the scope of this inquiry.

Between 1999 and 2002 the Department of Justice developed its own world's-best-practice judicial appointments process under Attorney-General Hon Dr Peter Patmore. Whether or not this protocol was ever subsequently followed, it was official Departmental policy until August 2008. Despite this, the then Secretary for the Department of Justice Ms Lisa Hutton did not advise her Attorney-General Mr Kons, to adopt the process in 2007. The alternative process which was recommended and adopted was a pale imitation of the official policy. The direct comparison of the requirements of the Official policy and the practice adopted can be appreciated by reference to the following table:

2002 Policy	**2007 Practice**
Expressions of interest to serve on an unpaid nomination committee are invited by public advertisement.	Not followed.
Nomination committee appointed by the A-G. Committee to comprise:	Not followed.

2002 Policy	2007 Practice
• Judge's or Magistrate's Representative	Not followed.
• Secretary for the Department of Justice	Ms Lisa Hutton conducted a nomination process of sorts in consultation with the Chief Magistrate.
• Senior lawyer with litigation experience (eg: Barrister)	Not followed
• Senior Lawyer with commercial practice experience (eg: Solicitor)	Not followed
• Two lay members with staff selection/ appraisal experience	Not followed.
Expressions of Interest for the Judicial Appointment are invited by public advertisement	Expressions of Interest advertised in newspapers on 2 May 2007.
Prospective candidates address the selection criteria in writing	Required in the Public Advertisement.
Candidates meeting the criteria are interviewed by the nomination committee	Not followed. Chief Magistrate Shott assessed a list of names while on leave overseas on the basis of personal knowledge and a brief statement of eligibility criteria.
The nomination committee to consult confidentially with:	
• Law Society	Contacted by Ms Hutton only after the A-G made his final decision in favour of Mr Hay.
• Bar Association	Not followed
• DPP	Not followed
• Solicitor-General	Not followed
• Chief Justice	Not followed
• Chief Magistrate	Chief Magistrate Arnold Shott conducted a nomination process of sorts in consultation with the Secretary for the Department of Justice.
• Applicant's Referees	Unclear to what extent this occurred (if at all).

2002 Policy	2007 Practice
A-G determines nominee from a short-list produced by the nomination committee.	A-G Kons changed his mind following a last minute telephone call from the Secretary for the Department of Premier and Cabinet.
Prior to Cabinet, candidate required to sign forms:	Not followed. Mr Hay was invited to the Hobart Magistrate's Christmas Party prior to Cabinet's endorsement.
• Authorising a Police Check.	Not followed.
• Declaring potential conflicts of interest, including all private interests from the previous 12 months.	Not followed.
• Declaring possible breaches of tax laws.	Not followed.
• Including a statement in connection with bankruptcy and financial difficulties.	Not followed.
A-G proceeds to Cabinet with the Nominee.	A-G Kons proceeded to Cabinet with Mr Hay's nomination on 13 August 2007.

Following the actual appointment process itself, Ms Hutton subsequently prepared a carefully crafted Question Time Brief for her Minister which, by her own admission; "*by design, does not expose that the intended appointment of COOPER had been the reason for the appointment delay*." More than seven months later, Ms Hutton also prepared a briefing note for a Ministerial media advisor which, in the view of this Committee, was equally carefully crafted so as to be factually accurate, but substantially misleading.

Evidence has been presented to this Committee that Mr Steven Kons MP revealed to his Ministerial Office staff during meetings held on Monday, 7 April 2007, that he had told Mr Cooper the previous year that he would be nominated to Cabinet for appointment as a Magistrate. During the same meetings it was alleged that Mr Kons also revealed that he had shredded Mr Cooper's nomination documents following a telephone call from Ms Hornsey.

In the course of this Interim Report, the Committee has made a number of adverse findings and recommendations for action or change. Prior to adopting this Interim Report, the propositions upon which these findings and recommendations are based have been put to the individuals in question as a matter of fairness.

2. SENIOR PUBLIC SECTOR APPOINTMENTS

There is genuine concern within the community that the present system of senior public sector appointments does not safeguard against either; corruption of the State Service Principles; or the unwarranted politicisation of the public sector. These concerns are substantially validated by the findings of this Committee with respect to the important case-study of a single judicial appointment process in this State in 2007 as outlined in the initial sections of this Interim Report.

The framework of the *State Service Act 2000* does not provide for direct accountability to the Parliament. The current *State Service Act 2000* framework is too narrow in its application, in that it does not apply across the entire public sector. The current *State Service Act 2000* framework is too shallow in its application, in that it does not apply with sufficient universality or certainty to executive level grades of the public sector. The current *State Service Act 2000* framework is not sufficiently independent of Ministerial influence, particularly with reference to the direct ministerial influence of the Premier.

Evidence presented to this Committee by Auditor-General Mr Mike Blake was that world's-best-practice systems for public sector executive appointments, adapted to local conditions, currently operate in New Zealand, South Australia and Western Australia. For various reasons, the Auditor-General recommended the Western Australian legislative model to this Committee as the superior model for implementation in Tasmania.

This Committee has examined all of the available evidence and has determined that it should endorse the recommendation of the Auditor-General. All of these matters could be addressed if a regime similar to the Western Australian Public Sector Management regime was to be adopted in Tasmania. Briefly put, the regime in question contains the following elements of relevance:

1. A public sector management Act with universal application to Government and all of its agencies;
2. A public sector standards Commissioner administering that Act and reporting directly to Parliament;
3. Selection and promotion processes for all public sector executive appointments conducted by the public sector standards Commissioner;
4. Shortlists of suitable candidates presented to the relevant Minister by the public sector standards Commissioner;
5. The relevant Minister has the power to reject an entire shortlist and ask for a new shortlist;
6. If a relevant Minister wishes to appoint someone not appearing on a shortlist prepared by the public sector standards Commissioner, they may do so, provided that the Minister publishes reasons for doing so in the Gazette.

There is reason to believe that the system of appointments and promotions within the senior public sector can, and indeed does, play a central role in ensuring (or retarding), the development of a robust, independent and responsive culture within Government. This Committee's inquiries to date suggest that the development of perfect policies and protocols is not a guarantee that the business of government will be discharged in an orderly, and accountable manner. However, experience suggests that the combination of an appropriate framework together with diligent independent scrutiny is needed in any system of public sector executive appointments.

2009 **Hon. Paul Harriss MLC**
Chair

RECOMMENDATIONS

The Committee has made the following recommendations in this report:

RECOMMENDATION 1.

The Committee **recommends** that the Minister for Education should immediately refer to the Auditor-General for investigation and report, the possible breach of sections 10 and 20 of the *Archives Act 1983* on Wednesday, 8 August 2007 by the destruction of documents prepared within the Department of Justice in relation to Mr Simon Cooper and to consider whether or not the relevant sections are inconsistent with [1.3.3] of the Cabinet Handbook 2004.

RECOMMENDATION 2.

The Committee **recommends** that the Government immediately issue a formal apology in clear and unambiguous terms for any harm, hurt or embarrassment occasioned to Mr Simon Cooper and Mr Glenn Hay arising from any inappropriate conduct of the former Attorney-General and senior public servants in connection with the appointment of a Magistrate in 2007.

RECOMMENDATION 3.

The Committee **recommends** the Australian Securities and Investments Commission should be provided with all evidence gathered by the Committee relevant to Gunns Ltd's Wednesday, 14 March 2007 "*ASX and Media Release*", announcing its withdrawal from the Pulp Mill Assessment Process.

RECOMMENDATION 4.

The Committee **recommends** that, pursuant to s14(1) of the *State Service Act 2000*, the Premier should direct the State Service Commissioner to delegate his powers of investigation, under s18(1) of that Act, to an independent judicial officer for the purposes of examining the conduct of Ms Linda Hornsey disclosed in this Report, in order to determine if her conduct so disclosed constituted a breach of the State Service Code of Conduct at subsections 9(1), (2), (3), (8), (11), (13) and (14) of the *State Service Act 2000*; and the State Service Principles at subsections 7(1)(a), (b), (f) and (g) of that Act. In the event that such an independent investigation finds that Ms Hornsey did, in fact, breach the State Service Code of Conduct, the Committee **recommends** that the Premier should take such action as is recommended by the independent judicial officer so appointed.

RECOMMENDATION 5.

The Committee **recommends** that, pursuant to s14(1) of the *State Service Act 2000*, the Premier should immediately direct the State Service Commissioner to delegate his powers of investigation, under s18(1) of that Act, to an independent judicial officer for the purposes of examining the conduct of Ms Lisa Hutton disclosed in this Report, to determine if the conduct so disclosed constitutes a breach of the State Service Code of Conduct at subsections 9(1), (2), (10), (13) and (14) of the *State Service Act 2000*; and the State Service Principles at subsections 7(1)(a) and (g) of that Act. In the event that such an independent investigation finds that Ms Hutton has, in fact, breached the State Service Code of Conduct, the Committee **recommends** that the Premier should take such action as is recommended by the independent judicial officer so appointed.

RECOMMENDATION 6.

The Committee **recommends** that the Government should immediately reinstate its Judicial Appointments Policy of 2002, as reproduced at Appendix 6 to this report, with the sole inclusion of a third-party nomination procedure as per the Federal Court judicial appointments policy.

RECOMMENDATION 7.

The Committee **recommends** that the testimony of, or otherwise concerning, Hon Paul Lennon before the Select Committee on Public Sector Executive Appointments be immediately referred to the Privileges Committee of the Legislative Council to determine if, and if so, to what extent that testimony reveals a breach of the privileges, or is a contempt of the Legislative Council and, if that Committee so finds, what penalty, if any, the House might impose for the breach or contempt. The Committee **further recommends** that the Privileges Committee of the Legislative Council should utilise an independent Counsel assisting in order to facilitate the gathering and assessment of evidence in connection with this recommendation.

RECOMMENDATION 8.

The Committee **recommends** that the testimony of Mr Steven Kons MP before the Select Committee on Public Sector Executive Appointments should immediately be referred to the Privileges Committee of the Legislative Council to determine if, and if so, to what extent that testimony constitutes a breach of the privileges, or is a contempt of the Legislative Council and, if that Committee so finds, what penalty, if any, the House might impose for the breach or contempt. The Committee **further recommends** that the Privileges Committee of the Legislative Council should utilise an independent Counsel assisting in order to facilitate the gathering and assessment of evidence in connection with this recommendation.

RECOMMENDATION 9.

The Committee **recommends** that the testimony of Ms Linda Hornsey before the Select Committee on Public Sector Executive Appointments should immediately be referred to the Privileges Committee of the Legislative Council to determine if, and if so, to what extent that testimony constitutes a breach of the privileges, or is a contempt of the Legislative Council and, if that Committee so finds, what penalty, if any, the House might impose for the breach or contempt. The Committee **further recommends** that the Privileges Committee of the Legislative Council should utilise an independent Counsel assisting, in order to facilitate the gathering and assessment of evidence in connection with this recommendation.

RECOMMENDATION 10.

The Committee **recommends** that the testimony of Ms Lisa Hutton before the Select Committee on Public Sector Executive Appointments should be immediately referred to the Privileges Committee of the Legislative Council to determine if, and if so, to what extent that testimony constitutes a breach of the privileges, or is a contempt of the Legislative Council and, if that Committee so finds, what penalty, if any, the House might impose for the breach or contempt. The Committee **further recommends** that the Privileges Committee of the Legislative Council should utilise an independent Counsel assisting, in order to facilitate the gathering and assessment of evidence in connection with this recommendation.

RECOMMENDATION 11.

The Committee **recommends** that the Government should amend the *State Service Act 2000* to broaden the application of the State Service Principles to the entire public sector.

RECOMMENDATION 12.

The Committee **recommends** that the Legislative Council do call upon the Government as a matter of legislative priority, to replace the current *State Service Act 2000* with a Public Sector Management Act along the lines of those in place in Western Australia and New Zealand. One of the central features of such a legislative model must be the appointment of a Public Sector Standards Commissioner, reporting directly to Parliament, with jurisdiction to prepare shortlists of suitable candidates to all public sector executive appointments, up-to and including Heads of Agency, for Ministerial approval. Ministers should have the power to refuse such shortlists and request replacement short-lists, on the proviso that they publish their reasons for so doing in the *Gazette*.

THE APPOINTMENT OF A MAGISTRATE IN 2007

1. CENTRALITY TO THE ORDER OF REFERENCE

This Committee draws the attention of the Legislative Council to the fact that the above issue was at the core of its Order of Reference from the Legislative Council on Wednesday, 11 June 2008. The motion for the Order of Reference was moved in the Legislative Council by Hon Paul Harriss MLC. In his introductory remarks, the mover made the following comments specifically relating to the process leading up to the appointment of a Magistrate in 2007:[6]

> *Madam President, with regard to that matter, was there inappropriate or, indeed, illegal interference with the process? Who knows, because the matter has not been investigated. The Attorney-General is not prepared to initiate an inquiry. ... So Madam President, there is this depth of uncertainty, this depth of mistrust, this depth of genuine concern by the people of Tasmania in the appropriate operations of the Government in transparency and openness. Why would not the Attorney-General of the day simply initiate an investigation and authorise an investigation into this current circumstance to determine whether there has been improper conduct or indeed possibly illegal conduct? The people of Tasmania deserve to know the answer to that question.*

As this report identifies, as a meaningful case-study, much can be learned from a forensic examination of these matters regarding systemic and cultural problems within the Executive Government. These systemic and cultural problems have a corrosive effect on the confidence of the people of Tasmania in the machinery of Government in this State. By way of warning, these underlying problems, together with their deleterious effect on public perceptions of Government and the Parliament should be of as much concern to future Governments as they must be to the present Government.

Fortunately, the constitutionally empowered Legislative Council exercised its

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[6] Legislative Council, *Hansard record of proceedings*, Wednesday 11 June 2008, http://www.parliament.tas.gov.au/HansardCouncil/isysquery/43583e8f-dd33-425a-b2eb-42e7d24cbd80/2/doc/c11june2.pdf at p 51.

independent authority to order the kind of inquiry that the Attorney-General did not see fit to recommend. The Committee is hopeful that the Government will immediately move to give effect to the views reflected in this Report.

As indicated in the Introduction to this Report, at the point in time when this Committee commenced its investigations relating to the Order of Reference, the DPP gave evidence before the Joint Parliamentary Committee on Ethical Conduct. The DPP's testimony was widely reported, and those reports were of some concern to this Committee. On 10 October 2008 the Joint Parliamentary Committee on Ethical Conduct published its second Interim Report containing the DPP's Transcript of Evidence from 10 September 2008. That transcript includes the following passage starting at p 3:[7]

> *It has occurred to me since making the submission that there is something to be said for a facility in any body that might be set up in not only investigating conduct but reporting on it, even if it falls short of criminal conduct.*
>
> *... it seems to me something to bear in mind as an add-on that matters of concern falling short of criminal conduct might still be properly the subject of comment as a by-product of an investigation. I have an example at the moment where, as is well known, I am looking at the results of investigations into allegations concerning the appointment of the Solicitor-General and the appointment of a magistrate. At the end of that, if there is to be no charge then usually I or the police will make a fairly limited statement to the effect that perhaps there's no reasonable prospect of conviction, and we won't canvas the evidence. It is usually wrong to do so, especially perhaps to make credibility judgments about people when they haven't had a chance to respond to them.*
>
> *So usually it is limited to that, and not a whole dredging and bringing forth of explanations. In the case of investigation into public figures and matters pursuant to public powers or governance there might be a case to make a little bit more of what was revealed in the investigation. <u>Whether or not there was criminal conduct in these investigations, I can assure it has revealed, to me at least, an appalling failure of process in both nominated appointments.</u>*
>
> *...*

7 See: http://www.parliament.tas.gov.au/ctee/Transcripts/10%20September%2008%20-%20Hobart%20_Ellis_.pdf

> *With the appointment of the magistrate, perhaps the Attorney-General will ask me to make a different report to him because I will certainly make him aware of what the investigation has revealed. It has investigated the whole of the circumstances surrounding this investigation. It couldn't be fuller, and certainly we got more than your FOI request revealed, Mr McKim, although that didn't seem to have been answered completely by a long shot.*
>
> *What has been revealed is a failure of process where there was a facade of criteria being compared to CVs, but that didn't happen. There was a confusion of roles where people were having things to do or having things to say about it. One could only wonder about the appropriateness of the Chief Magistrate having what seems to be an unusually large say in the appointment, to the exclusion of anyone else, especially when the Department of Justice has such little connection with the legal profession. Other things are of concern, particularly when the process - such as it is - is being gone through at the moment with the same figures essentially doing it.*
>
> *My point was that an investigation can reveal things of concern that are short of criminal behaviour. There still might need to be a facility to get the benefit of having such an investigation given to the body politic, or given to those who have an interest in it, if not made public.*

After the DPP's well-publicised appearance before the Joint Parliamentary Committee on Ethical Conduct, but before his Transcript of Evidence was published by that Committee, the Commissioner of Police published a letter he had received from the DPP dated Tuesday, 23 September 2008,[8] concerning the investigations to which the DPP referred in the passage above. That letter indicated that the DPP would not proceed with a prosecution on the basis of the evidence gathered by Tasmania Police to date. The DPP's letter indicated that the allegations which triggered the Police investigations could not be proved to be false.[9]

In light of the fact that the Police investigations were not leading to a criminal prosecution, and given that the investigations were directly related to the Committee's Order of Reference, the Committee resolved on Thursday, 2

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8 See Appendix 5.

9 At p 4.

October 2008 to send for the relevant files to assist with its inquiries. This was done by means of a confidential summons served personally, and without notice on the Commissioner of Police. Given the public comments of the DPP in this matter, it would have been negligent for the Committee not to have taken this action.

On Friday, 10 October 2008, the Commissioner of Police released the requested files to the Committee (minus certain carefully identified data that was protected by Commonwealth legislation). In his letter of release to the Committee, Tasmania Police Principal Legal Officer, Mr Mark Miller noted that the Commissioner of Police had sought legal advice with respect to the Committee's summons from the Solicitor-General. Mr Miller's letter of release to the Committee made mention of the Solicitor-General's advice on this matter as having drawn; "*attention to a number of deficiencies in the summons*". For the information of the Committee, Mr Miller's letter of release further noted that he; "*advised Mr Hine that I believe it appropriate to interpret the terms of reference of the Committee broadly*."

This Committee does not accept that there were any deficiencies in the confidential summons served on the Commissioner of Police.

As noted above in this Report, the power of summons delegated to this Committee by the Legislative Council in its Order of Reference, as a proceeding in Parliament, is not justiciable by virtue of Article 9 of the Bill of Rights 1688. Furthermore, sections 1 and 12 of the *Parliamentary Privileges Act 1858* do not "*create*" a novel power of summons in limited terms, but give statutory recognition to a power that was already a recognised practice, custom and usage of the Parliament prior to 1858. The second edition of Erskine May's seminal work; "*A practical treatise on the law, privileges, proceedings and usage of Parliament*", published in 1851 contains the following observation (Erskine-May, The Law, Privileges, Proceedings and Usage of Parliament 1851, 299):

> *As the object of select committees is usually to take evidence, the House of Commons, when necessary, give them* "leave to send for persons, papers,

> and records."
> *By virtue of this authority, any witness may be summoned by an order, signed by the chairman, and he must bring all documents which he is informed will be required for the use of the committee. Any neglect or disobedience of a summons will be reported to the house, and the offender will be treated in the same manner as if he had been guilty of a similar contempt to the house itself.*

In any event, the matter did not become a point of controversy due to the position taken by the Commissioner of Police. However, the fact remains that the summonsing power of a Committee of the Legislative Council has been brought into question. This Committee, and indeed all Committees of the Legislative Council, has all of the powers of the Legislative Council to do those things for which the Legislative Council has delegated its authority to investigate. Such powers, including where so delegated, include the power to summons persons and documents, a refusal of which renders those in default liable to a finding of contempt of the Legislative Council.

> ***Committee Comment***
> The Committee notes the differing interpretations of its power to summons, and its entitlement to send for documents under its Order of Reference, as expressed by the Solicitor-General and Mr Miller. While intending no disrespect to these senior legal practitioners, the Committee again refers to the leading authority on Westminster Parliamentary law, practice, custom and usage (Erskine-May, The Law, Privileges, Proceedings and Usage of Parliament 1989, 618) which clearly states that; "*The interpretation of the order of reference of a select committee is, however, a matter for the committee*". This Committee accepts that the course of action advised by Mr Miller is consistent with its understanding of the law, practices, customs and usages of select committees of the Legislative Council. However, this Committee does not accept that the law, practice, customs and usages of Select Committees of the Legislative Council are in any way dependent on the interpretations of; "*any court or place out of*

> *parliament*".[10]
>
> Any failure to comply with an order of the Legislative Council, or a regularly constituted Committee of the Legislative Council with power to send for persons or papers, renders the offending party liable to the summary judgement of the Legislative Council.[11] The ability to punish for contempt is the enforcement aspect of the Legislative Council's power to send for persons or papers. Without the express ability to enforce one of its orders, the power of the Legislative Council or one of its Committees to order the attendance of persons or the production of documents would be meaningless. The Committee notes that there may be a need for the Legislative Council to review its enforcement powers to ensure that these powers reflect an appropriate balance, in a modern context, between preserving the institutions of our representative democracy and meeting the expectations of the people of Tasmania.

The Committee notes that, on Thursday, 16 October 2008 the Premier, Hon David Bartlett MP announced the temporary appointment of former Commissioner Mr Richard McCreadie to replace Acting Commissioner Mr Darren Hine. This matter is not addressed in this Interim Report.

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10 Article 9, Bill of Rights 1688; "*That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament.*"

11 Section 3 of the *Parliamentary Privileges Act 1858* provides *inter alia*:

Each House is hereby empowered to punish in a summary manner, as for contempt, by imprisonment in such custody and in such place as it may direct, during the then existing session or any portion thereof, any of the offences hereinafter enumerated, whether committed by a Member of the House or by any other person:

(a) The disobedience of any order of either House, or of any committee duly authorized in that behalf, to attend, or to produce papers, books, records, or other documents before the House or such committee;

2. MAGISTRATE APPOINTMENT PROCESSES

In relation to the current Australian systems for judicial appointment, this Committee notes that the Commonwealth Attorney-General, Hon Robert McClelland MP has recently observed (McClelland 2008):

> *The mystery surrounding the current judicial appointments process and controversy over past appointments has two negative consequences.*
>
> *First, it can tarnish or detract from the honour of being appointed to judicial office.*
>
> *Second, at a broader level it can diminish public confidence in the courts and the justice system.*

The Committee was also interested to note that a public consultation paper from New Zealand on this question identified that, internationally, there appeared to be four predominant methods of judicial selection. That document articulated these as being (New Zealand, Department of Justice 2004, 12):

- Appointment on the advice of the Executive and/or the Legislature
- Formal training programmes
- Popular election
- A judicial appointments commission.

The consultation paper further noted that in jurisdictions which have a judicial appointments commission, some of these bodies directly appoint the officer, whilst others make recommendations on the appointment to an officer of the Executive Government.

World's best practice for the process of appointing judicial officers is an issue that has received attention in many jurisdictions. A methodology which appears to have widespread approval is the establishment of a commission or committee to assess and recommend candidates. For instance, a commission of this type operates in the United Kingdom.

Local Application of World's Best Practice

At its second public hearing, this Committee was advised by former Attorney-General, Hon Dr Peter Patmore that he had developed and implemented a process for the appointment of Judicial Officers while he held the office of Attorney-General. In evidence to the Committee, Dr Patmore advised as follows (Patmore, Transcript of Evidence 20 September 2008, 18):

> *So I then worked out a process of appointment in the office, which I have tabled as a copy, where I felt that the appointment should be one step removed again. We had an open tendering process as it was. We had criteria. We had a broad way in which we could consult but there was still an element of criticism able to be given. Therefore, I looked towards the idea of a committee to be formed that would be removed from the Attorney General, and that would then consider all the applicants. Then it would make a recommendation to the Attorney General. The Attorney General would then go to Cabinet. That was the process I advertised and had it in place and that was the position it was in when I resigned from Parliament.*

The appointment process to which Hon Dr Patmore referred in the above passage, was Department of Justice policy in 2002, and the relevant Departmental document is reproduced in Appendix 6 to this report. The relevant section of the document outlining the process is as follows:

> ***Appointment Process for Judges and Magistrates***
>
> *The steps in the appointment process for Judges and Magistrates are as follows:-*
>
> > *Expressions of interest are called for by public advertisement.*
> > *Prospective candidates address in writing the selection criteria.*
> > *Those who meet the criteria are interviewed by a Committee.*
>
> *The members of the Committee will be appointed by the Attorney-General from those who have expressed interest in being appointed following a public advertisement. The Committee will be made up of a Judges' representative, or in the case of a magisterial appointment a magistrates' representative, the Secretary of the Department of Justice, a senior lawyer with significant litigious experience, a senior lawyer with considerable experience in commercial law and two lay members with considerable experience in selection and appraisal of staff.*

The Committee will meet when a vacancy occurs in a judicial office. The members of the Committee will not receive payment for their services.

The Committee will consult with the Law Society, the Bar Association, the Director of Public Prosecutions, the Solicitor General, the Chief Justice, the Chief Magistrate and the referees named by the applicant. This consultation will be conducted on a confidential basis, with the consent of the applicant having been obtained on their application.

A report will be provided by the Committee to the Attorney-General on each of the candidates and their abilities to meet the selection criteria, together with the names of all applicants who applied and were not interviewed with brief reasons for their failure to be selected for interview.

The Attorney-General will determine the candidate who will be put to Cabinet for appointment. This person, prior to their name being put to Cabinet, will be asked to sign forms allowing for a police check as well as signing a personal declaration relating to possible breaches of taxation laws, bankruptcy, financial difficulties and any possible conflict of interest. They will also be asked to declare private interests in the last 12 months.

The above model, implemented by Hon Dr Patmore while Attorney-General in this State closely resembles that implemented by the then Lord Chancellor's Office in the United Kingdom. This resemblance is not coincidental, as the United Kingdom model was specifically referred to in a 1999 public discussion document, issued in 1999 by the Department of Justice, which preceded the final Departmental policy (Department of Justice 1999, 23).

The public discussion paper noted that; "*the quality of the judiciary and its composition is largely dependent upon the method of judicial appointment*." (Department of Justice 1999, 2). This Committee endorses this observation by the Department. The key selection criteria against which to assess candidates for judicial appointment were identified in the discussion paper, and divided into three sections, namely: "*Legal knowledge and Experience",*

"Skills and Abilities" and "Personal Qualities." The Committee was interested to learn that this appointment process methodology was an operational policy document within the Department of Justice in 2002 when Hon Dr Patmore resigned from Parliament.

On the question of the accountability of the Executive Government for the process of judicial appointments, this Committee was interested to receive the perspective of Hon Dr Patmore in the following extract of his testimony (Patmore, Transcript of Evidence 2008, 19):

> *…I think ultimate responsibility lies with the Attorney-General and through him, Cabinet … The point I make is that ultimately it has to be the Government's responsibility and a Government decision. You could have all the good advice in the world but I don't think you can negate your ultimate responsibility by saying that the committee did it. Ultimately someone has to be at the end of the chain who bears responsibility for it, and it's got to be you."*

Mr Rick Snell, Senior Lecturer in the University of Tasmania's Faculty of Law, discussed the matters raised by Hon Dr Patmore in the wider context of public Sector Appointments. This Committee was particularly interested in the points raised in the following extract of Mr Snell's testimony (Snell 2008, 26):

> *… the Rudd Government has brought in a number of very important reforms, especially in the appointment of judicial officers. I think they are state of the art now in terms of the latest appointment process for Federal Court judges and magistrates. You have open advertisements, selection criteria, the type of panel that Peter Patmore was talking about involved in that process, and recommendations going forward. The federal Government has made steps to move in that way as well.*
>
> *One of the things that we could draw on is the learning from the experience of the Commissioner of Public Appointments in the United Kingdom, which was appointed after the Nolan Report in the mid 1990s. It has set down clear guidelines for public service appointments, which all departments have to follow. If they want to deviate they have to get permission for their particular procedures to be endorsed by the Public Appointments Commissioner.*

That would be useful here, having some organisational body that sets down clear criteria that ought to be applied across the board unless there is good reason for particular portfolios or particular areas for specialised appointment processes to be adopted. If so, they ought to have to go through some type of endorsement, either by that commissioner or by a parliamentary committee to say that this exception is acceptable."

National Application of World's Best Practice

This Committee notes that Hon Robert McClelland MP has recently presided over a restructure of the appointment process for federal judicial positions. The aims of the changes announced by Attorney-General McClelland are to ensure (Attorney-General's Department 2008, 2):

- *greater transparency and public confidence in the judicial appointments process*
- *that all appointments are based on merit, and*
- *that everyone who has the qualities for appointment as a judge or magistrate is fairly and properly considered.*

The mechanisms that are to be used to ensure that the above aims are achieved are as follows (Attorney-General's Department 2008, 2):

For the Federal Court and Federal Magistrates Court these processes include:

- *broad consultation to identify persons who are suitable for appointment*
- *notices in national and regional media seeking expressions of interest and nominations*
- *notification of appointment criteria, and*
- *appointments advisory panels to assess expressions of interest and nominations against the appointment criteria and to develop a shortlist of highly suitable candidates.*

For appointments to the Federal Magistrates Court, the appointments advisory panel comprises the Chief Federal Magistrate or a Federal

> *Magistrate nominated by him, a retired judicial officer and a senior officer from the Attorney-General's Department.*

This Committee notes that the new Federal judicial appointments process results in the panel providing a shortlist to the Attorney-General, who makes a recommendation on appointment to Cabinet. The Governor-General then appoints the individual on the advice of their Ministers.

A list of requisite qualities for Federal judicial appointment is provided for the information of applicants as an indication of eligibility for appointment. These qualities are (Attorney-General's Department 2008, 2):

> *To be eligible to be appointed as a Federal Court judge, a person must have been enrolled as a legal practitioner of the High Court or a Supreme Court of a State or Territory for a least 5 years.*
>
> *In addition, judges must have the following personal and professional qualities to a high degree:*
>
> - *legal expertise*
> - *conceptual, analytical and organisational skills*
> - *decision-making skills*
> - *the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments*
> - *the capacity to work effectively under pressure*
> - *a commitment to professional development*
> - *interpersonal and communication skills*
> - *integrity, impartiality, tact and courtesy, and*
> - *the capacity to inspire respect and confidence.*

An interesting feature of the new Federal process is the inclusion of a method by which appropriate persons may be nominated by a third-party with the prior agreement of the nominee.

Committee Comment

This Committee considers that the inclusion of a third-party nomination process is a promising approach to the problem of suitable candidates

for judicial appointment who are reluctant, for one reason or another, to trumpet their own suitability for appointment. The Committee believes that any future policy adopted for judicial appointments and other legal appointments in this State such as that of a DPP, Solicitor-General or Crown-Solicitor should include such a rubric.

Recent Local Developments

This Committee notes that on Friday, 15 August 2008, then Attorney-General Hon David Llewellyn MP approved a Protocol for Judicial Appointments which officially supersedes that laid down by Hon Dr Peter Patmore in 2002. This represented the third of Premier David Bartlett's so-called *"Ten Point Plan"*. The protocol is reproduced in its entirety at Appendix 7 and contains the following relevant procedures:

> ***Call for Expressions of Interest***
>
> *A call for expressions of interest in appointment will be advertised in the three Tasmanian daily newspapers and on the Department of Justice website.*
> *Unless exceptional circumstances apply, no less than three weeks will be allowed for the lodgement of responses.*
>
> *Respondents will be asked to provide a curriculum vitae and a response to a set of published criteria similar to those attached.*
>
> *The expressions of interest received will be assessed against the published criteria by the Chief Justice/Chief Magistrate (or their nominee) whichever is relevant and the Secretary of the Department of Justice. Should the Chief Justice/Chief Magistrate choose not to take part in the assessment process or to nominate a person in their place the Attorney-General will appoint an additional adviser to the panel.*
>
> *The Attorney may in any case appoint an additional person or persons on the basis of expertise or otherwise to assist with this assessment. Additional panel members may come from outside Tasmania in appropriate cases.*
>
> *The assessment panel will provide recommendations to the Attorney-General on which candidates are suitable for appointment. The Solicitor-General will*

be asked to advise in the event of a question as to the eligibility of any candidate for appointment.

Other Consultation

The Attorney-General may consult on a strictly confidential basis with other persons in deliberating on an appointment.

Once the Attorney has identified the preferred candidate the Secretary of the Department of Justice will contact the President of the Law Society and the Chair of the Legal Profession Board on a confidential basis seeking comment on whether there is any reason (such as impending disciplinary action) that the appointment should not proceed.

This step will also be followed in the case of the appointment of a temporary magistrate.

If the proposed appointee is a practitioner from another jurisdiction the check will also be made with the equivalent professional body from their home jurisdiction.

A criminal history check will also be carried out for all new judicial appointments.

All judicial appointments whether permanent or temporary must be considered by Cabinet prior to submission to the Executive Council in compliance with government policy on senior appointments.

This Committee notes that this new protocol was introduced without the broad-based consultation that characterised the 2002 *"Patmore"* protocol. The Committee further notes that the new protocol simultaneously waters down the independence, transparency and consultation requirements of the 2002 *"Patmore"* protocol, while at the same time reflecting many of the flawed practices that took place in the appointment of a Magistrate in this State in 2007. The Committee believes that any reasonable assessment of the current, 2008 judicial appointment protocol, finds it wanting when compared to the world's best practice protocol adopted by the Department of Justice in

2002. As the third element of the Premier's; *"Ten Point Plan"* to strengthen trust in democracy, the 2008 judicial appointment protocol amounts to a sub-standard outcome.

Critique of World's Best Practice in Judicial Appointments

The Committee notes the recent thoughtful analysis of the issue of judicial appointment processes published by Mr Justice Ronald Sackville, formerly of the Federal Court. In that paper his Honour observed that (Sackville 2006, 10):

> *One of the advantages of an independent appointments body is that it can systematically encourage qualified lawyers from outside the ranks of professional advocates to seek appointment on the bench at an appropriate level ... an independent body, supported by skilled staff and by uniform advertising, interview and selection procedures, is very much better placed to undertake the task than the necessarily haphazard, non-transparent efforts of an Attorney-General and his or her Department or personal staff.*

Justice Sackville further observed that merely having an appointments commission should not be regarded as a panacea. There is an on-going debate about how such a body would operate in practice (Sackville 2006, 11):

> *The more difficult question is how the criteria are to be applied to candidates with different kinds of experience and different attributes (or drawbacks). The reference to* 'legal knowledge and experience' *in the Lord Chancellor's list* [the United Kingdom's methodology]*, for example, tends to disguise the difficulty of the weight that should be given to forensic experience when addressed against other forms of legal experience.*
>
> *The Lord Chancellor's list makes no express reference to the desirability of having a more diverse judiciary, although there has been much discussion in the United Kingdom about the desirability of such an outcome. There is undoubtedly some tension between the principle that judicial appointments should be made exclusively on merit and the proposition that that the appointing or recommending body should actively seek greater diversity.*

However, any challenges that a system based on an independent appointments commission would pose, should not overshadow the many advantages flowing from such a system, as Justice Sackville observed (Sackville 2006, 20):

> *Leaving aside pragmatic considerations, there is much to be said as a matter of principle for a system that seeks both to strengthen political accountability for judicial appointments and to introduce an independent body into the process. This can be done by establishing an independent commission that* ***recommends*** *the appointment of candidates to judicial office, but does not* ***appoint*** *particular candidates … On this approach, the Attorney-General or government of the day would have the option of rejecting a particular recommendation. However, if that course was followed, it would be necessary for the Attorney-General to explain publicly why the Government had chosen to reject the recommendations. ...*
>
> *It is possible to strike a balance between the virtues of an independent appointment process and leaving ultimate responsibility (and thus accountability) for judicial appointments with the elected government. That balance can most effectively be struck by conferring upon the commission the functions of inviting applications from qualified candidates, assessing the merit of those who apply and recommending either a particular candidate or a short list of no more than (say) three or five candidates suitable for appointment. If the Government, through the Attorney-General, decides not to accept the recommendation, it should have the option of inviting the commission to reconsider, provided it gives reasons for rejecting the recommendation. If the Government, following the reconsiderations, still wishes to select a candidate other than the recommended person or persons, it should be free to do so. However, the Attorney-General would be required to table in Parliament a statement of reasons for selecting a candidate not supported by the commission. In this way, both political accountability for the decision and transparency and integrity of the appointments process will be enhanced.*

The Committee notes that Justice Sackville listed a number of criteria as serving to ensure the optimal composition of any judicial appointments commission, namely (Sackville 2006, 22):

(a) the *ex officio* appointment of a majority of members;
(b) legal and judicial members of the commission should assess the legal competency of candidates, but the entire committee should come to a recommendation;
(c) it should be small in size, with non lawyers making up at least an equal share if not the majority;
(d) it should be flexible allowing smaller groupings to make decisions for junior courts or tribunals.

Pursuant to its Order of Reference, this Committee had cause to investigate the circumstances surrounding the appointment of a Magistrate in 2007. The policy document tabled by Hon Dr Peter Patmore provided a useful benchmark in determining to what extent that process represented or varied from world's best practice adapted to local conditions. The Committee's findings relating to that matter are discussed in the following section.

3. THE APPOINTMENT OF A MAGISTRATE IN 2007

Hansard for the House of Assembly from Tuesday, 8 April 2008 reveals that Mr Kim Booth MP tabled what appeared to be a reconstituted assortment of shredding-machine waste.[12] The material tabled by Mr Booth was revealed to be a Cabinet Brief signed by then Attorney-General Mr Steven Kons MP and dated Wednesday, 8 August 2007.

The tabled document was thereafter reproduced in major daily newspapers throughout the State. This document, if authentic, indicated that the Attorney-General had signed a recommendation to Cabinet for the appointment of Mr Simon Cooper to the position of Magistrate sitting in Hobart. Even at such an early stage in the saga that has subsequently unfolded, it was then apparent that the Department of Justice may not have complied with its statutory obligations under s 10 of the *Archives Act 1983* which reads as follows:

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[12] Hansard, Tasmania, House of Assembly, 8 April 2008 <http://www.parliament.tas.gov.au/HansardHouse/isysquery/396019c1-8184-4659-90e1-557085e212c5/3/doc/h8april1.pdf> at p 19.

Preservation of State records

1) *The relevant authority –*
   a) *is to keep proper records in respect of the business of the Government department, State authority or local authority for which the relevant authority is responsible; and*
   b) *is to cause all such records to be preserved and accessible until they are dealt with in accordance with this Act; and*

The Committee further notes that s 20 of the *Archives Act 1983* provides in the following terms that the destruction of State records constitutes an offence:

Disposal, destruction, &c., of State records

1) *Except as provided by this Part, a person shall not–*
   a. *destroy or otherwise dispose of a State record; or*
   b. *transfer, or be a party to arrangements for the transfer of, the custody of a State record; or*
   c. *transfer, or be a party to arrangements for the transfer of, the ownership of a State record; or*
   ca) *refuse to provide the State Archivist with the full name and residential address of the person for whom that person is acting as an agent in an arrangement under paragraph (b) or (c) for the transfer of a State record; or*
   d) *damage or alter a State record.*

Penalty:

Fine not exceeding 50 penalty units.

A sworn statement made out by the Secretary for the Department of Justice, Ms Lisa Hutton and taken into evidence by this Committee confirms the authenticity of the tabled document. (Hutton, Statutory Declaration 2 2008, 6):

> *On Tuesday 8 April 2008 shortly after Mr BOOTH produced the shredded COOPER document in Parliament I was shown a copy of the document by the Premier Paul LENNON for the purpose of me confirming its authenticity. This occurred at Parliament House in the Premiers* [sic] *office. As events had unfolded during the morning in Parliament I had been called down there with a view to speaking with the Attorney-General to provide a briefing. About the*

> *time this occurred I received a phone call from Evan ROLLEY which resulted in me seeing the Premier. As a direct result of viewing the document my memory of the proposed appointment of COOPER returned to me. I confirmed to the Premier that the document was authentic.*

In addition, this Committee has discoverd that Ms Hutton authored a Ministerial Brief for then Attorney-General Mr Stephen Kons MP which included the following admission; "*The earlier superseded Brief in relation to Mr Cooper was not retained by the agency.*" (Hutton, Statutory Declaration 2 2008, 155). Ms Hutton was more expansive in a sworn statement which was taken into evidence by this Committee, as can be seen in the following extract (Hutton, Statutory Declaration 1 2008, 5):

> *On the morning of Wednesday 8th August 2007, I was advised that the person who was to be appointed as a Magistrate had changed from Simon COOPER to Glenn HAY. I cannot recall how this information was communicated to me. ... As a result of this communication, I accessed the electronic version of the Departmental Minute titled Cabinet Noting of Magistrate Appointment for Mr COOPER and amended it. The Cabinet Brief was amended in the same way by a departmental officer at my direction. Both documents are proforma type documents and based on the advice I was provided, I changed the name from Simon COOPER to Glenn HAY and also changed the work history summary. <u>Although the original document for the nomination of Mr Simon COOPER had been originally saved, I did not retain that saved document</u>. The reason for this is that the original document no longer had any relevance to the appointment of Mr HAY and I did not see that there was any need to save a document that was not going to be officially used.* [Underlining Added].

A sworn statement of Mr Steven Kons MP taken into evidence by this Committee is also relevant to this matter. Mr Kons' comments of relevance are as follows (Kons, Statutory Declaration 2008, 5):

> *The conversation, who I believe may have been with Ms HORNSEY, related to the nomination of Mr COOPER. All I can recall about the conversation was she said "*shred it*". ...*
>
> *After the phone conversation was terminated, I took the Cabinet Minute relating to Mr COOPER to the office shredder and shredded it. The reason I did this was because I was told to and I knew a new one would be prepared.*

At a public hearing of the Committee, Mr Kons provided a further rationale for the shredding of the document in testimony before the Committee. This rationale is relevant to later sections of this report and was expressed in the following terms (Kons, Transcript of Evidence 2008, 3):

> *As we did not have a security bin, shredding it was better than putting it in a normal waste bin where rats and rodents could get to it.*

This Committee notes that the issue of a potential breach of the *Archives Act 1983* being disclosed by the shredding of the Cabinet Brief nominating Mr Cooper was raised in a question by Hon Michael Hodgman QC MP, addressed to the Premier, Mr David Bartlett MP. The following extract from the Hansard record of debates for the House of Assembly for Wednesday, 29 October 2008, at 10.53am records the Premier's response:[13]

> *Mr BARTLETT - Mr Speaker, I thank the member for his question. At the time that these events were playing out, I sought advice on this exact matter, knowing that I am of course in control of the* Archives Act 1983*. I do not have to hand immediately with me the advice I received at the time because I anticipated this question some months ago, not today. I would be very happy to get you that advice, but it was simply that the Archives Act had not been breached; that is my understanding.*

As the Premier has not tabled the advice to which he is recorded as having referred, and as he did not supply the advice of the Solicitor-General prior to this Committee adopting this Interim Report, it is not possible to comment further on the adequacy or otherwise of that advice in view of the entire circumstances of the matter in question.

> ***Committee Comment***
>
> The Committee poses the following question; "*If the destruction of the only hard-copy of an official document, together with the only electronic copy of the same document does not constitute a breach of s 10 of the*

[13] See: http://www.parliament.tas.gov.au/HansardHouse/isysquery/f8e5b089-c04b-42e2-91d1-55bb4ece33e2/2/doc/h29october1.pdf at p 13.

> *Archives Act 1983, what conduct would constitute a breach?*"

The Committee notes that, at all relevant times, the Minister responsible for the administration of the *Archives Act 1983* was the Minister for Education. Notwithstanding the above comments of the Premier, this Committee is concerned that evidence before it may, in fact, disclose a breach of the *Archives Act 1983*. During the course of her second, *in-camera* hearing before this Committee, Ms Hutton disclosed that, on Friday, 16 January 2009, the Solicitor-General produced an Opinion or Advice for the Minister for Education entitled; "*Advice re Archives Act 1983*" which refers to the shredding of the Cabinet Briefing documents by Mr Kons on 8 August 2007.

This Committee resolved, at a regularly constituted meeting on Friday, 20 March 2009, to order the delivery to it of a copy of this document from the Minister for Education. The subsequent summons was delivered to the Minister on Tuesday, 24 March 2009 with delivery ordered by noon on Wednesday 25 March 2009. In his response to this Committee, the Minister for Education expressed reservations about supplying the requested document on the basis of Legal Professional Privilege. In line with the findings of the Courts (*Egan v Chadwick* (1999) 46 NSWLR 563 at [86] per Spigelman CJ with Meager JA agreeing at [152] & at [138] per Priestley JA), this Committee does not accept that its power to send for documents is hindered by such considerations and this view is clearly enunciated in the following extract from *Egan v Chadwick* (1999) 46 NSWLR 563 at [86] per Spigelman CJ:

> *In performing its accountability function, the Legislative Council may require access to legal advice on the basis of which the Executive acted, or purported to act. In many situations, access to such advice will be relevant in order to make an informed assessment of the justification for the Executive decision. In my opinion, access to legal advice is reasonably necessary for the exercise by the Legislative Council of its functions.*

In light of the foregoing, this Committee makes the following finding with respect to the destruction of the only copies of the Cabinet Brief relating to Mr Simon Cooper on Wednesday, 8 August 2007:

> *Finding 1*
>
> *This Committee finds that there is sufficient evidence to suggest a prima facie breach of sections 10 and 20 of the Archives Act 1983 may have occurred on Wednesday 8 August 2007 relating to documents prepared within the Department of Justice in relation to Mr Simon Cooper.*

The Committee therefore makes the following recommendation:

> **RECOMMENDATION 1.**
>
> The Committee **recommends** that the Minister for Education should immediately refer to the Auditor-General for investigation and report, the possible breach of sections 10 and 20 of the *Archives Act 1983* on Wednesday, 8 August 2007 by the destruction of documents prepared within the Department of Justice in relation to Mr Simon Cooper and to consider whether or not the relevant sections are inconsistent with [1.3.3] of the Cabinet Handbook 2004.

The fact that Mr Cooper was never appointed to the vacant Magistrate's position, and that someone appeared to have shredded the document became the subject of much conjecture, surmise, rumour and innuendo within the community. These events resulted in significant unwarranted and unnecessary embarrassment for two capable and senior lawyers, namely Mr Cooper, and the person actually appointed to the position, Mr Glenn Hay.

All of the inquiries of the Committee have revealed that the only thing that these two gentlemen have done to invite this appalling farrago of nonsense into their lives, was to be sufficiently eminent within their profession of choice to have been shortlisted for appointment as a Magistrate after an open and

arms-length short-listing process. The Committee notes that Mr Steven Kons MP made a public personal apology to both Mr Cooper and Mr Hay on Tuesday, 8 April 2008 for the embarrassment that this sorry affair may have caused them. However, this was not primarily a personal matter. It was, in fact an action of the Executive Government. The Committee notes that to date, there has been no apology at a Government level to these two highly respected public servants for the harm occasioned to their good names as a result of the shoddy and uncoordinated treatment of official correspondence.

The Committee therefore makes the following recommendation in the strongest possible terms:

> **RECOMMENDATION 2.**
>
> The Committee **recommends** that the Government immediately issue a formal apology in clear and unambiguous terms for any harm, hurt or embarrassment occasioned to Mr Simon Cooper and Mr Glenn Hay arising from any inappropriate conduct of the former Attorney-General and senior public servants in connection with the appointment of a Magistrate in 2007.

<u>The Scope of the Committee's Inquiry</u>

There has been considerable commentary in the public domain regarding this Committee's interpretation of its Order of Reference. In part, the Committee has addressed this matter above in the Introduction to this Report. This issue is also canvassed further below. Nevertheless, at the outset and for the sake of clarity, it is as well to address the specific question of why the Committee spent time questioning witnesses on issues surrounding the Pulp Mill between February and July 2007.

A sworn statement made out by Mr Steven Kons MP and taken into evidence by this Committee drew the attention of the Committee to the matter of the Pulp Mill as being of potential relevance to Mr Cooper's expression of interest for appointment as a Magistrate and the subsequent saga that has unfolded.

That statement included the following passage (Kons, Statutory Declaration 2008, 3):

> *I do not recall the date, but when it was time to nominate a person to Cabinet for the Magistrates position, I was getting the clear message from the Premier's Office that Mr Cooper was to be the nominee. This message was communicated to me during the meetings I had with the Premier, Mr LENNON, the Secretary of the Department of Premier and Cabinet (DPAC), Ms Linda HORNSEY. As I held the position of Deputy Premier at the time, I had meetings with them every Monday in the Premier's Office, prior to Cabinet. During the discussions in respect to the Magistrate appointment, I communicated my concerns about Mr COOPER being the nominee, but it was clear to me that Mr COOPER was the preferred candidate. I cannot provide more specific details of these discussions or the dates and times when they occurred.*
>
> *Although I cannot confirm the reason why he [Mr Cooper] was preferred as the nominee, I can only speculate on the matter. My belief is that Mr COOPER made some comments in his capacity as Acting Executive Commissioner of the RPDC that placed the government in a potentially difficult position. For example, I was aware that he sent a letter to the Premier over concerns about the deficiencies in the Gunns Pulp Mill application.*

Given Mr Kons' unique knowledge of both the events surrounding the appointment of a Magistrate in 2007, and the Pulp Mill approval process in that year, this Committee had good reason to test Mr Kons' assertion that Mr Cooper's treatment in connection with the appointment of a Magistrate in 2007 was in some way due to his work as Acting Executive Commissioner of the RPDC. In the course of its inquiries into these matters, the Committee had cause to reflect on the credibility of Mr Kons' sworn testimony. Indeed, the credibility of a number of witnesses before the Committee is a matter that is dealt with separately below.

Chronology of Events

January 2007

In early January 2007 Magistrate Roger Willee advised Chief Magistrate Arnold Shott of his intention to retire in June of that year. Prior to January 2007 Mr Simon Cooper was employed as the Chairperson of the Resource Management Planning Appeal Tribunal (**RMPAT**). Mr Julian Green was Chair and Executive Commissioner of the Resource Planning and Development Commission (**RPDC**) until his resignation on Friday, 12 January 2007. As a result of Mr Green's resignation, the then Attorney-General, Mr Steven Kons MP, appointed Mr Cooper to the position of Acting Executive Commissioner of the RPDC. Mr Cooper took unpaid leave from the RMPAT for the duration of his role as Acting Executive Commissioner of the RPDC, which was expected to be for between six and twelve weeks. At all relevant times, then Premier Hon Paul Lennon MP was the Minister responsible for the Pulp Mill as a; "*project of state significance*" under the *State Policies and Projects Act 1993*.

Shortly after taking over his acting role with the RPDC, Mr Cooper advised then Premier, Hon Paul Lennon MP to appoint Hon Christopher Wright QC as the Chair of the Pulp Mill Assessment Committee. A media release was subsequently issued by Mr Lennon announcing Mr Wright's appointment and stated (Lennon, Media Release: 'Retired Judge Nominated to Head RPDC Panel' 2007):

> 'Mr Wright is ideally qualified to oversee the pulp mill assessment process and is held in high esteem not only in legal circles but right across the Tasmanian community,*' the Premier said.*
>
> 'The public can have the utmost confidence in his integrity and understanding of Tasmania.*'*
>
> *The Premier thanked interim RPDC chief Simon Cooper for his diligent work in stabilising the Commission during a difficult period.*
>
> 'Mr Cooper has been instrumental in securing Justice Wright's agreement to chair the pulp mill assessment panel,*' Mr Lennon said.*

February 2007

During late January and early February, Mr John Gay, Executive Chairman of Gunns Ltd placed at least two telephone calls to Mr Simon Cooper to discuss concerns the former had with the RPDC Pulp Mill assessment process. Mr Cooper asserts that in at least one of these telephone calls, on Thursday, 8 February 2007, Mr Gay sought to arrange an *ex parte* meeting with Hon Christopher Wright QC about these concerns. Mr Cooper asserts that he refused to comply with Mr Gay's request. Mr Gay has advised the Committee that his preferred method of managing his business affairs is via the telephone. Mr Gay further advised the Committee that following a telephone call with Mr Cooper he formed the view that the RPDC Pulp Mill assessment process was not likely to deliver a satisfactory outcome for Gunns Ltd. Given the small number of telephone calls between Mr Gay and Mr Cooper, the Committee has reason to believe that both witnesses have identified the same telephone call.

On 22 February 2007, the RPDC Pulp Mill assessment committee met in Launceston for a public directions hearing. At that hearing Hon Christopher Wright QC addressed the issue of compounding delays in Gunns Ltd's submissions to the Committee and indicated among other things that in light of these, he did not believe the assessment process could be completed before the end of 2007. In a media statement issued shortly thereafter, Gunns Ltd indicated that it would continue to work within the assessment process.

Notwithstanding this media statement, a special meeting was held on the evening of Sunday, 25 February 2007 in Hobart in the Premier's Reception Room between Mr Gay, two directors and the company secretary of Gunns Ltd on the one part and the then Premier, two Cabinet ministers and Ms Linda Hornsey on the other part to discuss the Pulp Mill assessment process.

A sworn statement made out by Mr Cooper, and taken into evidence by this Committee, indicates that around mid-day on Monday, 26 February 2007 he attended the Premier's Office for a meeting with Premier Lennon and Ms

Linda Hornsey, then Secretary for the Department of Premier and Cabinet. Mr Cooper states that, at this meeting (Cooper, Statutory Declaration 2008, 4):

> *The Premier told me that he wanted a reduced timeline for the pulp mill assessment process. He wanted the process finished by July 2007 as opposed to our timeline concluding in October 2007. ... It was my view that the Premier* [sic] *request for a shorter time frame was in no way improper, however; ultimately the Assessment Panel were responsible for determining the necessary time line.*

The following morning Mr Cooper and Mr Wright attended the Premier's Office for a meeting with the Premier and Ms Hornsey. At that meeting Mr Cooper and Mr Wright were provided with a document entitled; "*Timeline showing process steps assuming end date is 31 July 2007*". This document is reproduced at Appendix 8 to this Report. Mr Cooper's sworn evidence relating to this meeting, supported by extensive contemporaneous notes, is as follows (Cooper, Statutory Declaration 2008, 4):

> *The timelines excluded the ability for the assessment process to have any public hearings. Neither Chris WRIGHT nor I were happy with this; we both believed that hearings formed an integral part in the assessment process. Chris WRIGHT expressed his concerns over the need for public hearings. He expressed passive disquiet in relation to the proposal and told the Premier that he would need to consult with the three other Assessment Panel members. I held the view that the proposed time line was Gunns initiated but I did not express this view to the Premier. I believed the reduced time line did not satisfied* [sic] *the requirement for a full and proper assessment process as was required in the legislative frame work of the State Policy and Projects Act 1993. Whilst there was a legal argument public hearings was not required, this was not my position. Furthermore, there were Federal legislation requirements regarding public hearings which I believed were relevant to the process. Linda HORNSEY indicated the Solicitor-General's opinion was public hearings were not required. She said she would arrange an appointment with the Solicitor-General for Chris WRIGHT and me immediately after the meeting. She subsequently made those arrangements.*
>
> *Immediately after that meeting with the Premier, Chris WRIGHT and I went to the Solicitor-General's office and spoke with Mr Bill BALE QC. At this*

meeting the Solicitor-General expressed his opinion that public hearings were not required. As Chris WRIGHT and I had a counter view there were robust discussions with Mr BALE over the issue. No formal opinion was requested or obtained from the Solicitor-General to my knowledge.

March 2007

The relevant events of the first week in March are summarised in the following extract of the Hansard record of proceedings for the House of Assembly for Wednesday 13 June 2007 at 6.07pm:[14]

> ***Mr LENNON*** *(Franklin - Premier) - I rise tonight to put some information on the record about a question I was asked in question time by the Leader of the Tasmanian Greens, Ms Putt, which I undertook to get more advice on. This relates to the question I was asked this morning about the pulp mill assessment process, in particular the supplementary question.*
>
> *I can advise the House that I have had a further conversation with the head of my department, Ms Hornsey, today about this very matter. She has advised me that the RPDC's intention to write to Gunns on the supplementary IIS was discussed on Friday 2 March with the acting executive chair of the RPDC, Mr Simon Cooper. This was around the time that there was speculation about Gunns' position with the RPDC and followed the meeting about which there has been much discussion in Parliament that I had with Chris Wright QC, which occurred on 27 February.*
>
> *On 2 March, Linda Hornsey asked Mr Cooper to check with Mr Wright a letter that she was drafting on my behalf to send to Gunns. This was the letter which has been made public, which was dated 7 March and signed by myself when I came back from a private trip to New Zealand. It was at that time that she became aware that there was correspondence being drafted within the RPDC and she made a suggestion that that letter concerning additional information, which the RPDC indicated was highly likely that they were going to be wanting to receive from Gunns, await*

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[14] Tasmania, House of Assembly, *Hansard record of proceedings*, Wednesday, 13 June 2007 (http://www.parliament.tas.gov.au/HansardHouse/isysquery/1df7cd32-1dd8-47c2-843e-78e5ea89366c/1/doc/).

Gunns' consideration of the correspondence which the RPDC was involved in being drafted for me to send and she undertook to follow the matters up with Gunns. Ms Hornsey advises me that she took those matters up with Gunns, that is, the need for the additional information being highly likely to be sought by the RPDC on 8 March, which is the same day that my letter dated 7 March was received.

The letter of 7 March 2007 to which Hon Paul Lennon referred in the above extract of Hansard is reproduced at Appendix 9 to this Interim Report. Following the events of 25-27 February 2007, the letter was drafted by Ms Hornsey in consultation with Mr Cooper and signed and sent by Premier Lennon on 7 March 2007. The obvious intent of this letter was to keep Gunns Ltd engaged in the RPDC process. The Committee notes however, that the letter is clearly from the Government and, although officers of the RPDC made comment on its content during the drafting process, the interests of the Government at that time were not identical to those of the RPDC. This Committee sees nothing untoward in the conduct of Ms Hornsey with regard to this letter. Her efforts in discharging the instructions of her Minister at this point in time were entirely appropriate to her role. Just as it was entirely appropriate for the Government to represent its interests in this matter, it was equally appropriate for the RPDC to seek to advance its own interests separately as an independent agency with its own charter.

On Friday, 9 March 2007, Hon Christopher Wright QC telephoned Mr Cooper at home advising that he required Mr Cooper to sign a draft letter to Gunns Ltd outlining that company's; "*non-compliance to timelines and deficiencies in the information they had provided to the Assessment Panel*." (Cooper, Statutory Declaration 2008, 6). Mr Cooper's evidence is that he was recuperating at home from a back injury at the time, and was not able to sign the letter on that day.

Mr Cooper's in-person testimony before the Committee at a public hearing was that (Cooper, Transcript of Evidence 2008, 7):

... I also received a phone call at about the same time, within an hour or so from Ms Hornsey, who apparently was aware that this letter or a letter of that type was on its way to Gunns. I don't know how she became aware that this letter or a letter of that type was on its way to Gunns. I don't know how she became aware that the letter was going to be sent but she told me not to send the letter, or asked me not to send the letter.

CHAIR *– What was your reaction to that request?*

Mr COOPER *– Well, I could see no harm in waiting at that stage. She told me in the course of that conversation that if that letter was received by Gunns it would tip them over the edge so, as it happened, the letter wasn't sent. That was on Friday 9 March, I was back at work on Monday 12 March and then Gunns withdrew on Wednesday 14 March.*

On the question of how Ms Hornsey knew that Mr Cooper had just been asked to send the letter to Gunns Ltd - within an hour or so of Mr Cooper turning his mind to it - while he was at home on sick-leave, this Committee refers to the following exchange between the Chair and Ms Hornsey during her in-person examination by the Committee (Hornsey 2008, 7):

CHAIR *- How was it that you were in possession of the knowledge that Mr Cooper was about to send such a letter?*

Ms HORNSEY *- I can only assume he told me.*

Mr Cooper's sworn evidence was that he believed; "*that holding off on sending the letter allowed Gunns to withdraw from the process without the deficiencies being highlighted.*" (Cooper, Statutory Declaration 2008, 6). Nevertheless, it was ultimately his decision, as head of an independent quasi-judicial statutory authority, to delay sending the letter outlining Gunns Ltd's; "*critical non-compliance*" with the RPDC Pulp Mill Assessment process. While sending the letter notifying critical non-compliance on Friday, 9 March 2007 would have been inconvenient for the Government, following so soon after the Premier's letter of Wednesday, 7 March 2007, it was entirely a matter internal to the RPDC. It was only Mr Cooper who was in a position to fully understand

all of the circumstances weighing on the decision to send, or not to send that letter on that day. This Committee has not been able to ascertain what role, if any, the unsent letter played in Gunns Ltd's decision five days later to withdraw from the RPDC process.

This Committee was interested to note that Ms Hornsey should have had such immediate information regarding Mr Wright's intention to have the letter sent to Gunns Ltd. This point was raised with Mr Cooper in his public hearing before the Committee (Cooper, Transcript of Evidence 2008, 8):

> ***CHAIR*** *– Did it concern you that Ms Hornsey should be phoning you about that letter some hours later when you had only received it that day?*
>
> ***Mr COOPER*** *– At the time, no. Now there could be any number of ways that she was aware of it. I do not know and would not like to speculate. Again, I do not see any impropriety with any of that. The commission is not ASIO. The commission operates as an independent statutory body but it necessarily operates in a public sense and there is no secret about what it does or how it conducts itself. All of its records are public. Everything that is written is written, or at least should be written, with a view to the fact that one day they will be in the public domain, or may be. I do not see any problem with any of that. That is certainly the culture that I operate in.*

The question of Ms Hornsey's intimate knowledge of the internal administrative affairs of an independent agency, reporting to the Department of Justice was also raised by this Committee with the then responsible Minister, former Attorney-General Mr Steven Kons MP at his public hearing. (Kons, Transcript of Evidence 2008, 23):

> ***CHAIR*** *- But it was your department - the RPDC - which, in an independent way quite rightly, was going to send out the letter to Gunns advising them that their submission was critically non-compliant. Did you –*
>
> ***Mr KONS*** *- I had no knowledge of that letter going out.*
>
> ***CHAIR*** *- No; it didn't go.*

Mr KONS *- Well, whether it did or didn't I wouldn't have expected them to say to me that they're going to be sending out a letter to someone.*

CHAIR *- No, but were you concerned that supposedly somewhere from within your department, Ms Hornsey became aware that the letter was in existence? Surely, it would have been a confidential-type process. Arm's length?*

Mr KONS *- Yes. I don't know where she found out that from. I certainly was not aware there was a letter being prepared to be sent.*

CHAIR *- Were you concerned that Ms Hornsey found out that a letter was to go out?*

Mr KONS *- I was concerned. As I said, I stayed away simply because of the fact that an independent process is an independent process and a minister does not get involved in it. I didn't get involved with Julian Green, as I said, when he was running the process. All I wanted to know was, 'Can you give me some brief idea of what issues are confronting you?' For example, one that he gave me was getting approvals from local government for things that had to be done in the public good that took six months. That sort of stuff - process.*

CHAIR *- Let us focus on this issue. Linda Hornsey phones Simon Cooper to intervene in an independent process, which he is about to embark upon. He is operating in your department. Did you express your dismay at Linda Hornsey's intervention to anybody?*

Mr KONS *- Well I was surprised that something like that would have happened.*

CHAIR *- You were surprised. Did you express that surprise and dismay to anybody?*

Mr KONS *- No.*

CHAIR *- You just kept it to yourself?*

Mr KONS *- Yes.*

Ms Hornsey explained the need for her personal intervention in the Pulp Mill Assessment process, and the authority under which it was effected in the following extract of her testimony before this Committee (Hornsey 2008, 7):

> ***CHAIR*** *- Had you been delegated by anybody in government to have significant carriage of that matter, so that you could feel confident that you were communicating the wishes of the Government to Mr Cooper and therefore appropriately handling the Gunns issue at that stage?*
>
> ***Ms HORNSEY*** *- Mr Chairman, I did have carriage of the matter in Premier and Cabinet because it was a matter of significant interest to the Premier. As I said earlier, he had a view that a pulp mill was an appropriate development for the State, for the economy and for the timber industry.*
>
> ***CHAIR*** *- Had the Premier delegated to you that level of authority or was it just a matter of administrative course that you had that authority?*
>
> ***Ms HORNSEY*** *- I certainly had the Premier's imprimatur to be the person responsible in his department and I made day-to-day administrative decisions.*

In addition to the Premier's; "*imprimatur*", the question arises as to whether or not Ms Hornsey made the telephone call to Mr Cooper on the instructions of the Premier, or otherwise with the Premier's knowledge. Mr Lennon's own comments in the House of Assembly indicate that he was in close communication with Ms Hornsey between Wednesday, 7 March and Friday, 9 March 2007. In the event that this was not the case, the question arises as to if and, if so, precisely when Ms Hornsey informed Premier Lennon of the Friday, 9 March 2007 telephone call, to seek ratification for her actions. On this point Ms Hornsey provided the following sworn testimony to the Committee (Hornsey 2008, 4):

> ***Mr MARTIN*** *- Obviously the Premier would have been aware of your making that phone call?*

Ms HORNSEY *- He may not at the time but I believe I would have discussed it with him subsequently.*

Mr MARTIN *- On the same day?*

Ms HORNSEY *- I cannot be that specific.*

Mr MARTIN *- Obviously you would have had a close working relationship with the Premier and, knowing his passion for the project, it would be hard to imagine you would not have mentioned it to him on the same day.*

Ms HORNSEY *- Certainly his view was that it was important to the economy of the State. I may not have had the opportunity to speak to the Premier immediately.*

Mr MARTIN *- Would you ever go more than 24 hours without speaking to the Premier?*

Ms HORNSEY *- On occasions, yes.*

Mr MARTIN *- It is a matter that Paul was most passionate about, and I think all of us know that it was his baby. Surely you would have told him about that within a very short period of time?*

Ms HORNSEY *- I accept that you have made a reasonable assumption but I cannot swear that I did.*

Mr MARTIN *- Would you have waited a month?*

Ms HORNSEY *- No.*

Mr MARTIN *- You would not have waited a week, would you?*

Ms HORNSEY *- No.*

***Mr MARTIN** - So it would be fair to assume that sometime before 16 March the Premier would have known about the RPDC draft letter to Gunns, that you had stopped that from being sent?*

***Ms HORNSEY** - It is a fair assumption, that is true.*

In further evidence before this Committee, Ms Hornsey allowed for the fact that she may have informed Premier Lennon as early as Friday 9 March 2007 of her discussions with Mr Cooper relating to the "critical non-compliance" letter. The clear inference that can be drawn from Ms Hornsey's sworn testimony to this Committee is that then Premier Lennon had no immediate knowledge of Ms Hornsey's telephone call to Mr Cooper prior to it taking place. However, Ms Hornsey has testified that former Premier Lennon would have been told of the telephone call by Ms Hornsey either immediately following the call or by Thursday, 16 March 2007 at the latest. This is at variance with what then Premier Lennon stated to the Legislative Council Estimates Committee A on Tuesday, 19 June 2007. The Hansard record of proceedings for that hearing records the following exchange:[15]

***Mr MARTIN** - Your department had asked for the non-compliance letter not to be sent and then they drafted a letter on your behalf which you signed –*

***Mr LENNON** - But I was not aware of that –*

***Mr MARTIN** - that did not mention the non-compliance.*

***Mr LENNON** - Terry, I was not aware of that. I was in New Zealand at the time.*

***Mr MARTIN** - Was the acting Premier aware?*

***Mr LENNON** - He would not have been aware of that.*

***Mr MARTIN** - What date did you become aware?*

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15 See: http://www.parliament.tas.gov.au/HansardCouncil/isysquery/f3375c53-27c1-49b9-bb3c-0bdbb5ed25cb/1/doc/cestatues1.pdf at p 22.

Mr LENNON *- I did not become aware until Simon Cooper wrote me the letter.*

Mr MARTIN *- So that is on 23 March?*

Mr LENNON *- When he wrote me the letter, yes.*

Committee Comment

The fact that the Secretary for the Department of Premier and Cabinet was free, perhaps even expected, to intermeddle in such a manner with the internal departmental minutiae of a Minister to whom she was not accountable, raises significant questions about Ministerial responsibility and accountability to the Parliament within the framework of Tasmania's democratic institutions. The Committee questions whether such actions can, or indeed ought to, be sanctioned by reference to the legislative framework surrounding projects of state significance. The involvement of the Secretary for the Department of Premier and Cabinet in such a matter also raises serious questions about the extent to which the *State Service Act 2000* is understood and applied at the highest levels of Government.

The implication from Ms Hornsey's testimony is that the "*imprimatur*" of the Premier given to her for management of the day-to-day decisions of Government with respect to the Pulp Mill Assessment Process was sufficient for her to be given unlimited freedom, to involve herself in the operations of potentially any and all related Departments. Such an implication should be of significant concern to the Parliament and the broader community. Not only does this undermine the ability of Ministers of the Crown to oversee the operations of Departments within their sworn commissions, it undermines the ability of the Parliament to hold Ministers accountable before the people of Tasmania.

It is arguable whether the Premier himself could, without damaging the fabric of responsible democratic government, interfere directly in the operational decision-making of another Minister's Department, let alone such processes of an autonomous, quasi-judicial government authority. The Committee is of the view that this issue warrants an independent, whole of government review of current Ministerial and Departmental lines of authority including, but not limited to, the ambiguities created by the projects of state significance legislative framework.

The testimony of Ms Hornsey relating to her role in delaying Mr Cooper's sending the letter of Friday, 23 March 2007, also suggests that former Premier Hon Paul Lennon may have mislead Legislative Council Estimates Committee A in evidence taken by that Committee on Tuesday, 19 June 2007 in relation to his knowledge of the matter, or alternatively, suffered a significant lapse of memory. The Committee notes that, Hansard records Hon Paul Lennon as having made the following remarks in the House of Assembly on Wednesday, 13 June 2007 at 6.07pm

> *On 2 March, Linda Hornsey asked Mr Cooper to check with Mr Wright a letter that she was drafting on my behalf to send to Gunns. This was the letter which has been made public, which was dated 7 March and signed by myself when I came back from a private trip to New Zealand. It was at that time that she became aware that there was correspondence being drafted within the RPDC*

These inconsistencies were put to Mr Lennon as a matter of fairness. Mr Lennon's response was that in his view the inconsistencies did not constitute a matter of any significance. Mr Lennon indicated that his evidence to Estimates Committee A was the truth as he understood it on the day.

Mr Cooper's sworn statement taken into evidence by this Committee, continues the chronology of events on Monday, 12 March 2007 as follows (Cooper, Statutory Declaration 2008, 7):

... I received a phone call from the Premier. He told me Gunns would be pulling out on 14 March 2007. In technical terms Gunns could not withdraw from the assessment process, they were in fact simply saying they no longer were going to build the pulp mill. He expressed concerns they may consider taking legal action against the state for the delays in the assessment process. I re-assured the Premier that I believed this was unlikely. I was of the view they would have no basis for it and I believe the suggestion was all part of the pressure Gunns was placing on the process to achieve their own ends.

This Committee notes that, according to the Hansard record of proceedings for the House of Assembly, former Premier Hon Paul Lennon is recorded, on Thursday, 15 March 2007 at 10.01am, as having said:[16]

At 1.15 p.m. yesterday, I received a phone call from the Gunns' executive chairman Mr John Gay informing me of the board's decision. This was followed at 1.30 p.m. by formal written notification from Gunns of their decision ...

The Hansard record of proceedings also indicates that Premier Lennon repeated the above assertion to the Legislative Council Estimates Committee A on Tuesday, 19 June 2007:[17]

***Mr LENNON** - I was made aware of the decision by the proponent to withdraw from the process shortly after 1 o'clock on 14 March.*

In testimony before this Committee at a public hearing, former Premier Hon Paul Lennon provided the following sworn evidence relevant to Mr Cooper's testimony (Lennon, Transcript of Evidence 2008, 20):

***CHAIR** - Do you not recall a telephone call which you placed to Simon Cooper on 12 March, two days prior, to advise him that* [Gunns] *were withdrawing from the process?*

***Mr LENNON** - No, I do not recall that at all.*

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16 See: http://www.parliament.tas.gov.au/HansardHouse/isysquery/ce9f3885-3d61-4ecc-8ccd-368082eb1413/1/doc/h15march1.pdf at p 1.

17 See: http://www.parliament.tas.gov.au/HansardCouncil/isysquery/49428bf0-9173-450a-aa9a-56c1512cd3c0/1/doc/cestatues1.pdf at p 26.

CHAIR *- Would it be possible that telephone records might reveal that on 12 March a telephone call was made by you to Simon Cooper?*

Mr LENNON *- I may have talked to him on 12 March but I definitely would not have talked to him about them withdrawing. I might have talked to him about my concern that they appeared close to withdrawing, but I was trying to keep them in the process. How could I tell him that they had withdrawn when they hadn't? ...*

The inconsistency between Mr Cooper's testimony, based on his extensive contemporaneous notes, and the Hansard record of Mr Lennon's assertion before the Legislative Council's Estimates Committee A was raised with Mr Cooper *in-camera* by this Committee (Cooper, Transcript of Evidence 2008, 29):

CHAIR *– You would then be aware, from the public disclosure of all these dates, that the Premier contends that he first knew of Gunns withdrawing from the process was 14 March.*

Mr COOPER *– That is not true.*

CHAIR *– Two days after he made the telephone call to you to tell you.*

Mr COOPER *– That is not true. He telephoned me on Monday 12 March and my note says, '*Gunns to pull the pin this Wednesday*' and in the statement that you have in front of you I have rendered it into English.*

CHAIR *– You became aware of the inconsistency, I presume, the fact that the Premier had in the public domain indicated in Parliament that the first he knew was on the 14th. He was questioned in the Estimates committee of the Legislative Council, particularly by Mr Martin -.*

Mr COOPER *– Yes.*

CHAIR *– When you became aware of that inconsistency what was your reaction?*

Mr COOPER – *Well, I had already been to see the DPP because I was pretty concerned about what was going on in a general sense. I had been to see Tim Ellis, an old friend; I did not go and see him in any official capacity but I rang him and went down and saw him on the 14th, as it happens. I was concerned generally about what was going on and I think by then there must have been something that had been said by the Premier that triggered that. I cannot remember what it was but there was some inconsistency that was attributed to him either in Parliament or outside Parliament. I do not remember what it was, but in relation to the content of the discussion between Chris Wright, Mr Lennon, Ms Hornsey and myself, the sense of unease that I had had about all of this crystallised and I went and saw Tim. I rang Tim, '*Can I come and see you?*', and told him what I was concerned about in a general sense and sought his advice as somebody whom obviously I respect greatly and whose judgment and legal acumen I respect greatly. I had these various concerns in relation to this whole process that I just thought was disgraceful. I went and spoke to Tim about it and he advised me that I was under no obligation to go into bat, as it were, go out in public and correct any, what I considered to be, misrepresentation or misstatement of what had occurred but plainly - and I suppose he did not need to tell me this - were I asked in a situation like this then I would have an obligation to tell the truth. It was a reassurance and I just felt that I needed to put a mark down that I was troubled about this and that I had gone and sought advice or counsel at about the highest level you could go. Beyond Tim there was only at that stage Bill Bale. I was not going to see Bill Bale, or a judge, and obviously it would have been wrong to seek to involve a judge. Obviously there was a retired judge involved in all this, Chris Wright, and we had very similar views about, I suppose, the probity of what was going on and the appropriateness. That is the best way of putting it.*

An extract of sworn testimony from Ms Linda Hornsey's public hearing may support Mr Cooper's assertion about being told on Monday, 12 March 2007 by then Premier Lennon of Gunns Ltd's intention to withdraw from the RPDC's Pulp Mill Assessment process. The following passage suggests that the Government was, in fact, given significant forewarning of the impending withdrawal (Hornsey 2008, 6):

***Mr MARTIN** - And in the preparation of the brief that went to Cabinet and PLP on that day?* [For a replacement assessment process]

***Ms HORNSEY -** Yes.*

***Mr MARTIN** - You were involved in that?*

***Ms HORNSEY -** Yes.*

***Mr MARTIN** - When was that prepared? Was that prepared on the day?*

***Ms HORNSEY -** It was –*

***Mr MARTIN** - I think Gunns notified the media at around 1 o'clock on that day.*

***Ms HORNSEY -** There was a very lengthy and detailed process between when we found out that Gunns were withdrawing and when the matter went to Cabinet. It involved a number of very senior public servants. We worked over maybe one or two weekends looking at what options might be available.*

***Mr MARTIN** - When did you become aware that Gunns were going to pull out of the process?*

***Ms HORNSEY -** The day they did.*

This Committee is particularly drawn to the intimation by Ms Hornsey, underlined in the extract above, that:

> *There was a very lengthy and detailed process between when we found out that Gunns were withdrawing and when the matter went to Cabinet. It involved a number of very senior public servants. We worked over maybe one or two weekends looking at what options might be available.*

The testimony of Mr Cooper, read in conjunction with that of Ms Hornsey suggests that former Premier Lennon may have had some form of advance

warning of Gunns Ltd's impending withdrawal from the RPDC Pulp Mill Assessment process. This assertion is refuted by Mr Lennon. In addition, the Committee notes that the sheer magnitude and potential significance of the proposed Pulp Mill at a State level suggests that both Gunns Ltd and the Lennon Government would have been unlikely to make rash or uncalculated decisions about its future.

The Committee notes that as far back as late January, Mr Gay and the Board of Gunns Ltd were losing confidence that the RPDC Pulp Mill assessment process would deliver them with an acceptable outcome. Presumably, these views within Gunns Ltd played at least some role in the high-level meeting in the Premier's Office on the evening of 25 February 2007. By Mr Gay's own testimony, the Board of Gunns Ltd was considering all of its options with respect to the Pulp Mill from January 2007. The Committee further notes that Board papers authorising the pre-prepared ASX Media Release of Wednesday, 14 March 2007 would have been prepared and circulated to members prior to the Board meeting on that day.

Ms Hornsey, was quite clear about the details of the preparations that were being made within the Department of Premier and Cabinet prior to Wednesday, 14 March 2007 and the formal withdrawal of Gunns Ltd from the RPDC Pulp Mill assessment process. Her testimony did not confirm that these preparations were taking place as a result of actual knowledge as opposed to a growing belief that such an outcome was inevitable. However, it is clear from Ms Hornsey's testimony that, at the very least, Gunns Ltd's official announcement did not come as a complete surprise, and the Government had a workable response ready to run with when such an announcement was made.

For his part, Hon Paul Lennon has asserted on two occasions before this Committee that he had no advance knowledge of the intention of Gunns Ltd to withdraw from the RPDC process on Wednesday, 14 March 2007. The resources available to this Committee, and the terms of its Order of Reference

do not enable it to pursue these inconsistencies beyond what has been disclosed in this Interim Report.

Mr Cooper's sworn testimony is that on Wednesday, 14 March 2007 he received a fax from Gunns Ltd advising that they were withdrawing from the Pulp Mill Assessment Process. This decision by the board of Gunns Ltd was notified to the Australian Stock Exchange (**ASX**) on the same day. A copy of the ASX notice is reproduced at Appendix 10 to this Report. The Committee notes Gunns Ltd's requirement to disclose this matter to the ASX, due to the continuous disclosure requirements of the ASX's "*Listing Rules*" at Rule 3.1,[18] and Chapter 6CA s 674 of the *Corporations Act 2001* (Cth).[19] Mr Cooper's testimony regarding this matter raises questions as to whether or not Gunns Ltd adequately complied with its listing and statutory obligations.

While the Committee makes no judgement whatsoever regarding Gunns Ltd's conduct in this regard, the Committee does make the following recommendation:

RECOMMENDATION 3.

The Committee **recommends** the Australian Securities and Investments Commission should be provided with all evidence gathered by the Committee relevant to Gunns Ltd's Wednesday, 14 March 2007 "*ASX and Media Release*", announcing its withdrawal from the Pulp Mill Assessment Process.

On Tuesday, 20 March 2007, Hon Christopher Wright QC made certain public statements concerning his experience as Chair of the RPDC's Pulp Mill Assessment Committee. These statements were widely reported at the time. A representative sample of relevant newspaper articles is reproduced at

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18 "*Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information*." (See: http://www.asx.com.au/ListingRules/chapters/Chapter03.pdf. Accessed 20/11/08)

19 Contravention of this section of the *Corporations Act 2001* (Cth) carries civil (s 1317E) and criminal sanctions (s 1311).

Appendix 12 to this Report. Mr Cooper's sworn evidence, based on extensive contemporaneous notes, was that on the same day Ms Linda Hornsey telephoned him and informed him of Mr Wright's statements to the press. Mr Cooper stated that (Cooper, Statutory Declaration 2008, 9):

> *She wanted me to contradict the media release made by Chris WRIGHT. His release related to our meeting with the Premier. Chris Wright had felt he had been lent on by the Premier to speed up the assessment process. I told her I tended to agree with Chris WRIGHT and I would not make any media release to the contrary without me first reviewing my notes of the meeting. ... I told Linda HORNSEY that I would not put my credibility up against Chris WRIGHT's. ...* [I] *returned to my office and checked my notes of the meeting. Whilst I was at my office I received a further telephone call from Linda HORNSEY. She told me a media release was no longer necessary as "*the heat*" has now gone out of it.*

In sworn testimony before this Committee, Ms Hornsey made the following response to Mr Cooper's assertions above (Hornsey 2008, 5):

> ***Mr MARTIN** - In the same month, the next couple of weeks, Christopher Wright issued a media statement on the occasion of his resignation as Chair of the Gunns Pulp Mill Assessment Committee. Do you remember ringing Mr Simon Cooper to request that he issue a media statement contradicting Mr Wright's statement?*
>
> ***Ms HORNSEY** - I did not do that.*

There is clearly an inconsistency in the evidence of Mr Cooper and Ms Hornsey on this matter. When this Committee raised the question of this inconsistency with Ms Hornsey, she did not dispute that she may have called Mr Cooper on 20 March 2007 but had no independent recollection of the content of the telephone call.

On Friday, 23 March 2007, Mr Cooper wrote a letter to Premier Lennon, regarding the circumstances surrounding Gunns Ltd's withdrawal from the RPDC Pulp Mill Assessment process. This letter included, by way of an attachment, a copy of the letter that would have been sent to him by Mr

Cooper on Friday, 9 March 2007, but for the intervention of Ms Hornsey (Cooper, Statutory Declaration 2008, 21). The apparent consequences of this letter having been sent to the Premier were described by Mr Cooper in his sworn evidence as follows (Cooper, Statutory Declaration 2008, 10):

> *I received a reply, dated 13 April 2007 from the Premier's office. The letter had no significant content apart from it acknowledged receipt of my letter. ... In the period after writing the letter it was quite apparent that the Premier's office was displeased with my (and the RPDC) stance over the pulp mill assessment process. This was apparent through lack of inclusion and general contact from that office.*

On Thursday, 29 March 2007 Mr Nick McKim MP lodged a Freedom of Information (FOI) application with the RPDC for all 2007 communications between the RPDC and the Government relating to the Gunns Pulp Mill. An identical FOI application was lodged by Mr McKim with the Department of Premier and Cabinet. A copy of the relevant RPDC and Department of Premier and Cabinet files was obtained by this Committee in response to a summons for documents.

Mr McKim's RPDC application was successful in the first instance. The entire application process was conducted by the Office Manager in the RPDC. The application to the Department of Premier and Cabinet however, was initially refused by the relevant Departmental officer, and consequent upon Mr McKim's appeal against that decision, the original decision was upheld in a letter signed by Ms Linda Hornsey. Mr McKim's entitlement to these documents was substantially supported by the Ombudsman following a subsequent investigation by that Officer.

April 2007

On Monday, 16 April 2007, Ms Lisa Hutton, Secretary for the Department of Justice, wrote to then Attorney-General Mr Steven Kons MP, advising that Magistrate Roger Willee had tendered his resignation, effective Monday, 2 July 2007. Ms Hutton recommended a process of appointment for Mr Willee's replacement under which the Department should call for expressions of

interest, after which Ms Hutton and the Chief Magistrate would draft a short-list for the Attorney-General's consideration. Attorney-General Kons approved this advice from Ms Hutton on Tuesday, 24 April 2007 (Hutton, Statutory Declaration 2 2008, 12). Ms Hutton's advice did not include any reference to the Departmental appointment policy document, developed in 2002 by Hon Dr Peter Patmore.

May 2007

In a sworn statement made out by Ms Lisa Hutton and taken into evidence by this Committee, Ms Hutton testified that, on instructions from Attorney-General Kons, expressions of interest were called for on Wednesday, 2 May 2007, from suitably qualified persons, for the vacant Magistrate's position caused by the impending retirement of Hobart Magistrate Roger Willee. The subsequent selection process, up-to-and-including the recommendation to Cabinet was properly a matter for the Department of Justice and the Attorney-General (Hutton, Statutory Declaration 1 2008, 1).

About this time Mr Cooper stated that he approached Attorney-General Kons and inquired if the prospect of creating two senior vacancies in planning bodies would, in any way, retard his expression of interest for the vacant Magistracy. In sworn evidence, Mr Cooper indicated Mr Kons' response to Mr Cooper's inquiry was as follows (Cooper, Statutory Declaration 2008, 11):

> *He advised me that if I was interested in the job I should submit an expression of interest and he would consider every applicant on their merits. He indicated that leaving two positions vacant at RMPAT and the RPDC would not influence his decision.*

Mr Kons provided some corroboration of Mr Cooper's comments in a separate sworn statement taken into evidence by this Committee as follows (Kons, Statutory Declaration 2008, 2):

> *Although Mr COOPER was occupying a key position within Justice, I did not believe that he should be deterred from applying for the position of Magistrate. However, my personal view was that he should not be nominated because of the perception that would be created by appointing a person who*

> *was personally associated with the then Premier, Paul LENNON. I was mindful of the fact that he had previously been appointed to a public position of Chairperson of the RMPAT and that another public appointment of this type would not have been viewed favourably. I recall his appointment to RMPAT attracted some criticism in Parliament. Furthermore, I did not believe that he was the best applicant for the position as he had not been a practicing lawyer in Tasmania for the past five years.*

> ***Committee Comment***
>
> This Committee notes the difficulties that arise in attempting to discern the relevant facts on the basis of Mr Kons' conflicting accounts of events. In the same sworn statement in which Mr Kons made the observation that (Kons, Statutory Declaration 2008, 2); *"my personal view was that [Mr Cooper] should not be nominated [as a Magistrate]"*, Mr Kons stated (Kons, Statutory Declaration 2008, 4); *"I do not dispute the suggestion that I may have told Mr COOPER I intended to appoint him as a Magistrate during a phone conversation with him whilst he was at White Beach."* However, such conflicting statements of intention do not rule out the possibility that Mr Cooper was told by Mr Kons that his application for the vacant position of Magistrate would be considered on its merits.

In evidence before this Committee at a public hearing, Mr Kons repeated some of the assertions contained within his prior sworn statement (Kons, Transcript of Evidence 2008, 2):

> *Although I had no reservations about his ability to be a magistrate I had concerns that if he should be nominated there would be a perception that he had been personally associated with the former Premier, having represented him as his lawyer. His appointment to RMPAT was criticised by the Opposition even though he was doing a sterling job there.*

This Committee notes Mr Kons' concern about the; "*perception*" that might have been created, both in the public domain, and within Parliament, if Mr Cooper had been appointed as a Magistrate. The Committee appreciates that such concerns may exercise a Minister's mind. However, the Committee was

not prepared for the revelation that the same considerations were also at the forefront of the mind of the then de facto Head of the State Service, the Secretary for the Department of Premier and Cabinet, Ms Linda Hornsey.

In sworn testimony given by Ms Linda Hornsey before this Committee the following exchange took place (Hornsey 2008, 9):

> ***Mr MARTIN*** *- What was the reason for your decision to ask* [Attorney-General Kons] *not to proceed with the Cooper appointment?*
>
> ***Ms HORNSEY*** *- Two reasons: it would have been politically controversial.*
>
> ***Mr MARTIN*** *- Because?*
>
> ***Ms HORNSEY*** *- Because there had been past criticism of Mr Cooper's appointment because of connections to the Premier, which in fact were unfair given that he is a highly competent, professional individual. Nonetheless there was public criticism. I held the view that it was the wrong time to appoint him, given that past controversy. The second reason was the important nature of the two positions he was actually undertaking in government planning work at the time.*

Committee Comment

This Committee notes that Ms Hornsey's comments above should, perhaps be read in conjunction with the following extract from Mr Cooper's sworn statement in which he refers in the following terms to a conversation with Ms Hornsey in mid-August (Cooper, Statutory Declaration 2008, 17):

> *During the conversation she said words similar to; "*Well you can have the next one *(magistrates appointment)". I said; "*You cannot promise me that, it's not yours to give*". I told her the candidates may be completely different and it was not a promise that she could make or keep. She said words similar; "*No, no you can have the next one*".*

If accurate, Mr Cooper's account of this exchange, based on extensive contemporaneous notes, puts a particular complexion on Ms Hornsey's

sworn testimony before this Committee. In that context, Ms Hornsey stated that; "*I held the view that it was the wrong time to appoint him, given that past controversy*". The totality of this evidence is somewhat enigmatic. If Mr Cooper was truly considered a; *"politically controversial"* appointment as a Magistrate, as a matter of common-sense, the question of timing would appear to be irrelevant. The suggestion, therefore, that Mr Cooper could; *"have the next"* appointment as a Magistrate undermines the credibility of Ms Hornsey's claim that her last minute intervention in Mr Cooper's nomination was because he would have been a, *"politically controversial"* appointment.

On the question of Mr Cooper's dual involvements in the planning area, this Committee notes that these were properly matters for the relevant Minister, then Attorney-General Kons, and his departmental Secretary, Ms Hutton to consider. Given that Mr Kons was prepared to make the necessary accommodations, and that Ms Hutton had gone so far as to arrange for Mr Willee to postpone his retirement in order to facilitate Mr Cooper's appointment, this concern appears to be baseless. That leaves Ms Hornsey's express concern that Mr Cooper's appointment would have been "*politically controversial*".

Ms Hornsey testified before this Committee that she was aware of the process whereby a short-list of three candidates was produced for the vacant Magistrate position (Hornsey 2008, 10):

> ***Ms HORNSEY*** *- Mr Chairman, there was a process to appoint a magistrate. My memory was that there was an expression of interest process and that there may have been 20 applicants. A merit selection was made, I believe, at the time with the involvement of the Chief Magistrate. There were three candidates who were assessed to be suitable for appointment. I was aware of who those three were.*

This Committee further notes that Ms Hornsey, as the *de facto* Head of the State Service at the relevant time, was charged with the maintenance of the

State Service Principles as enunciated by s 7 of the *State Service Act 2000*. The Committee notes that the opening provisions of that section are:

1. *The State Service Principles are as follows:*
   a. *the State Service is apolitical, performing its functions in an impartial, ethical and professional manner;*
   b. *the State Service is a public service in which employment decisions are based on merit;*

   ...

This Committee draws the attention of the Legislative Council to the fact that section 8 of the *State Service Act 2000* places the following obligations on Heads of Agencies:

> *A Head of Agency must uphold, promote and comply with the State Service Principles.*

This Committee notes that the only indication in the Hansard record of proceedings of any; *"criticism"* in Parliament regarding Mr Cooper's appointment to RMPAT relates to the record from the House of Assembly Estimates Committee A hearing on Friday, 30 June 2006. That record reveals that there was a question about the selection process used in appointing Mr Cooper to RMPAT. The entire Hansard record relating to this question is as follows:[20]

> ***Mr MICHAEL HODGMAN*** *- I only have one question. I know that Mr Simon Cooper was appointed by your predecessor, Judy Jackson, and I have no problem at all with his ability to do the job as chairman of RMPAT, but can you tell the committee whether his position was advertised in the normal manner by your predecessor?*
>
> ***Mr KONS*** *- The advice I have received is that the department was not involved in the process. Back then it was run by the previous minister. I have to say, as far Mr Cooper is concerned, I requested some initial thoughts about where he wants to take the body. I was most impressed that within a week we had some suggestions.*

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[20] See http://www.parliament.tas.gov.au/HansardHouse/isysquery/8b851d8e-83c9-42ec-86df-3fc2308c552b/2/doc/hestafri2.pdf at p 112.

Mr MICHAEL HODGMAN *- I have no problem with his ability, you did not hear me. I just asked whether you could tell this committee whether the position of chairman of the Resource Management and Appeals Tribunal was advertised.*

Mr KONS *- It was not.*

Mr MICHAEL HODGMAN *- It was not. Surely you can give us an honest answer; it was not advertised.*

Mr KONS *- It was not. I am not too sure what the reason was.*

Mr MICHAEL HODGMAN *- I am not going to the reasons; you are not in the dock on this. I will move on.*

Mr KONS *- I just said it was not advertised and you wanted an opinion for something I do not know about.*

Mr MICHAEL HODGMAN *- No. I just asked you for an honest answer as to whether it was advertised or not.*

Mr KONS *- It was not advertised.*

In addition to the above exchange, this Committee observes that the House of Assembly Notice Paper for Wednesday, 21 June 2006, contained the following Notice of Motion, number 66:

Mr McKIM *to move - That the House:-*

1. *Condemns the State Government for appointing a new Chairman of the Resource Management and Planning Appeals Tribunal without a competitive and transparent process.*
2. *Calls on the Government to avoid the continual perception of cronyism and jobs for Labor mates by ensuring that future appointments to independent authorities are made after an open and transparent competitive process.*

The above Notice of Motion continued to appear on the House of Assembly Notice Paper throughout 2006 and 2007, but was never subsequently moved in that place. There is no record of the question of Mr Cooper's appointment to RMPAT ever being raised in the Legislative Council.

Committee Comment

It is not apparent to this Committee how the assertion made in Mr Kons' sworn statement that the appointment of Mr Cooper as the Chairman of RMPAT; "*attracted some criticism in Parliament*" can be made out. It is clear from the Hansard record that Hon Michael Hodgman QC MP asked Mr Kons if Mr Cooper's position at RMPAT was advertised. Mr Kons eventually answered "*It was not advertised.*" The Hansard record of proceedings reveals that Mr Hodgman did not make any comment whatsoever in response to Mr Kons answer.

The suggestion therefore that a question regarding a matter of pure fact, eliciting a binary response in the affirmative, should constitute "*criticism in Parliament*" is therefore obscure. As far as the Notice of Motion of Mr Nick McKim MP is concerned, it is clear that the Notice of Motion was focussed on the same question as Hon Michael Hodgman QC MP, namely, the appointment *process* used by Government.

The Committee has formed the view that if any criticism could be divined in Mr Hodgman's question, or Mr McKim's Notice of Motion, it was criticism of the processes adopted by Government rather than of the appointee. Finally, given that both Mr Hodgman and Mr McKim identify themselves as "*opposition*" members, criticism of Government from those sources (where such could reasonably be perceived as criticism), would appear to be unremarkable.

This Committee further notes a Media Release, entitled "*New chairman for the Resource Management and Planning Appeal Tribunal*" and issued by Attorney-General Hon Steven Kons MP on Friday, 7 April 2006, in which Mr Cooper's appointment to the Chairmanship of RMPAT was announced. This

Media Release is reproduced at Appendix 11 to this Report. According to that document:

> *Mr Kons said he was pleased to welcome Mr Cooper and his family back to Tasmania after some years in the United Kingdom.*
>
> *"A graduate of the University of Tasmania, Simon Cooper has almost 17 years experience as a legal practitioner in Tasmania and overseas," Mr Kons said.*
>
> *"Most recently, he has been the Deputy Director of the College of Law of England and Wales, with direct responsibility for training almost 10,000 solicitors every year.*
>
> *"He is a former President of the Tasmanian Bar Association, a former Chairman of the Tasmanian Parole Board and acted as the Counsel assisting the Coroner in Tasmania's deaths in custody investigation.*
>
> *"I'm confident Simon's wealth of experience in both civil and criminal law will serve him well in his new role."*

Expressions of interest for the vacant position of Magistrate were set down to close on Friday, 25 May 2007. A sworn statement of Ms Lisa Hutton and taken into evidence by this Committee described the process which then followed (Hutton, Statutory Declaration 1 2008, 2):

> *Once the applications were received, the process of reviewing each applicant to determine their background, experience and suitability for the position commenced. This activity was undertaken by Chief Magistrate Arnold SHOTT and I. This was carried out to provide the Attorney-General with a list of suitable applicants from which he could choose a Magistrate. He was not obliged to follow our recommendation, this was simply to assist him in making a choice. He could also have chosen a person who had not responded to the EOI if he wished. At the time, Mr SHOTT was overseas in Austria and therefore our communication about creating the final list was conducted by phone, facsimile and electronic mail.*

Given that the appointment to the vacant Magistrate's position was advertised, and was also subject to a short-listing process managed by the Secretary for the Department of Justice, Mr Kons' suggestion that an appointment of Mr Cooper would be subject to criticism, referred to above, is difficult to support.

Presumably, given that Mr Kons' prior apprehension of criticism stemmed from perceptions of a failure of proper process, in a situation where an open and arms-length short-listing process was followed (however limited), such criticism would be patently baseless. Criticism in such circumstances would not only be relatively easy to confound, but rightly regarded with some suspicion. The only concession to criticism of this nature might be the fact that the process adopted by Attorney-General Kons did not comply with the process developed by former Attorney-General Hon Dr Peter Patmore. Nevertheless, it is of relevance that this Committee notes the testimony given by Mr Kons himself in which he stated in another context that (Kons, Transcript of Evidence 2008, 28):

> ***Mr KONS*** *- Personally, I think that someone in a very senior position such as that gets paid the big bucks to cope with pressure that may be applied to them and that is why they get paid the big money to make independent decisions and to stand up to people who they think are bullying them.*

Committee Comment

It is understandable that an elected Minister of the Crown should have regard to the political implications of any given Ministerial decision. In this respect, Mr Steven Kons MP's sensitivities as to this matter are, perhaps unremarkable, if misconstrued. However, the forthright way in which the same, essentially political, considerations were used by Ms Hornsey as the major justification for her advice to Mr Kons not to proceed with the appointment of Mr Cooper later in this process, is of some concern to this Committee. As Ms Hornsey's stated in her testimony before this Committee, she formed the view that Mr Cooper's appointment; "*would have been politically controversial*".

It is remarkable to this Committee that the State's most senior public servant should see it as their proper role to colour the advice they give to Ministers based primarily on political considerations. This Committee accepts that a departmental Secretary can uphold, promote and comply with the State Service Principles at s 7 of the *State Service Act 2000*, and at the same time provide advice to ministers based on

political considerations, such as the perception of cronyism. However, it is also possible that in doing so, at some point, a Departmental Secretary may cross the line between informed apolitical advice, and purely partisan sensitivity.

Ms Hornsey stated in her evidence that; "*I believed* [Mr Cooper] *was a meritorious candidate*", and that; "*I think the three candidates* [on the shortlist] *were equally worthy*" (Hornsey 2008, 15). However, such process-oriented considerations did not prevent Ms Hornsey from proffering advice, principally based on admittedly political considerations, to the then Attorney-General, and her own Minister the then Premier, as was revealed in the following extract of testimony (MAGIS):

> ***CHAIR*** *- Had you made the former Premier aware of any of these considerations of yours, or concerns of yours, regarding the appointment of Simon Cooper?*
>
> ***Ms HORNSEY -*** *Yes, I did. When I first learned that Simon Cooper was a candidate at some time after that I raised it confidentially with the Premier.*
>
> ***CHAIR*** *- That was only when you learned he was a candidate?*
>
> ***Ms HORNSEY -*** *Yes.*
>
> ***CHAIR -*** *In what context did you raise that with the Premier?*
>
> ***Ms HORNSEY -*** *In the context of the same argument that I presented to the Attorney and to Lisa - that it would be seen as a highly political appointment. I was aware that Mr Willee wanted to go sooner rather than later and that whoever was appointed had to be available immediately. My view was that Mr Cooper was not available immediately because he was in two very critical positions at that time.*

> This Committee notes that all Ministers are well served by Ministerial office staff, none of whom are bound by the *State Service Act 2000*. This Committee accepts that it is the proper role and function of such staff to provide politically-informed advice to Ministers. However, the suggestion that the then *de facto* Head of the State Service could be given the; "*imprimatur*" of the then Premier to act in an apparently politically partial, and administratively irregular manner is of some concern to this Committee. It suggests that the objects of the *State Service Act 2000* may have been circumvented in a manner that was not envisaged by the Parliament. The Committee is also concerned by the suggestion, implicit in Ms Hornsey's conduct and testimony that the Premier might in some way, have the power to dispense with statutory obligations placed on senior public servants. Such a suggestion is indeed, in the words of one witness before this Committee; *"troubling"* (Cooper, Transcript of Evidence 2008, 22).

Available evidence indicates that, once the final 25 expressions of interest had been received by the Department of Justice, a list of the candidates was produced. It is clear from the relevant files held by the Department of Justice that this bare list was emailed to the Chief Magistrate while he was on leave in Europe. The Chief Magistrate was also provided with the statutory eligibility requirement for appointment as a Magistrate. It is therefore clear to this Committee that both the Chief Magistrate and the Secretary for the Department of Justice were fully seized of the nature of the relevant considerations relating to the short-listing process. It is also clear from the evidence that a small number of telephone calls were made between the Chief Magistrate and the Secretary of the Department of Justice as to certain limited matters of detail on the basis of the list (Hutton, Statutory Declaration 2 2008, 50-65).

Other than this, somewhat perfunctory, reference to available evidence the Chief Magistrate appears to have had little further information, or additional processes to hand, to assist him in selecting his suggested short-lists for appointment to the Magistracy while overseas on leave. Ms Hutton indicated

in two emails to Mr Shott that she had undertaken some functional inquiries relating to a small number of applicants (Hutton, Statutory Declaration 2 2008, 50-54). In sworn evidence at a public hearing of the Committee Ms Hutton made the following comments (Hutton, Transcript of Evidence 2008, 20):

> *Mr Shott at the time was somewhere in southern Germany, I understand. He had copies of the expressions of interest from those candidates that we were giving serious consideration to, which was probably two thirds or so of those who submitted an expression of interest.*

June 2007

On Monday, 4 June 2007, on the basis of the above, somewhat passive assessment, Attorney-General Kons was presented with two short-lists of three candidates. The principal shortlist of three candidates comprised the following names; Mr Simon Cooper, Mr Michael Daly and Mr Glenn Hay (Hutton, Statutory Declaration 1 2008, 2).

The Hansard record of proceedings for the House of Assembly on Wednesday, 6 June 2007 at 10.37am, indicates that Mr Nick McKim MP asked a question of the then Premier, Hon Paul Lennon MP relating to a copy of Mr Cooper's letter to the Premier dated Friday, 23 March 2007. This letter was obtained by Mr McKim pursuant to an application under the *Freedom of Information Act 1991*.

In fact, Mr McKim made two Freedom of Information applications for this document, one to the Department of Premier and Cabinet, and the second to the RPDC. This Committee notes that Mr McKim's application was initially rejected by the Department of Premier and Cabinet and this decision was subsequently upheld on internal review. The Secretary for that Department at this time was Ms Linda Hornsey and she upheld the original decision not to supply Mr McKim with those documents. Although the Department of Premier and Cabinet did not release that document, the RPDC did release the document to Mr McKim.[21]

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[21] Confirmed in a letter to the Committee from Mr Nick McKim, dated 29 January 2009.

The Hansard record of proceedings from the House of Assembly for Wednesday, 6 June 2007 at 10.59 am, records that Mr McKim MP questioned then Premier Hon Paul Lennon MP about certain disclosures in the Friday, 23 March 2007 letter that he had previously identified during question time. Mr McKim's question was as follows:

> ***Mr McKIM*** *(Question) - Mr Speaker, my question is once again to the Premier. Premier, can you confirm that in the letter to you from the Executive Commissioner of the RPDC that I referred to in my previous question you were further informed that, and I quote:*
>
> > It was the intention of the former Chairman of the Assessment Panel, the Honourable Christopher Wright QC, to send to Gunns Limited a letter detailing deficiencies with Gunns supplementary information provided to the commission on 16 January 2007. A copy of this letter is enclosed for your information. It had been intended to send this letter on 9 March but it was not sent, at the request of the Secretary of the Department of Premier and Cabinet.
>
> *When did the Secretary of your department request that the RPDC not send the letter to Gunns detailing deficiencies in their supplementary information, and what form did that request take? Did you know at the time that the Secretary of your department made that request, and is it appropriate that she did so?*
>
> *Given the fact that clearly the secretary of your department knew that the supplementary information supplied to the RPDC was deficient, is it not a fact that the secretary made the request that the letter not be sent so that Gunns could withdraw from the RPDC process before being officially notified by the RPDC that the supplementary information was deficient? Is it not now clear that Gunns Limited withdrew from the RPDC process because it knew that it had failed to provide adequate information that would enable the RPDC to properly assess the project, and that therefore the project would have either been rejected or further delays would have ensued, being the eleventh such delay directly attributable to Gunns' incompetence? Was not your secretary's unprecedented intervention part of a set-up to ensure that Gunns could get out of the RPDC process with*

clean hands and move into the sham assessment process, cobbled together by your Government in direct consultation with Gunns?

The Hansard record of proceedings for the House of Assembly on the following day, Thursday, 7 June 2007, records that Premier Lennon, at the instance of then Leader of the Greens Ms Peg Putt MP, provided the following answer to Mr McKim's question of the previous day, insofar as it related to Ms Hornsey:

Mr LENNON *- Mr Speaker, I thank the honourable member for her question. It does follow a question that I was asked yesterday by your Deputy Leader, who was asking me yesterday in his status as acting Leader. I did undertake to follow the matter up and I can advise the honourable member who asked the question today that I have had a conversation with the Secretary of the Department of Premier and Cabinet who confirms that a conversation did take place which is referred to in the correspondence sent by the Acting Executive Commissioner of the RPDC, I think dated 23 March but I stand to be corrected on that date, which refers to a draft letter that was proposed to be sent from the panel head looking at the Gunns proposal on 9 March. I think that is the reference in the correspondence. But I think that it is a long bow to draw, to say now that there was some conspiracy being hatched between the Department of Premier and Cabinet Secretary and persons inside the RPDC to somehow or other agree not to send a letter so that Gunns would be able to withdraw from the RPDC process. It is fanciful to suggest that the Secretary of the Department of Premier and Cabinet, in having a conversation with the RPDC, was able to or indeed sought to - because she did not - curtail the activity of Christopher Wright, chair of the assessment panel, in any way, shape or form. The decision not to send the letter was his, of course. He did so, on the advice that I have received, on the request from the RPDC following a conversation that the Secretary of the Department of Premier and Cabinet had. I am advised that she indicated nothing more than that she was prepared to try to assist the RPDC if they wanted her assistance to get further information. That is what I have been advised and that is totally plausible as far as I am concerned.*

Subsequent events from 9 March and shortly thereafter saw a decision by Gunns, and by Gunns alone, to withdraw from the RPDC process. As we have said continually, that was not our preferred course of action. We wanted the proposal to be dealt with through the RPDC. It was a decision of Gunns, and Gunns alone. To suggest that there was some conspiracy being hatched, which you have done through your media statements, the innuendo in your questions and through the reflections on Ms Hornsey that you made yesterday in this House through your acting Leader, is fanciful. To suggest some conspiracy on the part of Ms Hornsey also requires compliance from persons or person inside the RPDC, and it is just ridiculous to suggest that. It is wrong, baseless and false, and I totally reject it. I hold Ms Hornsey in very high regard and I believe the wider Tasmanian community does as well. She has done an outstanding job now over a long period of time as Secretary of the Department of Premier and Cabinet.

This issue also received wide media coverage on Thursday, 7 June 2007. A representative sample of the media coverage is reproduced at Appendix 14 to this Report.

Mr Simon Cooper's sworn statement indicated that, on the morning of Thursday, 7 June 2007 while he was on holiday at his family shack, he was contacted by telephone by Attorney-General Mr Steven Kons MP. Mr Cooper's testimony regarding their subsequent conversation, based on extensive contemporaneous notes, is as follows (Cooper, Statutory Declaration 2008, 11):

> *I had a conversation with Mr KONS and during which he said words similar to;* "I have decided to appoint you as a magistrate*". Mr KONS said words similar to;* "The only people who know is Paul and I.*" I took Paul to be a reference to the Premier; it could have been no one else in the contextual sense.*

Mr Kons made the following concession in a sworn statement and taken into evidence by this Committee, in relation to Mr Cooper's testimony regarding the above telephone call (Kons, Statutory Declaration 2008, 4):

I do not dispute the suggestion that I may have told Mr COOPER I intended to appoint him as Magistrate during a phone conversation with him whilst he was at White Beach.

However, Mr Kons' in-person testimony to this Committee regarding the above telephone call is somewhat at variance from his own previous sworn statement (Kons, Transcript of Evidence 2008, 20):

Mr MARTIN *- Did you not tell Cooper on 7 June that he had the job?*

Mr KONS *- The way I would have told Cooper, and the way I recall it was that I told him he was in with a very good chance, that there was high probability that he would get this job. As I said, on his performance and what I had seen of the work and the way he fronted up to his obligations in RPDC and RMPAT, he was really good, so I was giving him a highly flagged invitation that he may be the next magistrate. I did not want him to go into a job, leave loose ends everywhere by appointing him as a magistrate and then we would have a planning system in disarray because the Chairman was involving himself in too many decisions so the planning system hits a bottleneck.*

Given that Mr Kons' sworn statement outlined the reasons why he believed it was not appropriate to appoint Mr Cooper as a Magistrate, this Committee sought to ascertain the reasons why Mr Cooper subsequently became the preferred candidate up to, and including, the morning of Wednesday, 8 August 2007. In the same sworn statement, Mr Kons made the following observations (Kons, Statutory Declaration 2008, 3):

I do not recall the date, but when it was time to nominate a person to Cabinet for the Magistrate's position, I was getting the clear message from the Premier's Office that Mr COOPER was to be the nominee. This message was communicated to me during the meetings I had with the Premier, Mr LENNON, the Secretary of the Department of Premier and Cabinet (DPAC), Ms Linda HORNSEY. As I held the position of Deputy Premier at the time, I had meetings with them every Monday in the Premier's Office, prior to Cabinet. During the discussions in respect to the Magistrate appointment, I communicated my concerns about Mr COOPER being the nominee, but it was clear to me that Mr COOPER was the preferred candidate. I cannot

provide more specific details of these discussions or the dates and times when they occurred.

Further, Mr Kons repeated the essence of the above passage at the conclusion of his sworn statement in the following words (Cooper, Statutory Declaration 2008, 7):

In conclusion, I would like to say that at no stage was Mr COOPER my preferred nominee for the position of Magistrate. I initially signed the Cabinet Minute to nominate him to Cabinet and this was done because of the messages I received from the Premier's Office. However, when I received the phone call to shred the nomination of Mr COOPER, I was comfortable with that course of action. I was subsequently pleased with the nomination and believed that Mr HAY was a good choice. I believe I was simply doing what the Premier's Office required.

Mr Kons' sworn statement does not concur with the recollection of former Premier Hon Paul Lennon. Mr Lennon's in-person testimony to this Committee was as follows (Lennon, Transcript of Evidence 2008, 11):

CHAIR *- ... You said you took little interest because the Attorney was tasked with that appointment. My question was, did you and Steve Kons specifically discuss Steve's desire, intention, to appoint Simon Cooper, given his satisfaction with his high level of credentials.*

Mr LENNON *- No. He never said to me that he wanted to appoint Simon Cooper. I did not discuss the matter. I do not know how many times I have to say this to you.*

And again in a later response to a similar question (Lennon, Transcript of Evidence 2008, 13):

Mr LENNON *- I do not know what meetings he is referring to. I did not take any active interests* [sic] *in this appointment at all. As I have said repeatedly, had I wanted to take an interest in it, I simply would have done so at a Cabinet meeting.*

This Committee notes that Mr Kons confirmed the content of his sworn statement, during his examination by the Committee with respect to the; "*clear message from the Premier's Office that Mr COOPER was to be the nominee*". The following passage demonstrates this point (Kons, Transcript of Evidence 2008, 42):

CHAIR *- You actually said to the Committee earlier that Mr Lennon never told you to do anything.*

Mr KONS *- No.*

CHAIR *- Nonetheless, he's entitled to give you a clear message however he chooses –*

Mr KONS *– That's right.*

CHAIR *- that it'd be a good appointment to make.*

Mr KONS *- Yes. At no time, everything in my portfolio, what I was doing - can I say that people would say to me that you're not going to do that, but you get it up to the stage where you think you might have to take up the fight.*

CHAIR *- Okay, you've confirmed that you were getting clear messages from the Premier and from Ms Hornsey that Mr Cooper would be a –*

Mr KONS *- Clear messages, but not in spoken word or written word.*

CHAIR *- Not in spoken word?*

Mr KONS *- No.*

CHAIR *- So you read their mind?*

Mr KONS *- Yes. That's like now, I mean, I'm here and I can gauge an expectation of what you want me to say or what you want me to do. I think I've repeated that a number of times. From people's actions, by their*

> *acceptance of what you're telling them, you can presume that the appointment you're going to make is acceptable. If I say I'm going to appoint Cooper and I don't get a response from you, it doesn't mean you're against it. It could mean that you probably accept it.*

On the question of whether the Pulp Mill Assessment process was relevant to the decision to appoint Mr Cooper as a Magistrate, this Committee is in the difficult position of attempting to reconcile Mr Kons' sworn statement of Wednesday, 9 July 2008 with his own in-person testimony before the Committee at a public hearing on Tuesday, 11 November 2008. Mr Steven Kons MP's sworn statement indicates that he was getting; "*the clear message from the Premier's Office*" [ie: the Premier and Ms Linda Hornsey], that Mr Cooper was to be the nominee (Kons, Statutory Declaration 2008, 3):

> *Although I cannot confirm the reason why he was preferred as the nominee, I can only speculate on the matter. My belief is that Mr COOPER made some comments in his capacity as Acting Executive Commissioner of the RPDC that placed the government in a potentially difficult position. For example, I was aware that he sent a letter to the Premier over concerns about the deficiencies in the Gunns Pulp Mill application.*

Mr Kons' sworn statement should be compared with the following passage from the transcript of Mr Kons' in-person testimony (Kons, Transcript of Evidence 2008, 6):

> ***CHAIR*** *- Thank you. There are matters, Steve, in terms of our getting some chronology to the process that the committee has investigated with other witnesses and we will go down a similar path. There are matters related to the pulp mill approval process. You are well aware of some allegations that it was the desire of some to get Mr Cooper out of the RPDC process, therefore the assessment process. It would have been convenient therefore to appoint him a magistrate. The committee certainly does have some questions in that area so that we can satisfy ourselves about what processes might have unfolded for the appointment of a magistrate.*
>
> ***Mr KONS*** *- Well in response to getting Cooper out of the pulp mill process, I have read articles in the newspapers and seen all the media comments. I*

> *scratch my head to try to work out where that presumption can come from because I think it is completely preposterous that something like that can be concocted by people outside that process. ...*
> *To move him on because of the pulp mill is one of those fantasies that has overtaken the State that everything revolves around building a pulp mill. I unfortunately do not think that the centre of the universe is this pulp mill where others believe it is and within parliament our political opponents.*

In addition to his own sworn testimony, Mr Kons' assertion that he was given; "*the clear message from the Premier's Office*" that Mr Cooper was to be the nominee, does not appear to be supported by the sworn testimony of former Premier Hon Paul Lennon before this Committee. In sworn testimony before this Committee Mr Lennon's assertion was; "*He never said to me that he wanted to appoint Simon Cooper. I did not discuss the matter. I do not know how many times I have to say this to you*." Once again the Committee is faced with two differing versions of the same matter by two different witnesses.

Committee Comment

The question of whether Mr Cooper's duties at the RPDC affected how his expression of interest was processed is central to this Committee's Order of Reference. The Committee notes that Mr Steven Kons MP's in-person testimony before the Committee on this matter is directly inconsistent with Mr Kons' own prior sworn statement. Mr Kons, in his Wednesday, 9 July 2008 statement directly linked Mr Cooper's preferred candidacy for appointment as a Magistrate with his duties at the RPDC. Despite this, Mr Kons' Tuesday, 11 November 2008 testimony before the Committee described the same proposition as; "*one of those fantasies that has overtaken the State*".

The Committee has formed the view that Mr Kons' statements on this issue are mutually exclusive. Clearly both statements cannot be true. Either one, or both, of the statements must be false. On this basis, the Committee has concluded that Mr Kons' evidence is unreliable and

unsound, and that he cannot reasonably be regarded as a credible witness.

In order to test whether to prefer one or the other of Mr Kons' statements on the question of whether the Pulp Mill Assessment process was relevant to the decision to appoint Mr Cooper as a Magistrate, it is relevant to consider the testimony of other witnesses. The only other witness or statement relevant to this question is a sworn statement made out by Mr Nigel Burch, former Electorate Officer for Mr Steven Kons MP. In that statement, which was taken into evidence by this Committee, Mr Burch made the following observation (Burch 2007, 1):

> *On or about April 2007, I recall that the Attorney-General, Mr Steve KONS indicated to me that he wanted to merge the Resource Management Planning Appeals Tribunal (RMPAT) and the Resource Planning and Development Commission (RPDC) and that he wanted to have Mr Simon COOPER, who I understand to be a lawyer, appointed to oversee both of these areas. However, Mr KONS stated that the Premier, Mr Paul LENNON did not want Mr COOPER involved in the running of these departments and that to avoid this, the Premier wanted him appointed as a Magistrate.*

On the question of whether or not Mr Kons had signified to others that Mr Cooper was in fact his preferred nominee for appointment as a Magistrate, a sworn statement made out by Ms Lisa Hutton, Secretary for the Department of Justice indicated that; "*Around the 7th June 2007, I spoke with Mr KONS about the appointment for the new Magistrate and he informed me that his preferred appointee was Mr COOPER*." (Hutton, Statutory Declaration 1 2008, 3). It should also be noted that Ms Hutton made a diary entry, dated Thursday, 7 June 2007, which stated; "*SK: appoint temp magis (...?) for 6 mths pending perm appoint of S.C who in meantime will return to RMPAT & review RPDC structure*." (Hutton, Statutory Declaration 2 2008, 157).

In an undated, unsworn statement, Chief Magistrate Arnold Shott indicated as follows (Shott 2008, 2):

On, I believe, either 8 or 9 June, 2007, as a result of a message that I had received from her, I telephoned Lisa HUTTON. During this telephone call she indicated to me that it was likely that Simon COOPER may be the Attorney-General's preferred candidate and to this end I would have to plan for a delay in appointment due to his work commitments with the Resource Planning and Development Commission (RPDC) and Resource Management Planning Appeal Tribunal (RMPAT). ...
On, I believe, 9 June, 2007, and while still on leave overseas, I telephoned Roger WILLEE and asked him to defer his retirement date for a period that would cover the expected delay period.

Committee Comment

There is a remarkable coincidence in timing between the tabling in the House of Assembly by Mr Nick McKim MP (on Wednesday, 6 June 2007) of Mr Cooper's 23 March 2007 letter to Hon Paul Lennon outlining the deficiencies in Gunn's Ltd's Pulp Mill Assessment application to the RPDC, and Mr Steven Kons MP's first disclosures of a decision by him to seek the appointment of Mr Cooper as a Magistrate. Mr Cooper's sworn statements indicate that Mr Kons first informed him of that decision on Thursday, 7 June 2007. Ms Lisa Hutton made a diary entry to the same effect on the same date. Chief Magistrate Arnold Shott indicates that he was advised of this by Ms Hutton on; *"8 or 9 June, 2007"*.

This Committee has formed the view that, taken together with the content of Mr Kons' own sworn statement regarding the; *"messages"* he received from the; *"Premier's Office"* about Mr Cooper's appointment, there is no coincidence. The evidence strongly suggests that Mr Kons' disclosures on Thursday, 7 June 2007 about Mr Cooper being the preferred nominee as a Magistrate were triggered by the Wednesday, 6 June 2007 revelations in the House of Assembly regarding the derailment of the RPDC Pulp Mill Assessment process.

Mr Simon Cooper testified that, on Tuesday, 12 June 2007, he attended a private dinner with Attorney-General Mr Steven Kons MP and one other person. At the conclusion of the meal, and after the only other guest had excused themself, on the basis of his extensive contemporaneous notes Mr Cooper stated that (Cooper, Statutory Declaration 2008, 12):

> *I had a conversation with him in relation to the magistrate's position. He initiated the conversation, I did not. During that conversation he said words to the effect of;* "I don't want to trash the Commission (RPDC) we may have to delay your appointment as a magistrate. I will ask (Roger) WILLEE if he is prepared to stay on and if not I will appoint a temporary Magistrate,*" ... From the conversation I had with him I was in no doubt that my appointment was going ahead but that he required a smooth transition for the RPDC and RMPAT.*

Mr Kons' sworn statement in relation to his conversation with Mr Cooper at this meal was that (Kons, Statutory Declaration 2008, 4):

> *After that meal ... I had a discussion with Mr COOPER about the vacancy. I don't recall the exact conversation that I had with him, but I may have indicated to him that he had a good chance of being appointed and told him to* 'get ready*.'*

Mr Gary Hill, former Ministerial Head of Office for Mr Steven Kons MP made out a sworn statement which has been taken into evidence by this Committee. According to Mr Hill's sworn statement (Hill 2008, 3):

> *As a result of the conversations and meetings with Steve KONS on* [Wednesday, 9 April 2008] *and the previous day in relation to the magistrates appointment issue, I became aware through KONS that he did infact* [sic] *have dinner with Simon COOPER. He had a conversation with COOPER after dinner that night whilst walking away from the restaurant, about COOPER being appointed as a magistrate.*

In an email message to Chief Magistrate Shott titled; "*plan of attack*" and dated Wednesday, 13 June 2007 at 3.28pm, the Secretary for the Department of Justice, Ms Lisa Hutton outlined the need for Magistrate Roger Willee to

seek an extension of his intended retirement from the Executive Council until mid-August (Hutton, Statutory Declaration 2 2008, 60).

In a letter dated Thursday, 14 June 2007, Magistrate Roger Willee requested that Attorney-General Kons seek from the Executive Council an extension of Mr Willee's retirement date from Monday, 2 July 2007, to Monday 27 August 2007 (Hutton, Statutory Declaration 2 2008, 35).

In a letter dated Thursday, 14 June 2007, the Secretary for the Department of Justice, Ms Lisa Hutton advised all applicants for the Magistrates position that; "*a decision on the appointment is expected to be delayed for approximately two months*". (Hutton, Statutory Declaration 2 2008, 34). The reason for the delay was elucidated as follows by Ms Hutton when she appeared before the Committee to testify in person (Hutton, Transcript of Evidence 2008, 21):

> *As I think is known, the original intention was for Mr Simon Cooper to be appointed as magistrate. But at the time Mr Cooper was doing not one but two jobs for government, both of which were also in Mr Kons' portfolio areas. He was doing some particular review work in relation to the planning system. So there was a question of availability ...*

On Friday, 15 June 2007, Ms Linda Hornsey wrote a letter to Ms Peg Putt MP, Leader of the Tasmanian Greens in which she indicated that she wrote; "*to express my personal disappointment that you have chosen to damage my integrity in a very public way.*" This letter was leaked to Media outlets and received wide coverage. A selection of relevant media reports is reproduced at Appendix 15 to this Report. This Committee notes the degree to which Ms Hornsey chose to personalise this matter at this time. In testimony before this Committee Ms Hornsey made it clear that she believed that this was an unprecedented attack on her integrity and confirmed that it has left a lasting negative impression on her career. The Committee further notes that, according to Media reports, Ms Hornsey characterised events of this period of time as having; "*damaged her integrity*".

On Monday, 25 June 2007, an Executive Council Minute was formally executed extending the retirement date of Magistrate Roger Willee from Monday, 2 July 2007 to Monday, 27 August 2007 (Hutton, Statutory Declaration 2 2008, 36).

August 2007

On Tuesday, 7 August 2007, Ms Lisa Hutton prepared a Cabinet Minute and Cabinet Briefing documents for the attention of then Attorney-General, Mr Steven Kons MP (Hutton, Statutory Declaration 2 2008, 66-70). These documents comprised the first unsigned recommendation from the Attorney-General to Cabinet (the **First Cabinet Brief**), for the appointment of Mr Simon Cooper as a Magistrate to replace Mr Roger Willee.

On Ms Hutton's instructions, at 4.17pm on Tuesday, 7 August 2007, the documents were sent by her assistant Mr Brett Charlton, via a high-importance email to Ms Michelle Lowe (a Department of Justice liaison officer with Attorney-General Kon's Ministerial office) (Hutton, Statutory Declaration 2 2008, 66). At 4.28pm Ms Lowe forwarded Mr Charlton's email to Ms Stephanie Shadbolt, who was then Mr Steven Kons MP's Burnie-based Electorate Officer, requesting that the documents be signed by the Attorney-General and faxed back to Hobart the next morning (Hutton, Statutory Declaration 2 2008, 67).

Ms Shadbolt's sworn statement, taken into evidence by this Committee, was that (Shadbolt 2008, 3):

> *I received the* [the First Cabinet Brief] *on my email, acknowledged receipt and printed it off. I left it on my desk to enable me to give it to Mr KONS when he first arrived in the office the following morning. ... The following Morning I handed this document to Mr KONS, I am unsure what time he arrived but it would have been some where between 8.30am and 10 am.*

At 8.54am on Wednesday, 8 August 2007, Mr Brett Charlton emailed Ms Michelle Lowe a copy of Mr Simon Cooper's Curriculum Vitae (Hutton, Statutory Declaration 2 2008, 71).

Ms Shadbolt's sworn statement contains the following account of what happened next (Shadbolt 2008, 3):

> *I recall seeing Mr KONS with the* [First Cabinet Brief] *near the desks in the open plan area. He was obviously discussing the document with Nigel BURCH. Whilst I did not see Mr KONS sign the document he did have a pen out and was going through it. I took no notice of the discussions being had by Mr KONS and Nigel BURCH.*

Mr Nigel Burch's sworn statement summarised the events of that morning in the following terms (Burch 2007, 3):

> *During August 2007 I recall Mr KONS showed me a Cabinet Minute in the main office area which had been prepared under his hand. My understanding was that the minute had been prepared for Mr KONS by his department at the behest of someone at DPAC. The subject of that minute related to the appointment of Mr Simon COOPER as the next Magistrate.*
>
> *On being shown that document I saw that he had already signed the minute. I told Mr KONS that he would be crazy to sign a document saying the appointment was his choice, especially after he had been aware that the appointment was due to the Premier wanting to remove Mr COOPER from any role in planning. I told him if he signed the document as it was, he would be agreeing that the appointment was his choice, when he had told me that he was actually making the appointment under instruction. After I told him that, he made a hand written amendment to the document, effectively saying that the appointment was approved based on the advice of his department, rather than by any direct selection made by himself.*

Mr Kons' sworn statement relating to the signing of the First Cabinet Brief recommending the appointment of Mr Cooper was as follows (Kons, Statutory Declaration 2008, 4):

> *After examining the* [First Cabinet Brief]*, I spoke with Mr Nigel BURCH, who was also employed in my Burnie Office as an Electoral Officer. As a result of my discussions with him, I placed a notation on the Cabinet Minute to the effect that although I was prepared to sign the document as nominating Mr COOPER as Magistrate, this was done on the advice of my department.*

Ms Hornsey's testimony to this Committee on the question of her prior knowledge of Mr Kons' intention to recommend Mr Cooper for the position of Magistrate was as follows (Hornsey 2008, 11):

> ***CHAIR*** *- Linda, when did you first then learn that Mr Cooper was the recommended choice of the Attorney for the appointment of magistrate?*
>
> ***Ms HORNSEY*** *- During another conversation with Lisa Hutton, when she told me that the Attorney had asked for a cabinet minute to be drafted appointing Simon Cooper.*
>
> ***CHAIR*** *- Again, was that a communication that Lisa volunteered to you because of your involvement with regard to the preparation of matters to go before Cabinet?*
>
> ***Ms HORNSEY*** *- Absolutely.*

Ms Hornsey further testified about a somewhat earlier disclosure by her to Hon Paul Lennon regarding Mr Cooper's candidacy for the vacant appointment of a Magistrate before this Committee in the following terms (Hornsey 2008, 11):

> ***CHAIR*** *- Had you made the former Premier aware of any of these considerations of yours, or concerns of yours, regarding the appointment of Simon Cooper?*
>
> ***Ms HORNSEY*** *- Yes, I did. When I first learned that Simon Cooper was a candidate at some time after that I raised it confidentially with the Premier.*
>
> ***CHAIR*** *- That was only when you learned he was a candidate?*
>
> ***Ms HORNSEY*** *- Yes.*

Committee Comment

The Committee notes that Ms Hornsey's sworn testimony on this matter is inconsistent with the sworn evidence of Hon Steven Kons MP.

Ms Hornsey testified that she had no knowledge of Mr Kons' intention to appoint Mr Cooper as a Magistrate until Ms Hutton had been requested to draft the relevant Cabinet Brief. Mr Kons has testified that prior to the formal appointment process he was getting the; "*clear message from the Premier's Office that Mr COOPER was to be the nominee. This message was communicated to* [Mr Kons] *during the meetings ... with the Premier,* ... [and] ... *Ms Linda HORNSEY.*" If Mr Kons' decision to appoint, or not appoint, Mr Cooper as a Magistrate was, as was Mr Kons' sworn testimony, in some way related to his involvement in the Pulp Mill Assessment process it would clearly have been inappropriate.

Ms Shadbolt's sworn statement then continued as follows (Shadbolt 2008, 3):

> *Around this time I received a phone call on my work number from Michelle LOWE. She told me to tell Mr KONS to hold off or hold fire or words similar on the* [First Cabinet Brief] *and that he would receive a phone call from Linda HORNSEY, the secretary of the Department of Premier and Cabinet.*
>
> *I informed Mr KONS of this; Nigel BURCH was present at that time and would have heard this.*
>
> *Almost immediately after this Mr KONS received a phone call in his private office.*

Telephone records indicate that Attorney-General Kons received a telephone call on his mobile telephone on the morning of Wednesday, 8 August 2007, from Ms Hornsey's landline. That call commenced at 10.10am (Tasmania Police 2008, 10).

Mr Kons' sworn statement relating to that telephone call was as follows (Kons, Statutory Declaration 2008, 5):

> *The conversation, who I believe may have been with Ms HORNSEY, related to the nomination of Mr COOPER. All I can recall about the conversation was she said "*shred it*". I do not recall any of the details surrounding these words,*

but I was pleased because of the reasons I stated earlier in this statutory declaration. I cannot recall discussing who the nomination would be.

The testimony of Ms Hornsey before this Committee relevant to the 10.10am telephone call was as follows (Hornsey 2008, 9):

Mr MARTIN *- We will probably move now on to August. Mr Cooper was chosen by the Attorney-General to be appointed to the magistrate's position and it has been suggested that you made a phone call and told Mr Kons to not proceed with that, that you did not consider it appropriate and to shred the document. Is that correct?*

Ms HORNSEY *- I phoned the Attorney on that day and I advised him that it was not an appropriate appointment and I advised him. I said, '*If you are prepared to take my advice, my advice would be to shred the document*'.*

Mr MARTIN *- And Mr Kons agreed with that? He did not have a problem? Did he argue or put up a fight?*

Ms HORNSEY - *We had a discussion about the pros and cons of that appointment.*

Mr MARTIN *- What was the reason for your decision to ask him not to proceed with the Cooper appointment?*

Ms HORNSEY - *Two reasons: it would have been politically controversial.*

Former Premier, Hon Paul Lennon's testimony to this Committee concerning Ms Hornsey's telephone call to Mr Kons was (Lennon, Transcript of Evidence 2008, 11):

At a point in that process Ms Hornsey contacted the Attorney-General and offered her opinion. She did not do that at my request, if that is what you are asking me.

At 10.12am on Wednesday, 8 August 2007, Ms Lowe sent an email to Ms Hutton entitled; "*Cabinet Brief*" which stated (Hutton, Statutory Declaration 2 2008, 80):

> *Might be too late to stop him signing that one, but we won't do anything with it. He was on the phone with the door closed and Cabinet Brief in hand when I spoke to Steph.*

Telephone records indicate that then Attorney-General Kons' telephone call from Ms Hornsey terminated at 10:14:55am on Wednesday, 8 August 2007 (Tasmania Police 2008, 10). Almost immediately, Mr Kons emerged from his office, walked to the office shredder and shredded the Cabinet documents recommending the appointment of Mr Cooper. Mr Kons was then heard to say words similar to "*Well that's that then*." (Shadbolt 2008, 4), and (Burch 2007, 2).

Mr Kons' sworn statement relating to the shredding of the document was as follows (Kons, Statutory Declaration 2008, 5):

> *After the phone conversation was terminated, I took the Cabinet Minute relating to Mr COOPER to the office shredder and shredded it. The reason I did this was because I was told to and I knew one would be prepared. The reason why I shredded the COOPER document was not for any sinister reason, it was simply because I did not want two documents circulated with two different names, as this may have created confusion about who was to be nominated to Cabinet. I have no recollection of any discussion about the nomination of Glenn HAY or when I signed those documents relating to his appointment. However, I was very pleased with that choice as he would have been my original preferred candidate.*

The Committee notes that the Hansard record of proceedings in the House of Assembly for 6.00pm on Wednesday, 9 April 2008, on the adjournment contains some remarks by Mr Steven Kons MP relating to his resignation as Deputy Premier and Attorney-General. In those remarks Mr Kons made the following statement:

> *I reiterate that at no stage of my decision to recommend Glenn Hay to be appointed as a magistrate was I instructed by the Premier or the Premier's office not to recommend Simon Cooper, nor was I pressured by the former Secretary of the Department of Premier and Cabinet, Linda Hornsey.*
>
> *The decision to take Mr Hay's name to Cabinet was mine and mine alone.*

In response to a question about the above comments, by the Chair of this Committee, Mr Kons made the following observation at a public hearing:

> ***Mr KONS*** *- There is a difference between being instructed and having the ability to follow that instruction or not. I was never curtailed or put on notice that if you do not do this the consequences are there. The option was always mine.*

The Committee notes that Mr Kons' response did not extend to a consideration of the question as to whether or not he was; "*pressured by the former Secretary of the Department of Premier and Cabinet, Linda Hornsey*."

At 10.21am on Wednesday, 8 August 2007, Ms Hutton replied to Ms Lowe's email entitled; "*Re: Cabinet Brief*" with the following (Hutton, Statutory Declaration 2 2008, 79):

> *Thanks Michelle – I've got Brett poised ready to do mark 2 if & when it becomes necessary!*

At 10.25am on Wednesday, 8 August 2007, Ms Lowe sent an email to Ms Hutton which stated (Hutton, Statutory Declaration 2 2008, 80):

> *Steph just rang ... the Brief has been shredded!*

At 10.25am on Wednesday, 8 August 2007, Ms Hutton replied to Ms Lowe's email (Hutton, Statutory Declaration 2 2008, 80):

> *Ta!*

The question, therefore, arises as to whom it was who actually made the decision, and issued the instruction, to issue fresh documentation for the recommended appointment of Mr Hay as a Magistrate. On this question the responsible officer, the Secretary for the Department of Justice, Ms Lisa Hutton is regrettably vague. In a sworn statement received into evidence by this Committee, Ms Hutton stated (Hutton, Statutory Declaration 2 2008, 4):

> *With regards to the change from COOPER to HAY; I did not initiate the change and reiterated that I have no independent recollection of who*

contacted me about stopping the COOPER document and making a change to appoint HAY. However, there were only a small number of people that could have been responsible. They were the Premier Mr LENNON, Norm ANDREWS, the Attorney-General and Linda HORNSEY. It was unlikely to have been ANDREWS; the Premier rarely contacted me direct, therefore that proposition is highly unlikely. Linda HORNSEY was the most likely person with the Attorney-General being less likely. I think the change may have been made due to a perception of cronyism but I am unable to attribute this reason to any particular person.

In sworn evidence given before this Committee at a public hearing Ms Hutton made the following, equally ambiguous observation (Hutton, Transcript of Evidence 2008, 24):

I believe on the day that the change was communicated to me I had a discussion, I had a telephone conversation I think with Linda Hornsey, as Secretary of the Department of Premier and Cabinet but I could not tell you whether it was before or after I became aware that the Attorney had changed his mind.

At the same public hearing Ms Hutton also made the following, contribution (Hutton, Transcript of Evidence 2008, 28):

***Mr MARTIN** – Who asked you to prepare a new cabinet brief appointing Mr Hay?*

***Ms HUTTON** – I believe it was the Attorney who said to me that the appointee was to be Glenn Hay but I do not recall how exactly that was communicated. It was obviously communicated in a way that I knew that it needed to be done but I am not certain how the message was delivered*

Later in the same public hearing, Ms Hutton added to the Committee's understanding of this point at some length (Hutton, Transcript of Evidence 2008, 33-38). That passage of Ms Hutton's testimony warrants the specific attention of the careful reader, and is included at Appendix 13. Consider the following exchange (Hutton, Transcript of Evidence 2008, 33):

CHAIR *- So what would cause your office to prepare a replacement document when you had not yet been advised that the shredded one was no longer live?*

Ms HUTTON *- Oh well, the shredding is a bit incidental really. It might have been shredded or not shredded. It was not the shredding that was the decision-making process. The decision-making process was that the Attorney had changed his view about whom he was going to recommend for appointment.*

CHAIR - *How did you become aware of him changing his view?*

Ms HUTTON *- That is what I do not recall with any clarity whether it was him who told me. I suspect it was, but again this would have been a telephone conversation so there is no documentary record of it.*

The Chair again attempted to obtain a direct answer to this fundamental question from Ms Hutton in the following exchange (Hutton, Transcript of Evidence 2008, 35):

CHAIR *- You have indicated that Michelle Lowe advised you by e-mail that the document had been shredded. You have indicated that that was on 8 August.*

Ms HUTTON - *Yes.*

CHAIR *- When was the second document - the recommendation for Mr Hay - prepared?*

Ms HUTTON - *Somewhat earlier than that, on 8 August, I think.*

CHAIR *- Same day, earlier than the Michelle Lowe e-mail to you?*

Ms HUTTON - *Yes.*

The Chair's next attempt to ascertain from Ms Hutton the key facts in question had the following outcome (Hutton, Transcript of Evidence 2008, 36):

CHAIR *- But he was in the Burnie office on the 8th, hence the shredding of the document on that day. Why would the Glenn Hay recommendation have been prepared before this shredding by the Attorney?*

Ms HUTTON *- I think I have tried to explain to you that the shredding is a bit irrelevant. The relevant point was when the Attorney changed his mind. Obviously the Attorney had changed his mind about whom he wished to recommend for appointment and either had directed me accordingly or had sent a message via somebody else that he had changed his mind. That is the point I cannot recall with clarity. Therefore, the second set of documents was prepared. We did not have a lot of time to lose on it, if you like, because we were about to hit the cabinet deadline. The shredding was just a colourful detail afterwards, as far as I was concerned.*

CHAIR *- So clearly then in the public domain, I think the interpretation has been, the Attorney had not made any decision about not proceeding with Mr Cooper until he received a telephone call, then subsequently he shredded the document almost instantaneously at the conclusion of that telephone call. So clearly you are advising the committee that the Attorney had already made his mind up that Mr Cooper would not be appointed magistrate, before the alleged telephone conversation and before the shredding. And as incidental as you may think this shredding is, it is a matter of the public record that that was almost instantaneous after Mr Kons took an alleged telephone call.*

Ms HUTTON *- I see where you are going with that but I certainly did not prepare the second set of documents on my own account. I was preparing them as a result of being advised either directly or indirectly by the Attorney that he had changed his mind. If I had realised that you were going to be so interested in forensic detail I might have tried to get together as many of the details and times as I could, but that has not really been my focus. Nor did I expect that it would be the focus of the committee.*

Shortly after the above extract, the Chair sought to clarify what Ms Hutton's testimony regarding the central question actually was. This is reproduced in the following exchange (Hutton, Transcript of Evidence 2008, 37):

> ***CHAIR*** - *How can you advise the committee of the precise process by which you became aware that the Attorney had changed his mind? You have indicated that you are not sure whether it was a telephone call or whether somebody else told you or whether it was the Attorney himself.*
>
> ***Ms HUTTON -*** *That is true. I cannot.*
>
> ***CHAIR*** - *How can it be so that you can actually advise the committee of the precision of that communication that the Attorney was not going to proceed with Simon Cooper's appointment?*
>
> ***Ms HUTTON -*** *I cannot.*

In further evidence before this Committee Ms Hutton was no clearer than indicating it was; "*highly likely*" to have been Ms Linda Hornsey who issued the relevant instruction. In light of all the electronic evidence, this could only have occurred before Ms Hornsey's telephone call to Mr Kons. In further evidence before this Committee Ms Linda Hornsey, was equally adamant that she did not issue the relevant instruction to Ms Hutton.

Committee Comment

The source and timing of the instruction to Ms Lisa Hutton, Secretary for the Department of Justice, to prepare replacement documentation in the name of Mr Hay is a central fact around which much turns. The evidence of Ms Hutton on this point can be most appropriately characterised as evasive, inconsistent and incoherent. Further, for reasons that will become apparent below, Ms Hutton's testimony is indicative of a witness who is reluctant to tell the whole story. This Committee believes the evidence suggests that Ms Hutton's intention at this stage of her testimony was to endeavour to protect a third person.

The Committee has reluctantly arrived at the conclusion that Ms Hutton is an unreliable witness on this point.

In a sworn statement made out by Mr Norman Andrews (formerly Head of Ministerial Office for Attorney-General Mr Steven Kons MP), which was taken into evidence by this Committee contains the following passage (Andrews 2008, 3):

> *I cannot recall how I became aware that there had been a change from appointing COOPER as a Magistrate to appointing HAY. I do not know who actually made the decision to change the proposed appointment from COOPER to HAY but obviously the Attorney-General signed off on it. I had no involvement in the decision to change the appointment.*

The only other witnesses who could potentially give first-hand evidence about the issuing of an instruction to prepare replacement Cabinet documentation in the name of Mr Hay, are former Attorney-General Mr Steven Kons MP and Ms Linda Hornsey. As recorded above, Mr Kons' sworn statement relating to the shredding of the document included the following passage (Kons, Statutory Declaration 2008, 5):

> *I have no recollection of any discussion about the nomination of Glenn HAY or when I signed those documents relating to his appointment. However, I was very pleased with that choice as he would have been my original preferred candidate.*

In evidence to the Committee in-person Mr Kons provided the following account of this matter (Kons, Transcript of Evidence 2008, 38):

> ***CHAIR*** *- ... When was it then that subsequently you put forward another recommendation - that of Mr Hay?*
>
> ***Mr KONS*** *- I think it was that day.*
>
> ***CHAIR*** *- The same day?*
>
> ***Mr KONS*** *- Yes.*

***CHAIR** - It is your recommendation?*

***Mr KONS** - Yes.*

***CHAIR** - How did you go about that?*

***Mr KONS** - I communicated it to my secretary, I believe.*

***CHAIR** - To Ms Hutton?*

***Mr KONS** - Yes, or she rang me, I am not too sure of that process. The name was changed, the document was changed slightly. Mr Hay's name was replaced.*

***CHAIR** - I think it might be reasonably significant if we can determine whether it was she who phoned you or you that phoned her bearing in mind here it is you dealing with a judicial appointment, you negotiating with your department and yet Ms Hornsey intervenes.*

***Mr KONS** - I would have to chase up my phone records to see whether it was me ringing Lisa or Lisa ringing me and I don't know. What did Lisa say to you?*

***CHAIR** - I do not have it in front of me but let us construct this.*

***Mr KONS** - Look, I can't recall. I am not going to say something that could be wrong.*

At a later stage in his public hearing, Mr Kons' account of the replacement paperwork was as follows (Kons, Transcript of Evidence 2008, 38):

***CHAIR** - Following the shredding of the document, did you ask for replacement paperwork to be sent to you?*

***Mr KONS** - It would have been communicated and replacement paperwork would have come up.*

CHAIR *- Did you ask for it?*

Mr KONS *- As I said, I can't remember whether I rang Lisa or Lisa rang me.*

CHAIR *- It doesn't matter who rang whom but did you ask for it to be provided to you?*

Mr KONS *- If there is nothing there you presume that whether I asked for it or it was sent up the communication would have gone back to my secretary that the previous document wasn't going to be used, a new nominee was going to be appointed so the stuff would be sent; the new paperwork would be sent.*

CHAIR *- But you've decided that Glenn Hay is going to be the nominee.*

Mr KONS *- Yes.*

CHAIR *- That being the case –*

Mr KONS *- I would have communicated that, but I am saying whether I rang Lisa up to say Glenn Hay or Lisa rang me up to say what's going on, one of us would have rung the other up and communicated that the new appointment would be Mr Hay.*

CHAIR *- It is conceivable isn't it that she would have only rang you –*

Mr KONS *- If someone else told her, yes.*

CHAIR *- if somebody had told her that you had shredded the document?*

Mr KONS *- Yes.*

CHAIR *- Otherwise it is conceivable that you would have phoned her.*

Mr KONS *- Yes very conceivable. Factual actually.*

Police files conclusively show that there was no telephone call between Mr Kons and Ms Hutton, between 10.10am and 2.17pm on Wednesday, 8 August 2007. Neither is there <u>any</u> record of an email message for the same period of time between Mr Kons and Ms Hutton. Similarly, there is no record of any email or telephone communication between Ms Hutton and Ms Hornsey between 10.10am and 2.17pm on Wednesday, 8 August 2007. On this basis, the Committee has formed the view that the instruction to prepare the replacement documentation is unlikely to have emanated from Mr Kons. On balance therefore, it appears that Mr Kons' most reliable testimony on this question was that he has; "*no recollection of any discussion about the nomination of Glenn HAY*".

Other than Ms Hutton herself, the only witness before this Committee who has provided any evidence that they participated in a conversation with Ms Hutton about the Cooper/Hay appointment documentation was Ms Linda Hornsey. Ms Hornsey's sworn testimony was as follows (Hornsey 2008, 13):

> ***CHAIR*** - *Linda, when did you become aware, or did you become aware, that the Department of Justice had issued Cabinet briefing paperwork relating to the appointment of Mr Cooper?*
>
> ***Ms HORNSEY*** - *The same day I called the Attorney.*
>
> ***CHAIR*** - *Which would have been 8 August 2007?*
>
> ***Ms HORNSEY*** - *Yes.*
>
> ***CHAIR*** - *How did you become aware of the existence of that paperwork?*
>
> ***Ms HORNSEY*** - *Lisa Hutton called me.*

It appears likely then, based on all of the available evidence before the Committee that, prior to Ms Hornsey's telephone conversation with the Attorney-General, Ms Hutton had a conversation with Ms Hornsey. After this conversation, and before the Cooper recommendation was shredded by Mr

Kons, Ms Hutton began preparing the replacement documentation recommending the appointment of Mr Hay.

On balance therefore, it could reasonably be inferred that the replacement documentation was prepared on the instructions of Ms Hornsey and not Mr Kons. Regrettably the testimony of Ms Hornsey relevant to testing such an inference does not add any greater clarity to the matter (Hornsey 2008, 17):

> ***CHAIR*** *- How might it be that Lisa Hutton, the secretary of the Department of Justice, knew that a fresh Cabinet briefing relating to Mr Hay was required even before your telephone call to Mr Kons?*
>
> ***Ms HORNSEY -*** *I do not know the answer to that.*

Having ascertained a point at which some of the testimony of witnesses converges with an objective fact, the Committee is almost immediately faced with yet another inconsistency.

It is clear from the fact of the replacement Cabinet documentation that only one person was intended to be recommended to Cabinet by the Attorney-General. However, Ms Hornsey's sworn testimony to this Committee was as follows (Hornsey 2008, 12):

> ***CHAIR*** *- Okay, we will do that at some later stage. Linda, back to the matters related to specifically when the Attorney had made his choice, as it were, did you and/or the former Premier have any communication with the Attorney prior to him indicating to some people that it was his choice that Mr Cooper be appointed?*
>
> ***Ms HORNSEY*** *- Yes, during one of my discussions with Lisa Hutton I had suggested that a sensible way of handling the appointment of the magistrate, which I should point out is a Governor-in-Council appointment and it goes through the Cabinet first. Legitimately it is an opportunity for Cabinet to make a decision and then to advise the Governor in Council of that appointment. I felt that because there were three appointable people perhaps those three names should be put before Cabinet. I believe that*

Lisa Hutton had that conversation with the Attorney. I requested her to have that conversation with the Attorney.

Ms Hornsey's assertion that she made such a novel suggestion to Ms Lisa Hutton directly contradicts Ms Hutton's sworn statement which stated (Hutton, Statutory Declaration 2 2008, 4):

> *I believe that about the time that the COOPER documents were prepared I would have had discussions with Linda HORNSEY regarding the pending vacancies at the RPDC and RMPAT. DPAC had a strong interest in those positions and that would have been the reason for the contact. By necessity the issue of COOPER'S proposed appointment as a Magistrate would have arisen in my discussions as his appointment was to directly cause those vacancies. I do not recall Linda HORNSEY expressing any view over COOPER'S appointment as a Magistrate other than in the context of filling the pending vacancies his appointment would create.*

Ms Hornsey further testified that she provided her advice to put three names before Cabinet directly to then Attorney-General Mr Steven Kons MP (Hornsey 2008, 12):

> ***CHAIR*** *- I think that probably brings us to the matter of the discontinuance of a process to go ahead with the appointment of Mr Cooper. You have indicated in answer to questions from Terry that you did phone the Attorney on 8 August 2007 and suggested to him that the document recommending Simon Cooper be shredded. Did that communication, by you to the Attorney, constitute the change of decision? Were you suggesting to the Attorney that that appointment ought not proceed?*
>
> ***Ms HORNSEY*** *- My advice to the Attorney was still that the three suitable candidates go by way of recommendation to Cabinet.*
>
> ***CHAIR*** *- So why was it then that you suggested strongly to the Attorney that he shred the document recommending Mr Cooper?*
>
> ***Ms HORNSEY*** *- Because I believed that he was agreeing to my suggestion that more than one name go before the Cabinet.*

On this point, Mr Kons' testimony before this Committee was as follows (Kons, Transcript of Evidence 2008, 43):

> ***CHAIR*** *- Okay. Following the call from or at the same time you had the telephone conversation with Linda Hornsey, did she suggest to you who your next recommendation should be?*
>
> ***Mr KONS*** *- I don't think so. I mean, it was down to two.*
>
> ***CHAIR*** *- Down to two?*
>
> ***Mr KONS*** *- Yes.*
>
> ***CHAIR*** *- What process did you use to determine that Mr Hay would be your next recommendation?*
>
> ***Mr KONS*** *- I think Mr Daley had acted on behalf of another member of parliament so I put the same process there - take the safe option and appoint the other equally accepted, highly-regarded person by the Secretary and the Chief Magistrate.*
>
> ***CHAIR*** *- At any time, did either Ms Hornsey or Ms Hutton indicate to you that it would be better for you to go forward to Cabinet with a list of three recommendations and let the Cabinet decide?*
>
> ***Mr KONS*** *- I don't think so. I doubt it because you don't go in with a list of names. You make your ultimate decision and put it forward to Cabinet and you have to bat for it. This way it's absolving your responsibility and passing on the buck; handballing it onto someone else to make a decision. It may have been a better process. Maybe that could be one of your recommendations.*
>
> ***CHAIR*** *- You are quite clear that that was never communicated to you by either of those two people.*
>
> ***Mr KONS*** *- I don't think so.*

Committee Comment

Ms Linda Hornsey's claim to have recommended to both Ms Lisa Hutton and former Attorney-General Kons that three names be submitted to Cabinet, rather than only one, is difficult to reconcile with objective fact.

After Ms Hornsey's conversation with Ms Hutton on the morning of Wednesday, 8 August 2007, but before the 10.10am telephone call between Ms Hornsey and Mr Kons, the Department of Justice prepared documentation recommending a single-person to Cabinet, namely; Mr Hay.

The evidence shows that, on Wednesday, 8 August 2007, subsequent to the 10.10am telephone call, there was no communication with Ms Hutton by either Ms Hornsey, or Mr Kons, prior to the Cabinet Brief being re-issued for Mr Kons' signature in the name of Mr Hay. Ms Hutton was Ms Hornsey's junior officer in the State Service. Ms Hornsey's; *"suggestion"* that Ms Hutton prepare replacement documentation could therefore reasonably be expected to be followed up in some way by Ms Hutton unless the suggestion were revoked. The Committee also notes that the replacement Cabinet Brief was sighted by Ms Hornsey prior to it being lodged for the Cabinet meeting of Monday, 13 August 2007. This would have given Ms Hornsey a further opportunity to question why her suggestion or advice had not been actioned.

Of less probative value, but worthy of noting nonetheless is the evidence of both Mr Kons and Ms Hutton. In response to the Chair's question as to whether either Ms Hutton or Ms Hornsey ever suggested to him that he recommend three names to Cabinet Mr Kons repeatedly testified; "*I don't think so*". Ms Hutton's recollection before the Committee did not include any reference to putting three names forward to Cabinet. Rather, Ms Hutton was very specific about what the final decision was that had been communicated to her, namely; "*I*

> *did not initiate the change and reiterated that I have no independent recollection of who contacted me about stopping the COOPER document and making a change to appoint HAY*."
>
> The Committee has therefore formed the view that Ms Hornsey's testimony on the details of her; "*advice*" to the Attorney-General cannot reasonably be regarded as being reliable.

At 12.17pm on Wednesday, 8 August 2007, Mr Brett Charlton, Human Resources advisor to Ms Hutton, sent an email to Ms Hutton entitled; "*Contact Number*" containing the telephone number of Mr Glenn Hay (Hutton, Statutory Declaration 2 2008, 81). In an unsworn statement dated Friday, 4 July 2008 Mr Hay observed as follows (G. Hay 2008, 1):

> *My records indicate that on the 8th August 2007, I received a telephone call from Ms Lisa HUTTON, the Secretary of the Department of Justice. I do not recall the exact time of this call but believe it was before late afternoon. Ms HUTTON asked if I was still interested in being appointed to a position as Magistrate. I indicated I was. Ms HUTTON informed me that the appointment to a position in Hobart could be confirmed subject to Cabinet approval at its meeting on the following Monday, followed by Executive Council approval on the 20th August and with a public announcement probable on the following day.*

At 12.43pm on Wednesday, 8 August 2007, Mr Charlton sent an email to Ms Hutton entitled "*Docs*" and attaching the new Cabinet Briefing documents and Curriculum Vitae for Mr Hay (Hutton, Statutory Declaration 2 2008, 82). At 12.47pm on the same day, Ms Hutton replied to Mr Charlton's email as follows (Hutton, Statutory Declaration 2 2008, 94):

> *Thanks Brett. As usual!*

Ms Hutton then immediately forwarded, via email, the Second Cabinet Briefing documents in the name of Mr Glenn Hay to Ms Mary Conway (Hutton, Statutory Declaration 2 2008, 82). Ms Conway then on-forwarded Ms

Hutton's email, in a separate email to Ms Lowe at 1.33pm on Wednesday, 8 August 2007 (Hutton, Statutory Declaration 2 2008, 95).

At 2.17pm on Wednesday, 8 August 2007, Ms Lowe sent an email to Ms Shadbolt entitled "*FW: Magistrates Appointment*" stating (Hutton, Statutory Declaration 2 2008, 95):

> *Take 2 Steph! Please could you work some magic on this and fax back. Thanks Michelle.*

Ms Lowe then emailed Ms Conway at 3.04pm on Wednesday, 8 August 2007, stating (Hutton, Statutory Declaration 2 2008, 99).

> *Hi Mary, Steph has just faxed this back signed. I Presume it is now safe to deliver!! I will take over to Cabinet Office shortly. Original probably won't be back till Friday morning.*

At 3.13pm on Wednesday, 8 August 2007, Ms Hutton forwarded, via email to Chief Magistrate Arnold Shott, some advice from the Solicitor-General. This email was entitled; "*Re: legal advice re qualifications for appointment as a magistrate (Our ref: 29436)*". In his reply to Ms Hutton at 3.19pm on that day Mr Shott wrote (Hutton, Statutory Declaration 2 2008, 103):

> *Thanks Lisa.*
> *Very interesting ...*
> *As to a not unrelated matter, I have just spoken with a particular gentleman and asked him to ensure that his diary was free for the Hobart Magistrates Court's Christmas Dinner. He was very pleased to pencil it in ...*
> *Best wishes*
> *Arnold*

At 3.25pm on Wednesday, 8 August 2007, Ms Conway sent an email to Ms Lowe stating; "*Lisa said yes to please deliver. Thanks M*" (Hutton, Statutory Declaration 2 2008, 99). At 3.34pm Ms Lowe emailed Ms Conway stating; "*Done!*" (Hutton, Statutory Declaration 2 2008, 99).

Mr Simon Cooper has testified that, on the morning of Monday, 13 August 2007, he was telephoned by a journalist. According to Mr Cooper's sworn

statement, the journalist informed him that, after intervention by the Premier's Office, documents recommending his appointment as a Magistrate had been shredded and another name had gone forward instead (Cooper, Statutory Declaration 2008, 15). Mr Cooper's sworn evidence, based on extensive contemporaneous notes, is that he then telephoned Ms Linda Hornsey around midday to ask if she knew anything about the matter. According to Mr Cooper Ms Hornsey's response was; "*I know nothing about it but I will make some inquiries*." (Cooper, Statutory Declaration 2008, 15).

At 10.30am on Monday, 13 August 2007, then Attorney-General Mr Steven Kons MP met with his Cabinet colleagues, at which meeting his recommendation that Cabinet approve the appointment of Mr Glenn Hay as a Magistrate to replace Mr Roger Willee was considered. Following Cabinet that day, an Executive Council Minute, together with supporting documentation, was prepared by Ms Lisa Hutton for Mr Kons' signature in advance of the next Executive Council meeting (Hutton, Statutory Declaration 2 2008, 41-44).

Mr Cooper has testified that, around 6.00pm on Monday, 13 August 2007, that Ms Hornsey telephoned Mr Cooper. According to Mr Cooper (Cooper, Statutory Declaration 2008, 15):

> *She confirmed that my name was to be going forward. She said words similar to; "*I stopped it when I became aware of it, we couldn't appoint you because it would look like a Labor mates thing or cronyism.*"*

On the question of contact between Mr Cooper and Ms Hornsey on Monday, 13 August 2007, Ms Hornsey's testimony before this Committee is somewhat at variance with that of Mr Cooper. According to one passage of Ms Hornsey's testimony before this Committee, her recollection was that; "*after the matter had been dealt with by Cabinet I either phoned or saw Mr Cooper and said*, 'I am sorry it was the wrong time'" (Hornsey 2008, 15). At another point in Ms Hornsey's testimony to this Committee, her evidence was that she did not contact Mr Cooper about his non-appointment until; "*the matter had been dealt with by Cabinet and Mr Hay's appointment had been through the*

Executive Council" (Hornsey 2008, 19). That latter event occurred on Monday, 20 August 2007. Ms Hornsey also testified before the Committee that, sometime after Monday, 20 August 2008; "*I did contact Mr Cooper because I have a lot of respect for Mr Cooper and I did tell him that I had intervened and provided alternative advice.*" (Hornsey 2008, 19).

Mr Cooper's sworn testimony, based on extensive contemporaneous notes, is that on Tuesday, 14 August 2007, he sent an email to Ms Hornsey, requesting a meeting with the Premier to discuss the processes surrounding the appointment of the Magistrate. Mr Cooper's sworn statement recalls that (Cooper, Statutory Declaration 2008, 16):

> *I had realised that Linda HORNSEY had lied to me when I first contacted her the previous day and there appeared no value in discussing the matter further with her. I felt that given the information she had passed on, my career and reputation may suffer. I believed I needed to consider my future which I wanted to discuss with the Premier. Linda HORNSEY contacted me shortly after. She challenged me for sending the email with her tenor or substance suggesting such things should not be documented. She told me that the Premier would not meet with me but she would.*

Mr Cooper's sworn statement indicated that at around 9.00am on Wednesday, 15 August 2007, he met Ms Hornsey at a Sandy Bay café. Prior to the meeting, Mr Cooper indicated that he greeted a number of personal associates who also happened to be at the café. According to Mr Cooper's statement, once Ms Hornsey arrived (Cooper, Statutory Declaration 2008, 17):

> *The first thing she said to me was "*Why did you send that letter? It caused me a lot of trouble*", this clearly was a reference to the letter I sent to the Premier on 23 March 2007 regarding the pulp mill assessment process. I explained to her it was sent because it was true and it was the collective thoughts of the Commissioners of the RPDC. We spent sometime talking about the reasons I sent the letter.*

After discussing Mr Cooper's letter of Friday, 23 March 2007, Mr Cooper's sworn statement indicates that his conversation with Ms Hornsey then turned

to the process surrounding the appointment of a Magistrate (Cooper, Statutory Declaration 2008, 17):

> *There was no real linking of the two conversations as such but my clear impression was that my letter to the Premier was the source of her annoyance with me and may have had an impact on my non-appointment. During to the conversation she said words similar to; "*Well you can have the next one *(magistrates appointment)". I said; "*You cannot promise me that, it's not yours to give*". I told her the candidates may be completely different and it was not a promise that she could make or keep. She said words similar; "*No, no you can have the next one*".*

Committee Comment

This Committee notes that Mr Cooper's testimony suggests a connection between the outcome of his candidacy for the vacant position of Magistrate, and his involvement in the Pulp Mill Assessment process. This suggestion is consistent with the testimony of Mr Stephen Kons MP, who also linked Mr Cooper's initial primacy in the appointment process with the Pulp Mill Assessment process, based on his discussions with Premier Lennon and Ms Hornsey. The Committee has above in this Interim Report indicated that the timing of Mr Kons decision to champion Mr Cooper as his preferred nominee to replace Magistrate Willee links that decision to the tabling in the House of Assembly of Mr Cooper's letter of 23 March 2007 to Premier Lennon.

This Committee has noted the documentary evidence of how personally affronted Ms Hornsey was, when her involvement in the delay of the Friday, 9 March 2007 letter from the RPDC to the Premier was placed in the public domain. The Committee further notes that publication of this matter was made possible by means of a Freedom of Information request that was denied by her Department, but allowed by the agency controlled by Mr Cooper. This, together with Ms Hornsey's advice to Mr Kons that he not only revoke his decision to nominate Mr Cooper for appointment as a Magistrate but that he go so far as to shred the document naming Mr Cooper raises the possibility of either,

> or both, an improper motive or irrelevant considerations, being behind the part of Ms Hornsey's involvement in the decision on Wednesday, 8 August 2007 to shred Mr Cooper's nomination to Cabinet. At the very least a reasonable apprehension of bias can be said to exist which would warrant Ms Hornsey excusing herself from any consideration of Mr Cooper as a potential nominee for a judicial appointment. When this Committee raised the apparent conflict of interest with Ms Hornsey directly, she readily admitted that, with hindsight, the perceived conflict of interest was such that she probably should have recused herself from any involvement.
>
> Such factors would clearly be contrary to Ms Hornsey's statutory obligations at section 8 of the *State Service Act 2000* as a Head of Agency and *de facto* Head of the State Service. The fact that such considerations were on foot at the time of Ms Hornsey's intervention, it was improper for her to have intervened as she did.

In light of the foregoing, this Committee makes the following finding with respect to Ms Linda Hornsey:

Finding 2

This Committee finds that, the conduct of Ms Linda Hornsey on Wednesday, 8 August 2007 in relation to a judicial appointment in this State may have constituted a breach of her obligations under section 8 of the State Service Act 2000*. There is no suggestion from any witness before this Committee that Ms Hornsey acted in this matter at the behest of anyone else.*

Ms Hornsey had personal difficulties relating to the Pulp Mill Assessment process in connection with Mr Simon Cooper and the RPDC in both March and June of 2007 which were aired in the public domain on 15 June 2007. In light of these events, she was singularly inappropriate as a source of advice about Mr Cooper's suitability for appointment as a Magistrate in August 2007. Such was the perception

of bias, that the ethical thing to have done was to refrain from becoming involved.

In particular, this Committee finds that Ms Hornsey may have; breached the State Service Principles as defined at subsections 7(1)(a), (b) and (f) of the State Service Act *without any justification under subsection 7(1)(e); and may also have intervened in such a way that a candidate for appointment as a Magistrate was denied the protection afforded by subsection 7(2)(d) of that Act.*[22]

In light of the above finding, the Committee makes the following recommendation :

RECOMMENDATION 4.

The Committee **recommends** that, pursuant to s14(1) of the *State Service Act 2000*, the Premier should direct the State Service Commissioner to delegate his powers of investigation, under s18(1) of

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7. State Service Principles

(1) The State Service Principles are as follows:

(a) the State Service is apolitical, performing its functions in an impartial, ethical and professional manner;

(b) the State Service is a public service in which employment decisions are based on merit;

(c) ...

(d) the State Service is accountable for its actions and performance, within the framework of Ministerial responsibility, to the Government, the Parliament and the community;

(e) the State Service is responsive to the Government in providing honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;

(f) the State Service delivers services fairly and impartially to the community;

(g) the State Service develops leadership of the highest quality;

...

8. Heads of Agencies must promote State Service Principles

A Head of Agency must uphold, promote and comply with the State Service Principles.

that Act, to an independent judicial officer for the purposes of examining the conduct of Ms Linda Hornsey disclosed in this Report, in order to determine if her conduct so disclosed constituted a breach of the State Service Code of Conduct at subsections 9(1), (2), (3), (8), (11), (13) and (14) of the *State Service Act 2000*; and the State Service Principles at subsections 7(1)(a), (b), (f) and (g) of that Act. In the event that such an independent investigation finds that Ms Hornsey did, in fact, breach the State Service Code of Conduct, the Committee **recommends** that the Premier should take such action as is recommended by the independent judicial officer so appointed.

In answer to questions from the Committee during her public hearing Ms Hornsey's recollection of discussions with Mr Cooper about his non-appointment lacked clarity. At one point Ms Hornsey stated (Hornsey 2008, 15):

> ***Ms HORNSEY*** - *I believe after the matter had been dealt with by Cabinet I either phoned or saw Mr Cooper and said,* 'I am sorry it was the wrong time' *because I believed he was a meritorious candidate. ...*

At a later point in her sworn evidence before the Committee the following exchange took place (Hornsey 2008, 20):

> ***CHAIR*** - *Linda, during your communication with Mr Cooper after the cabinet process, did you indicate to him that he would be the next magistrate when a vacancy occurred?*
>
> ***Ms HORNSEY*** - *No. I may well have said something like* 'there will be other opportunities.' *It is not my gift, Mr Chairman. I cannot indicate that to anybody. These are matters in the end for processes and Cabinet and Executive Council. Not ever did I do that, nor would I.*

At 11.50am on Wednesday, 15 August 2007 Mr Norm Andrews, then Head of Office for Attorney-General Mr Steven Kons MP, sent an email requesting Ms Lisa Hutton to provide a Question Time Brief (**QTB**) for Mr Kons, relating to the appointment of Mr Hay as a Magistrate. Speaking about this QTB in a

sworn statement, Ms Hutton observed (Hutton, Statutory Declaration 2 2008, 5):

> *The content is in a standard QTB form that represents a script for the Minister which in this case was the Attorney-General Mr KONS. I acknowledge that the QTB was written in such a way to avoid mentioning the true reason for the appointment delay. The penultimate paragraph on page one of the brief is factually correct, but by design, does not expose that the intended appointment of COOPER had been the reason for the appointment delay. I held the view that providing this information would have the potential to unnecessarily expose the appointment to political criticism.*

When this Committee raised concerns about these matters with Ms Hutton, her response was to suggest deficiencies in the way her statement was written and the construction placed upon it by the Committee. Ms Hutton also suggested that her actions were justified by her desire to avoid criticism of the Courts.

Committee Comment

Once again this Committee notes the matter-of-fact way in which a Departmental Secretary viewed it as their responsibility to colour the advice provided to a Minister to avoid; "*political criticism*". In this instance however, by Ms Hutton's own admission, she prepared a Question Time Brief for her Minister which; "*by design*" was; "*written in such a way to avoid mentioning the true reason for the appointment delay*." It is one thing for a member of a Minister's staff to assist a Minister to mislead the House or the public, including clever half truths. It is quite another thing for a Head of Agency, bound by section 8 of the *State Service Act 2000* to have done so. It is not constitutionally appropriate, formally or as a matter of political science, for a Head of Agency to seek to deflect discussion of a judicial appointment process, by deliberately concealing and misleading the facts of a so-called delay in the process. Political criticism is essential to responsible government in a parliamentary democracy, such as Tasmania. It is emphatically not something which, in itself, is an evil which a Head of

> Agency should seek to avert by advising a Minister to mislead the House. It also follows that the notion of correct information; "*unnecessarily*" leading to political criticism is wrongheaded. It cannot be necessary for political discussion to proceed on an incorrect basis, known to be so by someone in a position to prevent it from thus proceeding. The converse, rather, must be true.
>
> The fact that past, and current Heads of Agency, including some of the State's most senior officials, appear to regard such an approach to the duties of their office as normal practice is one of the most concerning facts to have emerged from this Committees enquiries. Rather than assisting Ministers in the discharge of their functions, such gratuitous advice is bound to lead Ministers into error. In addition, it shows scant regard for the pre-eminence of the Parliament as the State's duly constituted and democratically elected legislature and inquest.

On Monday, 20 August 2007, the Executive Council approved the appointment of Mr Glenn Hay as a Magistrate in Tasmania commencing on Monday, 3 September 2007 (Hutton, Statutory Declaration 2 2008, 42). The appointment was publically announced later the same day by Attorney-General Kons.

April 2008

On Saturday, 5 April 2008, an article was published in the *Mercury* newspaper entitled; "*Magistrate Job Axed: Former Head of PS Hornsey Interceded*". A copy of the article is reproduced at Appendix 16 to this report. The article was written by *Mercury* journalist Ms Sue Neales. The opening section of the article reads as follows:

> *The former head of Tasmania's public service, Linda Hornsey, personally intervened last year to stymie the appointment of a new magistrate by then Attorney-General Steve Kons.*
>
> *Despite Mr Kons having signed a letter last July appointing the Resource Planning and Development Commission executive commissioner Simon*

Cooper to the Magistrates Court, Ms Hornsey was instrumental in having the appointment stopped at the last minute.

Ms Hornsey, then-secretary of the Department of Premier and Cabinet, is understood to have phoned Mr Kons before his signed letter confirming Mr Cooper's appointment as a magistrate was dispatched for inclusion in Cabinet documents.

As will be appreciated, the above passage substantially accords with known facts. The *Mercury* article understandably drew the attention of Ministerial media advisor to Attorney-General Stephen Kons MP, Mr Rohan Wade. In a sworn statement made out by Mr Wade and taken into evidence by this Committee, Mr Wade gave an account of some of the events that thereafter unfolded (Wade 2008, 2):

I subsequently discussed the article with Mr KONS. Mr KONS detailed to me that there was no letter to Mr COOPER. I identified that the statement by the "Mercury" *was therefore inaccurate and that Mr KONS was comfortable with a rebuttal of the article. I decided that the strategy relating to the rebuttal would centre on the fact that there was no* "letter"*.*

As a result, I made contact with Lisa HUTTON, the Secretary of the Department of Justice for her advice as the appointment of a Magistrate was within her jurisdiction. I confirmed the process of a magistrate with Lisa HUTTON for my understanding. Lisa HUTTON explained the appointment process to me and confirmed that no letter was sent to any appointee or otherwise. She stated words to the effect of, "the article shows a complete ignorance of the appointment process. To think that a Magistrate would be appointed by a letter is completely incorrect."

I subsequently compiled a draft response to the article. I can recall that I discussed the draft response with Mr KONS verbally over the telephone. I may also have emailed him a copy of the response, I am unsure. I can recall that either way, Mr KONS was satisfied with the content of the draft.

I recall that I had at least two contacts with Lisa HUTTON in relation to the media release. I recall that I may have emailed her a copy of the draft for her

> *assessment. I don't recall any changes that she made or suggested to the media release.*

In a sworn statement taken into evidence by this Committee, Ms Lisa Hutton affirmed that she read the *Mercury* article on Saturday, 5 April 2008 (Hutton, Statutory Declaration 2 2008, 6):

> *On 5 April 2008 I read the* Mercury *article* "Magistrate job axed"*. At the time I was at Jackman and Mcross and it was prior to me receiving a phone call from the Deputy Premier's media advisor, Rohan Wade. At the time of reading the article I had no memory or recollection of COOPER being the intended appointment and that documents with his name had been prepared and destroyed. The article, my conversations with WADE and my subsequent preparation of an email to WADE did not prompt my memory in this regard. When WADE spoke with me we focussed our discussions on the "*signed a letter*" reference and not the general substance of the article. I returned home and I accessed my work computer server remotely and I prepared an email to send to WADE. This email detailed the process and the timing surrounding the Magistrate's appointment.*

In addition, before this Committee Ms Hutton testified that when she read the article on Saturday, 5 April 2008 (Hutton, Transcript of Evidence 2008, 39):

> *... the story at the time was run along the lines that the Attorney had signed a letter appointing Mr Cooper or offering him appointment or something of that nature. I looked at it and thought that was ridiculous because that was not how the process works at all. So that could not possibly be true.*

Committee Comment

Ms Hutton's evidence regarding the *Mercury* article of Saturday, 5 April 2008 is remarkable in at least three respects. The first of these is the fact that, out of the entire *Mercury* article, the one point on which she found herself fixated was the distinction between a; "*letter of appointment*" and a; "*Cabinet Brief*", rather than taking any account of; "*the general substance of the article*". The second remarkable aspect of Ms Hutton's evidence is that, after reading the article and discussing it in detail with Mr Rohan Wade, she; "*had no memory or recollection of*

COOPER being the intended appointment and that documents with his name had been prepared and destroyed". The third remarkable aspect of Ms Hutton's evidence in this regard, relates to the research she undertook on Saturday, 5 April 2008 to assist Mr Wade's drafting of a Ministerial Media Release responding to the *Mercury* article. As indicated in the above extract of Ms Hutton's sworn statement (Hutton, Statutory Declaration 2 2008, 26):

> *I returned home and I accessed my work computer server remotely and I prepared an email to send to WADE. This email detailed the process and the timing surrounding the Magistrate's appointment.*

The email to which Ms Hutton refers in her sworn statement was sent to Mr Wade at 1:29pm on Saturday, 5 April 2008, and contains the following three paragraphs of relevance (Hutton, Statutory Declaration 2 2008, 120):

> *On 4 June I sent a minute to the AG advising him of the three candidates who, in the assessment of the CM* [Chief Magistrate] *& I,* 'particularly deserved consideration for appointment'*. Glenn Hay was amongst those three.*
>
> *Some time between June and early August the AG made his choice & communicated that to me – possibly verbally only but probably also by endorsing it on the original of the minute of 4 June and sending it back to the Dept.*
>
> *On 8 Aug we sent over a Minute enclosing a Cabinet Brief for the AG to sign which advised Cabinet of the proposed appointment of Glenn Hay. Cabinet noted the matter on 13 Aug.*

The level of particularity and detail evinced by Ms Hutton's email to Mr Wade is testament to either a singular memory for detail, or a thorough review of the relevant files and emails, or both. The passage Ms Hutton quotes is indeed taken word for word from her Monday, 4 June 2007 minute to Attorney-General Kons.

The particularity of Ms Hutton's wording, when she stated; "*Some time between June and early August the AG made his choice &*

communicated that to me", without actually saying what the Attorney's choice was, is also striking. The reference in the final paragraph of the above extract to the exact date of the email exchange with the Burnie office is also singular. This date was not mentioned in the *Mercury* article of Saturday, 5 April 2008, and such a level of detail suggests an intimate acquaintance (either from memory or as a result of an email search) with the events of Wednesday, 8 August 2008. Against such a background, it is notable that Ms Hutton should have included such a detailed and factually accurate observation as; "*Some time between June and early August the AG made his choice & communicated that to me*" and yet leave out the fact that the Attorney's choice at that time was actually Mr Simon Cooper.

On the evidence available to this Committee, it is open to the reasonable person to infer that Ms Hutton intended to create the impression that Mr Hay was the choice that was communicated to her by the Attorney between June and early August. In fact, as is discussed above, that choice was Mr Cooper. In its own way, it could reasonably be characterised as a central pillar around which a deliberate strategy of misinformation was concocted by Ministerial staffers on Saturday, 5 April 2008, for purely political purposes. It could equally be characterised as yet another; *"clever"* half-truth designed to deceive the intended audience about the true circumstances surrounding a judicial appointment.

In light of the foregoing, this Committee makes the following finding with respect to Ms Lisa Hutton:

Finding 3

This Committee finds that the conduct of Ms Lisa Hutton in firstly; producing what was, by her own admission, a deliberately misleading Question Time Brief on Wednesday, 15 August 2007 in relation to a judicial appointment in this State, and secondly; producing a carefully crafted misleading statement of facts in relation to the same judicial

> *appointment for the information of the Attorney-General's Media Advisor on Saturday, 5 April 2008; may both constitute significant breaches of her obligations under section 8 of the* State Service Act 2000*. In particular, this Committee finds that Ms Hutton's conduct constitutes an egregious breach of the State Service Principles as defined at subsections 7(1)(a) and (1)(g) of that Act without any justification under subsection 7(1)(e).*

It should be noted that as a matter of fairness, this finding was specifically put to Ms Hutton. Ms Hutton refuted the substance of this finding, but could adduce no persuasive evidence that suggested to this Committee that the finding was unwarranted. In light of the above finding, the Committee makes the following recommendation :

RECOMMENDATION 5.

The Committee **recommends** that, pursuant to s14(1) of the *State Service Act 2000*, the Premier should immediately direct the State Service Commissioner to delegate his powers of investigation, under s18(1) of that Act, to an independent judicial officer for the purposes of examining the conduct of Ms Lisa Hutton disclosed in this Report, to determine if the conduct so disclosed constitutes a breach of the State Service Code of Conduct at subsections 9(1), (2), (10), (13) and (14)[23]

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[23]

9. The State Service Code of Conduct

(1) An employee must behave honestly and with integrity in the course of State Service employment.

(2) An employee must act with care and diligence in the course of State Service employment.

...

(10) An employee must not knowingly provide false or misleading information in connection with the employee's State Service employment.

...

(13) An employee, when acting in the course of State Service employment, must behave in a way that upholds the State Service Principles.

(14) An employee must at all times behave in a way that does not adversely affect the integrity and good reputation of the State Service.

of the *State Service Act 2000*; and the State Service Principles at subsections 7(1)(a) and (g) of that Act. In the event that such an independent investigation finds that Ms Hornsey did, in fact, breach the State Service Code of Conduct, the Committee **recommends** that the Premier should take such action as is recommended by the independent judicial officer so appointed.

In April 2008, Mr Gary Hill was the Ministerial Head of Office for Attorney-General Steven Kons MP. Mr Hill made out a sworn statement which has been taken into evidence by this Committee. According to Mr Hill's sworn statement (Hill 2008, 2):

> *The following Monday the 7th April 2008, I had meetings with Steve KONS, Peter PEARCE and Rohan* [WADE] *was present for some of these. It was essentially to* 'script' *a response for Steve KONS in parliament when he was eventually going to be asked questions on this appointment. We held the view that KONS would be questioned over the matter.*
>
> *It was obvious to me that the* 'Mercury' *must have had some form of document because of the factual nature of the report. ...*
>
> *I also recall on this day, that during this meeting on the Monday when we were establishing what his (KONS) stance would be in relation to any questioning in Parliament, he (KONS) informed me that he had received a phone call from Linda HORNSEY the day the document was* 'shredded'*. From the conversation with Steve KONS on this day, he informed me that he actually* 'shredded' *a document that day. He stated to me that HORNSEY had phoned him, and it was as a result of this call that he changed his mind, and he wasn't going to pursue the path of COOPER and he would look at another candidate.*

Mr Hill has subsequently advised this Committee that, while Ms Hutton did not attend the meeting in question, she did meet with the same group of individuals on the same day to discuss matters relevant to Mr Kon's Parliamentary responsibilities.

The Hansard record of proceedings for the House of Assembly from Tuesday, 8 April 2008, indicates that at 10.29am Mr Nick McKim MP addressed a question without notice to then Deputy Premier and Attorney-General, Mr Steven Kons MP about the Saturday, 5 April 2008, *Mercury* article. The following is an extract of the relevant Hansard record of proceedings:[24]

> ***Mr McKIM*** *(Question) - My question is to the Deputy Premier. Deputy Premier, are you aware of allegations contained in the Mercury newspaper on Saturday 5 April that last year, when you were Attorney-General, you signed a document relating to the appointment of Simon Cooper as a magistrate and that the then Secretary of the Department of Premier and Cabinet demanded that the document be destroyed? Is it not a fact that the media release issued in your name on Saturday 5 April failed to address either of those specific allegations, instead denying the existence of a letter to Mr Cooper, an allegation that was not made? Deputy Premier, I will now give you another opportunity to respond to the allegations contained in the Mercury. Did a document relating to the appointment of Simon Cooper as a magistrate exist last year and did you sign it? Are you aware of any request from the then Secretary of the Department of Premier and Cabinet that the document be destroyed? Was any document relating to the appointment of Simon Cooper as a magistrate destroyed?*
>
> ***Mr KONS*** *- I thank the member for his question. I am aware of that article. The answer to the second and third question he asked is no and no. ...*

The Hansard record of proceedings for the House of Assembly from Tuesday, 8 April 2008, further indicates that, at 11.02am Hon Michael Hogman QC MP addressed a question without notice to then Deputy Premier and Attorney-

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[24] Hansard, Tasmania, House of Assembly, Tuesday 8 April 2008 <http://www.parliament.tas.gov.au/HansardHouse/isysquery/396019c1-8184-4659-90e1-557085e212c5/3/doc/h8april1.pdf> at p 8.

General Steven Kons MP about the Saturday, 5 April 2008, *Mercury* article. The following is an extract of the relevant Hansard record of proceedings:[25]

> ***Mr MICHAEL HODGMAN*** *- Will you tell the Parliament whether you said anything to Mr Simon John Cooper which might have conveyed to him the idea that you actually proposed to recommend his appointment as a magistrate?*
>
> ***Mr KONS*** *- No, I did not convey or say anything to Mr Simon Cooper about him being appointed as a magistrate. Mr Cooper was and has been on the RPDC and RMPAT during my term as Minister for Planning and the only things we discussed have been in relation to that. I have had two dinners with Mr Cooper and there was just general discussion about RPDC matters and RMPAT and a further one with a group of other lawyers which was just an introduction of myself to a young group of lawyers who wanted to know what was going on in this State and what my views were about the Attorney-General's portfolio.*

Mr Gary Hill's sworn statement contains the following observations concerning the relevant parliamentary debate on Tuesday, 8 April 2008 (Hill 2008, 2):

> *I listened to the questions put to KONS by* 'live stream' *direct from my PC and immediately thought that his response was very serious and that he had mislead parliament. I was shocked at his response because it was not the way we had discussed it* [the previous day].

Mr Hill has subsequently advised this Committee that, following these events, he immediately discussed his concerns with at least two other persons including the then Premier's Chief of Staff. Mr Hill's testimony is that, later that day he asked Mr Kons why he had mislead Parliament and the answer he received at that time was that Mr Kons thought that as the document had been shredded, it could not be produced in Parliament.

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[25] Hansard, Tasmania, House of Assembly, 8 April 2008 <http://www.parliament.tas.gov.au/HansardHouse/isysquery/396019c1-8184-4659-90e1-557085e212c5/3/doc/h8april1.pdf> at p 19.

The Hansard record of proceedings in the House of Assembly for Tuesday, 8 April 2008, indicates that at the conclusion of the above exchange between Mr Kons and Mr Hodgman, the reconstructed First Cabinet Brief shredding waste were tabled, as a single document, by leave of the House of Assembly on motion of Mr Kim Booth MP at 11.04am.[26]

The Hansard record of proceedings in the House of Assembly for the same day further indicates that, at 6.00pm Mr Stephen Kons MP rose at the adjournment and made the following statement:

> ***Mr KONS*** *(Braddon - Deputy Premier) - I wish to make a statement to the House in relation to matters raised during question time and to clarify the answers I provided at that time. These matters relate to the appointment of Glenn Hay as a magistrate in the State of Tasmania. I wish to acknowledge that a document tabled by the member for Bass, Mr Booth, arrived in my Burnie office from the Department of Justice, having been prepared on the basis that Mr Simon Cooper be appointed as magistrate. Subsequent to signing this document and before I returned the document to the department, I decided to again consider the advice I had received in relation to this appointment and evaluate the relevant qualifications of the individuals that the secretary of the department and the Chief Magistrate had recommended.*
>
> *Appointing individuals to high-profile and in some cases highly-coveted positions is not without some degree of risk that the appointment will not be welcomed or somehow seen as the wrong choice, particularly in the case of making a judicial appointment. It is imperative that the public have the utmost confidence in that person and I was conscious of the fact that other appointments involving Mr Cooper had been publicly criticised as Labor cronyism.*
>
> *I also had a conversation with the former Secretary of the Department of Premier and Cabinet, Linda Hornsey, regarding the appointment and her concerns about how it may have been perceived. As Deputy Premier, it*

[26] Hansard, Tasmania, House of Assembly, 8 April 2008 <http://www.parliament.tas.gov.au/HansardHouse/isysquery/396019c1-8184-4659-90e1-557085e212c5/3/doc/h8april1.pdf> at p 19.

was commonplace for me to discuss a range of issues with Ms Hornsey. It is also normal practice when it comes to assessing appointments to obtain a range of opinions to ensure the best applicant is selected. It was perfectly proper for the Secretary of the Department of Premier and Cabinet to be afforded the opportunity to express an opinion to me, but ultimately the recommendation I take to Cabinet is my decision and mine alone.

On examining the relevant qualifications, I concluded that Mr Hay's experience of serving as a temporary magistrate, along with his significant experience as a legal practitioner, made him the best person to become the next magistrate. Having made this decision, I communicated it to the Secretary of the Department of Justice. As the previous document prepared by the department was no longer valid, it was appropriate to have that document shredded, and I did so. This eliminates the chance of an earlier version of a document becoming wrongly referred to in future considerations. I was fully committed to the appointment of Mr Hay and this was the recommendation I took to Cabinet. Cabinet endorsed this recommendation and Mr Hay was duly appointed by the Executive Council. I emphasise that this appointment has been widely regarded as a good one and from all accounts Mr Hay is excelling in his role.

Having had the opportunity to revisit my recollections of the dinner I had with Mr Cooper, I recall that there was a discussion regarding the coming magistrate's appointment and I indicated to him at that time that I would view his expression of interest in the position favourably on the basis that he was doing an excellent job on RMPAT at that time, a role he continues to perform with distinction. It is now a matter of record that Mr Cooper was considered for the position but that Mr Hay's previous experience made him the most appropriate person to be appointed and Tasmania's justice system is being well served by this appointment.

I wish to place on record my apologies to the House for making any inaccurate statement in regard to these matters. As members can no doubt appreciate, it is easy to become confused as to the exact detail of what is being asked, given the questions contained several layers of individual questions. I would like to apologise unreservedly to Mr Cooper

> *and Mr Hay for the fact that this matter has brought their names into this House.*

The Hansard record of proceedings in the House of Assembly for Wednesday, 9 April 2008 indicates that, at 6.00pm Mr Stephen Kons MP again rose on the adjournment and confirmed to the House of Assembly that he had resigned as Deputy Premier earlier that day. In the course of his remarks, Hansard records that the following comments were made by Mr Kons:[27]

> *I wish to emphasise that at no time did I intend to wilfully mislead the Parliament and I took the earliest available opportunity to correct the record. I realise that the correction does not absolve the initial mistake and for that there must be a consequence. I reiterate that at no stage of my decision to recommend Glenn Hay to be appointed as a magistrate was I instructed by the Premier or the Premier's office not to recommend Simon Cooper, nor was I pressured by the former Secretary of the Department of Premier and Cabinet, Linda Hornsey.*

Committee Comment

The above Hansard record may be at odds with the sworn testimony taken into evidence by this Committee of Mr Kons' then Ministerial Head of Office Mr Gary Hill. Such an inconsistency raises the question as to whether Mr Kons' assertion that he did not; "*intend to wilfully mislead the Parliament*", on the morning of Tuesday, 8 April 2008, can be supported. The Committee notes that this significant inconsistency is yet to be adequately accounted for by Mr Kons.

The Committee notes that, given differing evidence from Mr Kons himself and other witnesses before this Committee, there is considerable uncertainty about the accuracy of Mr Kons' claim that he was not; "*pressured by the former Secretary of the Department of Premier and Cabinet, Linda Hornsey*", or any other person against appointing Mr Simon Cooper as a Magistrate.

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27 Hansard, Tasmania, House of Assembly, Wednesday, 9 April 2008 <http://www.parliament.tas.gov.au/HansardHouse/isysquery/e0346036-192a-4b0c-932d-fa5a752dd0ac/34/doc/h9april2.pdf> at p 94.

Comparison With World's Best Practice

This Committee has investigated the appointment of a Magistrate in Tasmania in 2007, using the available powers of the Legislative Council.

On the basis of evidence before it, this Committee is able to make a reasoned judgment about the extent to which the processes followed in 2007 represent, or are at variance with, world's best practice. This judgement is made easier for the Committee given that, in 2002, an operating policy of the Department of Justice was in place which, by and large, represented world's best practice, adapted to local circumstances. The following table indicates how the processes used in 2007 meet, or are at variance with, the Departmental policy of 2002:

2002 Policy	2007 Practice
Expressions of interest to serve on an unpaid nomination committee are invited by public advertisement.	Not followed.
Nomination committee appointed by the A-G. Committee to comprise:	Not followed.
• Judge's or Magistrate's Representative	Not followed.
• Secretary for the Department of Justice	Ms Lisa Hutton conducted a nomination process of sorts in consultation with the Chief Magistrate.
• Senior lawyer with litigation experience (eg: Barrister)	Not followed
• Senior Lawyer with commercial practice experience (eg: Solicitor)	Not followed
• Two lay members with staff selection/ appraisal experience	Not followed.
Expressions of Interest for the Judicial Appointment are invited by public advertisement	Expressions of Interest advertised in newspapers on 2 May 2007.
Prospective candidates address the selection criteria in writing	Required in the Public Advertisement.

2002 Policy	2007 Practice
Candidates meeting the criteria are interviewed by the nomination committee	Not followed. Chief Magistrate Shott assessed a list of names while on leave overseas on the basis of personal knowledge and a brief statement of eligibility criteria.
The nomination committee to consult confidentially with:	
• Law Society	Contacted by Ms Hutton only after the A-G made his final decision in favour of Mr Hay.
• Bar Association	Not followed
• DPP	Not followed
• Solicitor-General	Not followed
• Chief Justice	Not followed
• Chief Magistrate	Chief Magistrate Arnold Shott conducted a nomination process of sorts in consultation with the Secretary for the Department of Justice.
• Applicant's Referees	Unclear to what extent this occurred (if at all).
A-G determines nominee from a short-list produced by the nomination committee.	A-G Kons changed his mind following a last minute telephone call from the Secretary for the Department of Premier and Cabinet.
Prior to Cabinet, candidate required to sign forms:	Not followed. Mr Hay was invited to the Hobart Magistrate's Christmas Party prior to Cabinet's endorsement.
• Authorising a Police Check.	Not followed.
• Declaring potential conflicts of interest, including all private interests from the previous 12 months.	Not followed.
• Declaring possible breaches of tax laws.	Not followed.
• Including a statement in connection with bankruptcy and financial difficulties.	Not followed.

2002 Policy	2007 Practice
A-G proceeds to Cabinet with the Nominee.	A-G Kons proceeded to Cabinet with Mr Hay's nomination on 13 August 2007.

As can be seen by reference to the above comparison, the practices adopted by the Department of Justice, and approved by the then Attorney-General Mr Steven Kons MP, resulting in the appointment of a Magistrate in this State in 2007 were significantly, and negatively, at variance with the Department of Justice's own policy of 2002. Indeed, in comparison with Hon Dr Peter Patmore's 2002 protocol, the processes used within the Department of Justice, and approved by Attorney-General Kons, in 2007 can best be described as perfunctory. That policy was not formally superseded until August 2008. The Committee therefore makes the following finding:

Finding 4

The Committee finds that the process of appointing a Magistrate in this State in 2007 was significantly, and negatively, at variance with the Department of Justice's own 2002 policy document which outlined world's best practice adjusted to local circumstances. These variances relate to:

- *A substantial lack of appropriately catalogued documentary evidence in support of the entire process.*
- *The non-appointment of a sufficiently diverse and independent nomination committee.*
- *A demonstrably inadequate level of attention by the nomination committee, such as it was, to the extent that candidates demonstrated a satisfaction of the selection criteria in their written applications.*
- *Not interviewing all potential suitable candidates for appointment.*
- *A substantial lack of adequate professional consultation prior to the generation of a short-list.*

- *A lack of independent judgment on the part of the then Attorney-General at crucial points in the selection process.*
- *Failures in due process, especially with respect to the inordinate influence of the Department of Premier and Cabinet over the final nomination decision.*
- *A lack of basic human resource due diligence up to, and including the point of Cabinet consideration.*

This Committee has been advised that the present Attorney-General has requested a review of Department of Justice policy with respect to the appointment of judicial officers. In light of this Committee's enquiries, it is perhaps stating the obvious that such a review would do well to simply revert back to the Government's own prior policy of 2002, with the single exception of introducing a third-party nomination mechanism to capture suitable candidates who are too reticent to trumpet their own suitability for such appointments. In light of this the Committee makes the following recommendation:

RECOMMENDATION 6.

The Committee **recommends** that the Government should immediately reinstate its Judicial Appointments Policy of 2002, as reproduced at Appendix 6 to this report, with the sole inclusion of a third-party nomination procedure as per the Federal Court judicial appointments policy.

4. GENERAL DISCUSSION

In testimony before this Committee, former Premier Hon Paul Lennon observed (Lennon, Transcript of Evidence 2008, 4):

> **Mr LENNON** - The irony, of course, with this magistrate matter is that you are having an investigation into to why someone did not get a job rather than why Glenn Hay did. That is what is going on here. To me it is around the wrong way.

The same sentiment, if not the precise words, expressed by Mr Lennon in the above passage was shared by a number of other witnesses before this Committee. The question has effectively been asked; *"Why can't we put a line under this thing and just move on?"*

The Committee notes that such sentiments are not new phenomena in the political domain, especially during episodes of controversy. The Committee is of the view that, notwithstanding the situational appeal of such a sentiment, it is nevertheless objectionable. Such a sentiment is objectionable, first from an ethical perspective, and secondly in that it offends against the basic scientific method. Ethically speaking, such an argument, taken to its fullest expression, requires community standards to be applied differently to different people. That proposition is offensive to the principle of the rule of law. It is imprudent to ignore the results of a flawed experiment or process, if one wishes to perfect that experiment or process.

This Committee has examined the available evidence in order to determine the truth of what happened during the process of appointing a Magistrate in this State in 2007. Whereas the Police and the DPP are restricted in their enquiries by the narrow and technical elements of specific criminal offences, this Committee has been concerned to ascertain the simple truth. In addition, while matters of criminal culpability are decided by proof beyond reasonable doubt, this Committee has been entitled to make its findings based on the weight of the evidence.

Unfortunately, despite a comprehensive police investigation, and a forensic review of available evidence by a Select Committee of the Legislative Council with all of its powers of inquiry, there are still key facts that have not been ascertained. The basic question has to be asked; *"Is such an outcome acceptable in a modern representative democracy under the rule of law?"* To this question, this Committee answers an emphatic; Absolutely Not.

The principal reason why this Committee cannot report the full truth of what occurred is that the Executive Government did not follow its own, worlds-best-practice judicial appointments policy, which had been appropriately adapted to local conditions. In addition to this failure of process, the documentary trail underpinning the process that was followed, such as it was, was sub-standard. Even worse, some of the few key documents that actually were produced, were deliberately destroyed. Evidence has been presented in this Report that supports the view that this destruction of documents occurred to deliberately prevent the truth ever being known. Other interpretations may be possible.

This Committee has presented evidence that Heads of Agencies have interpreted their roles as being not only political advisors, but political actors, in the discharge of their functions. It may be that such an interpretation of the role of a Departmental Secretary is accepted by the general community and endorsed by the Parliament. However, this Committee has formed the view that such an interpretation sits uncomfortably with the requirements of the *State Service Act 2000*. While this is not a question that concerns the machinery of the criminal justice system, it is certainly a matter that goes to the heart of the public interest, and therefore is of significant relevance to Parliamentary debate.

Relevant to this debate is the fact that this Committee is unable to determine precisely whom it was, who instructed the Secretary for the Department of Justice to prepare the Cabinet Brief appointing Mr Glenn Hay as a Magistrate. There was no such documentary instruction. The Committee has good reason to believe that this instruction did not come from Mr Steven Kons MP. On balance, it appears likely that the instruction came from Ms Linda Hornsey, acting on her own authority and for reasons that are highly suspect.

If Mr Steven Kons MP is to be believed, he never wanted to appoint Mr Cooper to the position. As far as his testimony can be regarded as coherent, it is effectively that he was obliged to nominate Mr Cooper as a result of meetings he had with Premier Lennon and Ms Hornsey.

According to Mr Kons, after his telephone call with Ms Hornsey on Wednesday 8 August 2007, he was; "*very pleased with*" the choice of Mr Hay; "*as he would have been my original preferred candidate*." This testimony is consistent with the proposition that Mr Kons was operating under a fetter to his discretion between Wednesday 7, June 2007, and Wednesday, 8 August 2007, on which later date, that fetter was lifted by Ms Hornsey. The fact that Mr Kons appeared to have been so willing to then sign a document that was prepared on the instructions of another is either testament to a discretion that has truly been unfettered, or of a willing puppet acting on instructions.

It is open, on the evidence presented in this Report, for a reasonable person to conclude on balance, that the Lennon Government's commitment to the Pulp Mill was such that any and all obstacles to its expeditious approval had to be eliminated. While Mr Cooper conduct was the Acting Executive Commissioner of the RPDC, that agency denied the Premier's Office from implementing its own preferred truncated approval process for the Pulp Mill application. It was Mr Cooper, in his duly appointed role as acting head of the RPDC, who defended the Pulp Mill Approval Committee's entitlement to chart its own course as an independent planning approval agency during the assessment process.

Such was the depth of commitment to the Pulp Mill within the Lennon Government, that the Secretary for the Department of Premier and Cabinet, Ms Linda Hornsey evidently took it upon herself to intervene in the proper internal processes of an independent, quasi-judicial agency of government. That same departmental Secretary was subsequently instrumental in denying a Freedom of Information request for documents that revealed her involvement in that matter. The same departmental Secretary subsequently suggested shredding the original copy of a document, nominating to Cabinet for appointment as a Magistrate, the person responsible for the agency which allowed an identical Freedom of Information request.

There is credible evidence before this Committee that supports an inference that the Secretary for the Department of Premier and Cabinet intervened with a judicial appointment process on the basis of irrelevant considerations, including the very real possibility of personal payback.

The Secretary for the Department of Justice, by her own admission prepared a Question Time Brief for her Minister in such a way that it would not disclose the truth, while being factually accurate. The intention of that document was that it should prevent the Parliament from discovering the truth in connection with a judicial appointment in this State. This same Secretary produced carefully worded Ministerial briefing documentation in response to a media article which similarly did not disclose the whole truth while retaining strict (if strained) factual accuracy.

Evidence before this Committee concerning the withdrawal of Gunns Ltd from the RPDC Pulp Mill assessment process is inconsistent with evidence presented by a former Premier to an Estimates Committee of the Legislative Council.

There is credible evidence before this Committee that suggests a former Attorney-General and Deputy Premier may have sworn a false Statutory Declaration in the course of a Police inquiry and given false testimony to a Select Committee of the Legislative Council.

5. CREDIBILITY OF WITNESSES

During the course of its inquiries on the matter of the appointment of a Magistrate in Tasmania in 2007, this Committee has had cause to reflect on the credibility of certain witnesses. The Committee's concerns, findings and recommendations are as follows:

Hon Paul Lennon

Sworn testimony given to this Committee by Ms Linda Hornsey, former Secretary for the Department of Premier and Cabinet, appears to be

inconsistent with evidence given by former Premier Hon Paul Lennon to the Legislative Council Estimates Committee A on Tuesday, 19 June 2007. That evidence relates to Mr Lennon's knowledge of the contents of a letter, dated Friday, 23 March 2007 and written by Mr Simon Cooper, to Mr Lennon regarding Gunns Ltd's critical non-compliance with the RPDC Pulp Mill Assessment process. According to Ms Hornsey; "*it is a fair assumption*", that Mr Lennon would have been told about the letter in question by her before Friday, 16 March 2007. Mr Lennon's evidence however, is that he; "*did not become aware until Simon Cooper*" sent him the letter on Friday, 23 March 2007.

In addition, the sworn evidence of Mr Simon Cooper before this Committee is inconsistent with evidence given by Hon Paul Lennon to the Legislative Council Estimates Committee A on Tuesday, 19 June 2007. The relevant evidence relates to the date on which Mr Lennon first became aware that Gunns Ltd intended to withdraw from the RPDC Pulp Mill Assessment process. Mr Cooper's sworn testimony, based on extensive contemporaneous notes, was that Mr Lennon telephoned him on Monday, 12 March 2007 and told him that; "*Gunns would be pulling out on 14 March 2007*". The Hansard record of proceedings shows that Mr Lennon testified before the Legislative Council Estimates Committee A on Tuesday, 19 June 2007 that his first knowledge of Gunns Ltd's intention to withdraw from the RPDC assessment process was; "*shortly after 1 o'clock on 14 March*." In addition Mr Lennon has testified before this Committee that he; "*definitely would not have talked to* [Mr Cooper] *about them withdrawing*." As discussed above, certain sworn testimony given by Ms Linda Hornsey to this Committee prefers Mr Cooper's version of these events.

The sworn testimony of Mr Steven Kons MP taken into evidence by this Committee was that he was given the; "*clear message*", during meetings he had with then Premier Hon Paul Lennon and Ms Linda Hornsey that Mr Cooper; "*was to be the nominee*", to fill the vacant position of Magistrate created by the retirement of Mr Roger Willee. Mr Simon Cooper gave sworn evidence that Mr Kons told him of Hon Paul Lennon's involvement in Mr

Cooper becoming the nominee. Ms Linda Hornsey's sworn testimony was that, sometime after she learned about Mr Cooper's candidacy for the vacant Magistrate position she; "*raised it confidentially with the Premier*." Despite the testimony of these three witnesses being substantially in accord about Mr Lennon's knowledge and participation in conversations concerning the nomination of Mr Cooper for the vacant position of Magistrate, the sworn testimony of Mr Lennon is that he; "*did not take any active interests* [sic] *in this appointment at all*", and that Mr Kons; "*never said to me that he wanted to appoint Simon Cooper. I did not discuss the matter*."

In light of these several inconsistencies, including sworn evidence that is directly contradictory to the testimony of Hon Paul Lennon before the Legislative Council Estimates Committee A on Tuesday, 19 June 2007, the Committee makes the following finding and recommendation:

> *Finding 5*
>
> *The Committee finds that, certain testimony of Hon Paul Lennon before this Committee relating to the appointment of a Magistrate in Tasmania in 2007 was inconsistent with that of a number of witnesses before this Committee.*

In light of this finding, the Committee makes the following recommendation:

> **RECOMMENDATION 7.**
>
> The Committee **recommends** that the testimony of, or otherwise concerning, Hon Paul Lennon before the Select Committee on Public Sector Executive Appointments be referred to the Privileges Committee of the Legislative Council to determine if and, if so, to what extent that testimony reveals a breach of the privileges, or is a contempt of the Legislative Council and, if that Committee so finds, what penalty, if any, the House might impose for the breach or contempt. The Committee **further recommends** that the Privileges Committee of the Legislative Council should utilise an independent Counsel assisting in order to

facilitate the gathering and assessment of evidence in connection with this recommendation.

Mr Steven Kons MP

As noted above in this report, Mr Kons has given sworn testimony that; "*at no stage was Mr COOPER my preferred nominee for the position of Magistrate*". Despite this assertion, other witnesses, including Mr Cooper and Ms Hutton have testified that Mr Kons told them that Mr Cooper was, in fact Mr Kons' preferred nominee. In addition, Mr Kons' own former Head of Office has given sworn evidence that corroborates a claim, made independently by Mr Cooper, that Mr Kons told the Head of Office that he intended to nominate Mr Cooper to the vacancy. *Res ipsa loquitur*,[28] there is also the evidence of the signed shredded Cabinet Brief which, in fact, did recommend Mr Cooper to the position.

Mr Kons made out a sworn statement that Mr Cooper's nomination for the vacant position of Magistrate was effectively that of the; "*Premier's office*". Mr Kons confirmed in questioning before this Committee that he was given the clear impression from that source that Mr Cooper was to be the nominee. Mr Kons' testimony was that this impression came from the Premier and Ms Hornsey, not through spoken words, but that he; "*read their mind*". Regardless of how implausible such an; "*impression*" may at first seem, it was taken so seriously by Mr Kons and his Secretary for the Department of Justice that retiring Magistrate Mr Roger Willee was asked to postpone his retirement date from Monday, 2 July 2007 to Monday, 27 August 2007. To facilitate this re-arrangement, an extension of Mr Willee's service was especially approved by the Executive Council on Monday, 25 June 2007.

On the question of why Mr Cooper was preferred as a nominee for the vacant position of Magistrate, Mr Kons' earliest sworn statement on this question suggests that it was because of dissatisfaction within the Premier's office with Mr Cooper's handling of the Pulp Mill assessment process. This suggestion

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[28] Literally, "*the thing speaks for itself*".

was refuted by Ms Hornsey, Mr Lennon and even by Mr Kons' own subsequent sworn testimony before this Committee in which he described it as; "*one of those fantasies that has overtaken the State*."

There is also a direct inconsistency between the sworn statement of Mr Gary Hill, taken into evidence by this Committee, and the Hansard record of proceedings of the House of Assembly from Tuesday, 8 April 2008 at 10.29am, which is yet to be explained by Mr Kons. That inconsistency relates to the existence and shredding of the Cabinet Brief recommending Mr Cooper. According to Mr Hill, the full circumstances surrounding that document were; "*scripted*", on Monday 7 April 2008 at meetings convened by Mr Kons with a number of his Ministerial advisors. The Hansard record of Mr Kons' explanatory remarks indicates that, on Tuesday, 8 April 2008 he was; "*confused as to the exact detail of what is being asked*", and that; "*at no time did I intend to wilfully mislead the Parliament and I took the earliest available opportunity to correct the record*". Yet, on the basis of discussions that took place at "*scripting*" sessions on Monday, 7 April 2008 with Mr Kons and his senior advisors, the ministerial Head of Office has testified that he:

> *... immediately thought that* [Mr Kons'] *response was very serious and that* [Mr Kons] *had mislead parliament. I was shocked at* [Mr Kons'] *response because it was not the way we had discussed it.*

The Committee also notes that, in the course of his testimony before this Committee, Mr Steven Kons MP made the following remarks (Kons, Transcript of Evidence 2008, 41):

> ***Mr KONS*** *- I will give you one sort of thing just as an example. Regarding your committee I do not have to tell you that I think this is just trawling over old ground, a nonsense, that sort of thing, but I think you can gauge that is my view because I read the terms of reference and you are trying to work out a good process of appointing magistrates and senior executives here and from what we have been discussing for most of the morning, I do not think you will be able to say to me that the next Attorney-General will get a recommendation from your Committee that says you interview this person, that person, and develop a process. I do not have to categorically tell you that I think it is a nonsense but you can gauge that clear message.*

This Committee notes that Mr Kons attended on this Committee freely, and by leave of the House of Assembly. By doing so, he placed himself under the jurisdiction of the Standing Orders of the Legislative Council, and the authority of the Black Rod. The Committee observes that the several substantial inconsistencies in Mr Kons' testimony, together with his contemptuous remarks in the face of a duly appointed Committee of the Parliament, raise serious questions about his character and credit as a witness. None of these matters reflects well on the dignity of the Parliament.

The Committee notes the following extract from a recent edition of Erskine May which relates to indignities offered to the House (Erskine-May, The Law, Privileges, Proceedings and Usage of Parliament 1989, 121):

> *Indignities offered to the House by words spoken or writings published reflecting on its character or proceedings have been constantly punished by both the Lords and the Commons upon the principle that such acts tend to obstruct the Houses in the performance of their functions by diminishing the respect due to them.*

This has been the position since before the coming into law of the *Parliamentary Privileges Act 1858*, as evinced by the following extract from the second edition of Erskine May (Erskine-May, The Law, Privileges, Proceedings and Usage of Parliament 1851, 76):

> *A wilful disobedience to orders, within its jurisdiction, is a contempt of any court, and disobedience to the orders and rules of Parliament, in the exercise of its constitutional functions, is treated as a breach of privilege. Insults and obstructions, also, offered to a court at large, or to any of its members, are contempts; and in like manner, by the law of Parliament, are breaches of privilege. ...* [Underlining added].

In light of these several inconsistencies, the Committee makes the following finding and recommendation:

Finding 6

This Committee finds that, certain testimony of Mr Steven Kons MP before this Committee relating to the appointment of a Magistrate in Tasmania in 2007 was inconsistent and unreliable. The Committee further finds, on the balance of the evidence before it, that Mr Kons cannot reasonably be regarded as a credible witness.

In light of this finding, the Committee makes the following recommendation:

RECOMMENDATION 8.

The Committee **recommends** that the testimony of Mr Steven Kons MP before the Select Committee on Public Sector Executive Appointments should immediately be referred to the Privileges Committee of the Legislative Council to determine if, and if so, to what extent that testimony constitutes a breach of the privileges, or is a contempt of the Legislative Council and, if that Committee so finds, what penalty, if any, the House might impose for the breach or contempt. The Committee **further recommends** that the Privileges Committee of the Legislative Council should utilise an independent Counsel assisting in order to facilitate the gathering and assessment of evidence in connection with this recommendation.

Ms Linda Hornsey

Ms Hornsey's last minute telephonic intervention in the signing and subsequent shredding of a Cabinet Brief nominating Mr Cooper by Mr Kons can be viewed as a pattern of interference in the independent function of Government departments and agencies for essentially political purposes. The Committee notes that the propriety of Ms Hornsey's conduct in these instances was questioned by Mr Cooper who described it as; "*troubling*", and Mr Kons who described it as; "*surprising*".

Ms Hornsey testified before this Committee that there was a very lengthy and detailed process between when the Premier's Office found out that Gunns

was withdrawing from the RPDC Pulp Mill assessment process and when the matter went to Cabinet. She further testified that this process; "*involved a number of very senior public servants. We worked over maybe one or two weekends*". Yet two lines of transcript later, Ms Hornsey stated that she found out that Gunns Ltd was withdrawing from the process; "*The day they did.*" These two sworn statements are directly inconsistent. Ms Hornsey later clarified these comments stating that the Government anticipated the likelihood of a withdrawal from the RPDC Pulp Mill assessment process by Gunns Ltd from sometime in February.

The sworn testimony of Mr Simon Cooper is that he was telephoned on Tuesday, 20 March 2007 by Ms Hornsey seeking him to; "*contradict* [a] *media release made by Chris WRIGHT*", on the same day. Ms Hornsey's testimony on this point was; "*I did not do that*". The Committee has reason to believe that reference to independent sources, including telephone records, may support Mr Cooper's testimony on this point.

Mr Steven Kons MP has given sworn testimony that he discussed his decision to nominate Mr Simon Cooper well in advance with the Premier and Ms Hornsey on a number of occasions. Despite this, Ms Hornsey's sworn testimony was that she first became aware of the matter when Ms Lisa Hutton told her; "*that the Attorney had asked for a cabinet minute to be drafted appointing Simon Cooper*". It is the view of the Committee that, on the balance of testimony before the Committee, Ms Hornsey's testimony on this point is not correct.

Ms Hornsey's sworn testimony before this Committee was that she; "*felt that because there were three appointable people perhaps those three names should be put before Cabinet.*" Ms Hornsey further testified that she "*requested* [Ms Hutton] *to have that conversation with the Attorney*." Finally on this point, Ms Hornsey testified that her; "*advice to the Attorney was still that the three suitable candidates go by way of recommendation to Cabinet.*" Ms Hornsey's testimony on this point was not supported by the sworn evidence of Ms Hutton who has stated that she did; "*not recall Linda*

HORNSEY expressing any view over COOPER'S appointment as a Magistrate other than in the context of filling the pending vacancies his appointment would create." Nor was Ms Hornsey's testimony on this point supported by Mr Kons who testified that; "*you don't go in* [to Cabinet] *with a list of names. You make your ultimate decision and put it forward to Cabinet and you have to bat for it. This way it's absolving your responsibility and passing on the buck*". The Committee further notes that the final Cabinet Brief documentation submitted to Cabinet via Ms Hornsey herself had only one name on it. The balance of evidence before this Committee on this point does not support Ms Hornsey's testimony.

To the extent that it can be independently verified, Ms Hornsey's involvement in the decision not to proceed with the nomination of Mr Simon Cooper as a Magistrate is entirely consistent with the hypothesis that it was motivated by irrelevant considerations. It is open, on a reasonable assessment of the evidence, to infer that Ms Hornsey either acted out of a desire to achieve certain political outcomes for the Lennon government, or out of a purely personal sense of payback, or both. A more detailed and forensic investigation could well confirm which of these inferences should be preferred.

> *Finding 7*
>
> *The Committee finds that, certain testimony of Ms Linda Hornsey before this Committee relating to the appointment of a Magistrate in Tasmania in 2007 was inconsistent and unreliable.*

In light of this finding, the Committee makes the following recommendation:

RECOMMENDATION 9.

The Committee **recommends** that the testimony of Ms Linda Hornsey before the Select Committee on Public Sector Executive Appointments should immediately be referred to the Privileges Committee of the Legislative Council to determine if, and if so, to what extent that testimony constitutes a breach of the privileges, or is a contempt of the Legislative Council and, if that Committee so finds, what penalty, if any, the House might impose for the breach or contempt. The Committee **further recommends** that the Privileges Committee of the Legislative Council should utilise an independent Counsel assisting, in order to facilitate the gathering and assessment of evidence in connection with this recommendation.

Ms Lisa Hutton

The reasonable observer could draw the inference from Ms Hutton's testimony that the destruction of Government records relating to the nomination of Mr Cooper was a deliberate strategy to avoid the possibility that they might; "*unnecessarily expose the appointment to political criticism*." (Hutton, Statutory Declaration 2 2008, 6). Such an inference, if accurate, strikes at the foundation of democratic institutions in this State. The fact that such a threat to those institutions is either ignored, or is otherwise not appreciated, by the most senior public servants indicates a dangerous cultural malaise within Government.

As has already been noted above in this report, when the Committee repeatedly attempted to ascertain from Ms Hutton the source of the instruction she received to prepare the Cabinet Brief documentation nominating Mr Glenn Hay, the responses received from Ms Hutton were evasive, inconsistent and incoherent. Such testimony is a clear breach of Ms Hutton's oath before the Committee to; "*tell the truth, the whole truth and nothing but the truth*." It is a matter of verifiable fact that this documentation was being prepared in Ms Hutton's office while Mr Kons was on the telephone to Ms Hornsey. Following

that telephone call, there are no recorded telephone calls or emails between Mr Kons and Ms Hutton, prior to delivery of the Cabinet Brief documents nominating Mr Hay. The clear inference that can be drawn from Ms Hutton's unreliable testimony, taken together with the lack of recorded communication between herself and Mr Kons, is that Ms Hutton prepared the Cabinet Brief documents at a direction from Ms Hornsey, prior to that latter person's telephone call to Mr Kons.

Ms Hutton's willingness to manipulate her advice as a Head of Agency for purely political purposes appears to have reached its apotheosis in her involvement with the Ministerial response to the *Mercury* article of Saturday 5 April 2008. Her very detailed email on that day to the Attorney-General's media advisor was crafted carefully enough to create the incorrect impression that Mr Glenn Hay was at all times the preferred nominee for the vacant position of Magistrate, while retaining factual accuracy. However, what a reasonable observer might choose to characterise as deception-by-omission, Ms Hutton ascribes to a persistent lapse of memory (Hutton, Statutory Declaration 2 2008, 6):

> *At the time of reading the article I had no memory or recollection of COOPER being the intended appointment and that documents with his name had been prepared and destroyed. The article, my conversations with WADE and my subsequent preparation of an email to WADE did not prompt my memory in this regard. When WADE spoke with me we focussed our discussions on the "*signed a letter*" reference and not the general substance of the article. I returned home and I accessed my work computer server remotely and I prepared an email to send to WADE. This email detailed the process and the timing surrounding the Magistrate's appointment. ...*
>
> *On Tuesday 8 April 2008 shortly after Mr BOOTH produced the shredded COOPER document in Parliament I was shown a copy of the document by the Premier Paul LENNON for the purpose of me confirming its authenticity. This occurred at Parliament House in the Premiers office. ... As a direct result of viewing the document my memory of the proposed appointment of COOPER returned to me.*

The Committee has formed the view that the above sworn statement of Ms Hutton received into evidence by this Committee, stretches credulity beyond its reasonable limits. This conception is entirely consistent with other findings relating to Ms Hutton's testimony before this Committee.

Finally, this Committee notes that Ms Lisa Hutton appeared before it under summons detailing the Order of Reference, and in circumstances which had attracted considerable publicity regarding evidence taken in public. In light of these facts, and given Ms Hutton's Departmental responsibility for the appointment of a Magistrate in 2007, the Committee notes the following exchange between the Chair and Ms Hutton during her public hearing (Hutton, Transcript of Evidence 2008, 18):

> ***Ms HUTTON*** *- ... If I had realised that you were going to be so interested in forensic detail I might have tried to get together as many of the details and times as I could, but that has not really been my focus. Nor did I expect that it would be the focus of the committee.*
>
> ***CHAIR*** *- Lisa, you would understand clearly from your past experience that Legislative Council committees do investigate issues forensically whether they are of this nature or whether they are of other matters. So to suggest that if you had been aware that we were going to be so forensic about the process you would have come better prepared is surprising. Other members can speak for themselves but I would have understood that you clearly are aware that Legislative Council select committees are thorough. You would have also understood that, with what has transpired in previous days with this committee, we have already been thorough.*

This Committee is concerned that Ms Hutton's admitted lack of preparation for her hearing might, in some way be viewed as a precedent to be followed by other Departmental Secretaries summonsed to appear before Committees of the Legislative Council. The Committee makes it clear that such a professional discourtesy on the part of Heads of Agency is not acceptable to duly appointed Committees of the Legislative Council.

Finding 8

The Committee finds that, certain testimony of Ms Lisa Hutton before this Committee relating to the appointment of a Magistrate in Tasmania in 2007 was evasive, inconsistent, incoherent and otherwise unreliable and that Ms Hutton is not a credible witness. Further, sworn testimony of Ms Hutton before this Committee suggests that the duties of her office have been discharged in a manner that is inconsistent with the public interest.

In light of this finding, the Committee makes the following recommendations:

RECOMMENDATION 10.

The Committee **recommends** that the testimony of Ms Lisa Hutton before the Select Committee on Public Sector Executive Appointments should be immediately referred to the Privileges Committee of the Legislative Council to determine if, and if so, to what extent that testimony constitutes a breach of the privileges, or is a contempt of the Legislative Council and, if that Committee so finds, what penalty, if any, the House might impose for the breach or contempt. The Committee **further recommends** that the Privileges Committee of the Legislative Council should utilise an independent Counsel assisting, in order to facilitate the gathering and assessment of evidence in connection with this recommendation.

6. ADDITIONAL INSTANCES OF CONTEMPTUOUS CONDUCT

During the course of its inquiries on the matter of the appointment of a Magistrate in Tasmania in 2007, this Committee has had cause to consider a number of additional matters, and form a view about whether or not they might warrant a recommendation of Contempt proceedings. In particular, the Committee has been concerned that numerous media articles and statements made in the public domain by individuals, including senior members of the legal profession, regarding the Committee's proceedings have been either factually inaccurate, based on an ignorance of Parliamentary law and practice,

or both. Some examples are reproduced at Appendix 17 and 18 to this Interim Report.

On a number of occasions, this Committee has had cause to consider whether such statements and commentary should be referred to the Legislative Council as prima facie contempts. On reflection the Committee has determined that it should simply note that these occurrences indicate a lack of understanding among commentators about the nature and purpose of the Legislative Council and its various Committees. It is incumbent on political commentators to not only get their facts straight, but to develop a mature understanding of the role of the Parliament out of which they can meaningfully report on its activities. In this respect the Committee notes that the; "*Parliament*" is defined at section 10 of the *Constitution Act 1934* as comprising the; "*Governor and the Legislative Council and House of Assembly*" as separate but inter-related constitutional entities.

BEST PRACTICE FOR PUBLIC SECTOR EXECUTIVE APPOINTMENTS

1. CENTRALITY TO THE ORDER OF REFERENCE

This Committee draws the attention of the Legislative Council to the fact that the above issue was at the core of its Order of Reference from the Legislative Council on 11 June 2008. In his introductory remarks, the mover, Hon Paul Harriss MLC made the following comments specifically relating to public sector executive appointments:[29]

> *I commence simply by posing a question to the Council as I challenged myself about this particular proposition when I was thinking of giving notice of a select committee. The question is this: has this Government, and indeed have governments of all persuasions in the past, applied best practice regarding the appointment of people to senior Tasmanian public service executive positions or have they not?*
>
> *I would contend that we simply do not know. Why do we not know? Because there have been no benchmarks identified over the life of all governments. There have been no published documents or published data as to the best practice which is being applied by successive governments over the years in regard to the appointment of such people in the public sector. So I would further contend that it is appropriate, if not timely, to do our best as a House of the Tasmanian Parliament to examine, first of all what procedures and what processes are followed in other jurisdictions regarding such appointments, and if there are things to be learned from other jurisdictions then to appropriately make recommendations so that we can do things at the best possible level of public accountability that we can in this State.*
>
> *The Premier recently indicated that the days of this Government appointing people to senior public sector positions outside the bounds of merit are over. I turn to the Premier's own words.*

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[29] Legislative Council, *Hansard record of proceedings*, Wednesday 11 June 2008, http://www.parliament.tas.gov.au/HansardCouncil/isysquery/43583e8f-dd33-425a-b2eb-42e7d24cbd80/2/doc/c11june2.pdf at p 50.

Mr Bartlett said he was committed to merit-based appointments in the future. Does that pose the question as to whether that may not have been the case in the past? The Premier himself will know the answer to that question.

I quote the Premier:

> "There have been key appointments like heads of agency and others that may be characterised by commentators as something other than that but I am a firm believer in merit-based selection."

Mr Bartlett also promised more open and transparent recruiting but stopped short of committing to advertising senior positions. Honourable members will answer that question themselves as to whether stopping short of advertising those kind of positions is in fact fulfilling the commitment of openness and transparency.

I will quote again from the Premier:

> "I will commit to merit-based selection and there is a variety of ways of implementing that. Advertising is one of them, utilising headhunters is another."

As I have said, people in our society and indeed honourable members of this House will make their own judgments about whether the appointment of people to senior executive positions in the past have been merit based or 'jobs for the boys.' But whatever those value judgments may be, there is no value judgment necessary as to what the people of Tasmania think, particularly about the absolute imperative for government openness and transparency. I believe that, of recent times, the public of Tasmania have had a great deal of concern about the lack of transparency and openness.

2. CONCERNS REGARDING SENIOR PUBLIC SECTOR APPOINTMENTS IN TASMANIA

Dr Richard Herr, Honorary Associate at the University of Tasmania's School of Government and respected political scientist, testified before this Committee and explained that, in making his submission to this Committee, and in preparing for his public hearing, he intended to (Herr 2008, 10):

> *... focus on two particular concerns that I have with regard to senior public sector appointments. One is the influence of the senior executive service system, the SES system, and the way in which that can be used to politicise the public sector. The second issue was the growth and influence of non-State service minders, advisers and spin doctors in terms of influencing the public sector.*

As will be appreciated, this Committee has good reason to share the concerns articulated by Dr Herr above, about the impact that processes surrounding appointments to senior positions can have on the public sector.

Dr Herr related that he had formed the view (Herr 2008, 11):

> *... that the community's unease in recent years has been the belief that there have not been sufficient in-built integrity checks and controls over the appointment process. The lack of these checks as well as the lack of adequate transparency imposes serious risk to good governance values and I think someone described it as the slippery slope, the thin edge of the wedge, whatever you like, but as we looked at the royal commissions in these other States they all began with this notion that the executive misused its power in terms of appointing senior officers in the public sector to enable the Government of the day to do what it thought it wanted to do. There is nothing wrong with that at one level. Public servants are obliged to implement government policy. That is not the issue. The issue is when they implement government policy in ways that over time become corrupt. I hope no-one starts off to be corrupt but the system becomes corrupted by small degrees and there is a critical role, as those two royal commissions found, in the appointment of senior public sector officials in terms of making that happen.*

Mr Rick Snell, Senior Lecturer at the University of Tasmania's Faculty of Law also appeared before this Committee and it was his testimony that concerns about appointment processes should extend beyond the narrow, technical conception of the; "*State Service*", to the realm of the wider; "*public sector*" (Snell 2008, 24):

> *… what concerns me is the potential for both abuse and inconsistency in the appointment requirements for most key statutory positions in Tasmania, and the absence of best-practice guidelines for making those appointments,*

especially to boards and other authorities. To my mind, my major concern is that it seems to be a mixture of practices, ranging from a systematic process of permit-based selection at one end to effectively just cronyism at the other, and the great difficulty in Tasmania is actually identifying where we fall in between those extremes.

Mr Snell further suggested that (Snell 2008, 25):

I think we need to upgrade and improve the appointment processes for a series of officers ranging from senior statutory office holders … I think there ought to be a joint committee on government accountability and of its functions ought to be the appointment of senior statutory officials, especially people like the Auditor-General, the Ombudsman, the Commissioner of Police, the DPP and the Solicitor-General. I think it gives them a degree of independence; I think it proves their reputation and standing and I think it takes away … that these are really spoils of office; if you just happen to win power and you just happen to be in power at the time when you get the chance to appoint a solicitor-general or a judge or whatever else, well that's a benefit of your office. I think that really should be seen as gone, something to be dispensed with. I think the position is far too important to allow that to take place.

So I think there needs to be oversight for at least some of these appointments or at least the involvement of a parliamentary committee in some way. I think there should be, at minimum, a national advertisement for those statutory officers. Often they are advertised but there's actually no requirement for them to be so."[30]

By way of encapsulating his advice to this Committee relating to this component of its Order of reference, Dr Herr observed (Herr 2008, 11):

I think that open advertisement, selection committees made up of a range of senior public sector and where appropriate private sector participants, interviews and statutorily defined standards for eligibility are devices that have been adopted by other States to address some of these issues. I think in Tasmania the incorporation of measures such as these and making them

[30] Snell, Mr Rick, *Op. Cit.,* p. 25.

obligatory would do much to restore public confidence in the appointment of public sector CEOs.

...

I think the obligations on honesty and accuracy don't merely apply to those who hold senior public sector appointments or who are seeking those. I think there's an obligation for appropriate due diligence in making appointments and that needs to involve an effective process of undertaking that due diligence. That process itself is fraught with some significant perils.

Dr Herr further stated:

... I think we need a more transparent appointment system, one that the public can have confidence in, and one that is oversighted. I like the idea of a public service commissioner who has an oversight responsibility for making sure that all aspects of the public service are behaving appropriately … I would look to see selection panels that actually go through the eligibility requirements and are able to do so with a focus more on the professionalism of the candidate than their suitable qualities for the Government of the day. I think the Government of the day should expect all public servants, regardless of whether they are SES or under the State Service Act, to carry out their jobs professionally, so I do not see any problem with a proper selection committee that vets these things and gives guidance on appointments and authenticates that the candidate who goes to Cabinet looks like the one that any reasonable selection process would turn out."[31]

In his testimony before the Committee, Mr Randolph Wierenga, President of the Police Association of Tasmania, speaking of the disquiet expressed by sworn officers within his organisation surrounding recent senior appointments within Tasmania Police, stated his organisation's concerns in the following, substantially similar terms (Wierenga 2008, 32):

We believe that the principles that apply to the lower levels of applicant in the Police Service and the State Service should apply to the higher levels of the State Service and the Police Service. We say that for a couple of reasons. It ensures that the merit process is applied. Under the current legislation there is no reference to merit in the appointment at higher levels in the Police

[31] Herr, Dr Richard, *Op. Cit.,* pp. 14-15

Service or the State Service. We also say that because it makes sure that the process is open and transparent and not subject to criticism. When appointments are made without going through a process, it leaves those who make the appointments open to criticism and subject to all sorts of rumours and innuendo.

The Police Association of Tasmania's written submission also stressed the importance of transparency and accountability in senior police appointments (Police Association of Tasmania 2008).

On the Basis of evidence before this Committee, the Committee makes the following finding:

Finding 9

The Committee finds that there are genuine concerns within the community regarding the present system of appointment to public sector executive appointments in this State. These concerns are held by respected, well-informed individuals and organisations with no ulterior motives. In addition to evidence summarised in other parts of this Report relating to affairs in Tasmania, witnesses to this Committee have provided evidence of a system that is less than world's-best-practice.

3. REQUIREMENTS OF BEST PRACTICE IN EXECUTIVE APPOINTMENTS

When the Auditor-General, Mr Mike Blake testified before this Committee at a public hearing, the Committee was interested to note that, by way of an example of world's-best-practice adapted for Australian conditions, Mr Blake tabled documents detailing the executive appointments framework that is in operation in Western Australia (Blake 2008, 3):

I like the process [outlined in the Western Australian framework] *whereby for somebody to be appointed in the first instance as a head of agency, whether it be for agency x or agency y, there is a public advertisement. There is a testing of the market to see who the best people are out there that may put*

forward for this particular role. This process also envisages the possibility of a transfer arrangement whereby the head of agency may be appointed to a particular department but then can be moved within the sector that the person is working in.

It is worthy of noting that the above Western Australian methodology was a recommendation of a Commission of Government in that State, which itself was a product of a wide-ranging Royal Commission into the activities of Government which has come to be known as the; *"WA Inc Royal Commission"*. In Report II of that Commission, Commissioner Geoffrey Kennedy, Chairman of the Commission, observed that the then existing office of the Public Service Commissioner, which reported to Government, was not sufficiently independent or adequately structured, to prevent the system of Government in Western Australia from becoming corrupted. Commissioner Kennedy wrote with specific reference to the appointment of Heads of Agency that (Kennedy 1992, Para 6.3.8):

> *The power to appoint to those offices is not, and cannot be allowed by covert means to become, a* "spoil" *in the gift of a government. We acknowledge that the minister/chief executive officer relationship is a distinctive one and that the minister's expectations of the qualities and qualifications of his or her chief executive officer should be taken into account if their working relationship is to be an effective one. But this said, chief executive officers are part of the Public Service, and they represent both to the Government and to their departmental subordinates alike, the purposes and values of the Public Service itself. Their appointment procedures must reflect this and must be so structured as to ensure integrity in the procedures themselves. In balancing the legitimate interest a minister has in the appointment of a chief executive officer, with the public service interests which must be safeguarded, the Commission considers that the appointment procedures for chief executive officers should embody the following features:*
>
> *a. the Commissioner for Public Sector Standards (or the Public Service Commissioner, if the former office is not created) should be responsible for nominating a proposed appointee to the minister;*

b. *before taking steps to make a nomination, the Commissioner should invite the relevant minister to indicate any matters the minister wishes to be taken into account in making the appointment; and*

c. *if the nomination is not accepted, the Governor in Council should be able to appoint another person to the position, but if it does so, the responsible minister must notify the Parliament that the person appointed is not the person nominated by the Commissioner.*

The opportunity presented by learning from the bitter lessons meted out in other jurisdictions was highlighted for this Committee in the written submission of Dr Richard Herr. In that document, Dr Herr observed (Herr, Written Submission 2008, 2):

> *The 1989 Queensland royal commission headed by Tony Fitzgerald QC found that the politicisation of the public sector had corruptly impaired the capacity of senior executive officers to give frank and fearless advice to Government in order to minimise risks to their own career prospects. It was safer to give the Government the advice they wanted to hear rather than the full and sometimes challenging advice it needed to make effective and well-informed decisions. Even worse, the Fitzgerald Inquiry revealed that, over time, the entrenchment of political influence within the public sector extended to the implementation of Government policy as well. Corrupt implementation of policy and/or the application of laws flowed from the politicisation of the public sector. The corruption of the Queensland system began with small deviations from honest public sector practice and spread like a cancer to afflict the entire system.*
>
> *Other inquiries, such as the 1992 WA Inc Royal Commission, have found that the deadening effect of a politicised public sector extends to other issues of competence and professionalism. Public servants who suspect that their advice is filtered out as it goes up the administrative hierarchy or is twisted by ministerial officers to suit the political orientation of the minister will not perform as efficiently or as whole-heartedly as professional standards would require. A number of the recommendations from this royal commission led ultimately to a series of initiatives to address the political manipulation of senior executive appointments. These included a State Administrative*

Tribunal, Public Sector Management Act and a Public Sector Standards Commissioner. While these initiatives improved some public sector values such as transparency and merit-based promotion, a review of the impact of these measures last year indicated that they were not sufficient alone to achieve all that had been hoped (Maxine Murray, Ten-Year Review Report-Four: The Principle of Integrity in Official Conduct). Resisting the politicisation of the public sector, and the associated risk of corruption, requires constant vigilance from the Parliament and the public according to that review. I fully share this assessment, which is why I continue to be anxious about the limited capacity of the Parliament since 1998 to provide all the executive oversight needed to carry out its obligations in guaranteeing public sector integrity.

The essential role of the Parliament generally and the Legislative Council in particular, as the cornerstone of public scrutiny of the Executive Government was considered in great detail in Western Australia in the early 1990's. In the second Report of the WA Inc Royal Commission, Commissioner Kennedy stressed the central scrutiny role of committees of the Parliament, particularly focussing on those within the Legislative Council :

3.9.2 The review of the processes, practice and conduct of government is only one of the purposes for which committees can be used. But in a parliamentary democracy that purpose should be the cardinal one. In the exercise of its law-making power, the Parliament has greatly enlarged the power and authority of the executive and the administrative arms of government. These now have a pervasive effect on the daily life and well-being of the Western Australian community. The Commission urges the Parliament to bend its efforts to the fulfilment of its review obligation as a matter of urgency. The rational and systematic use of standing committees for this purpose should be a priority.

...

3.9.5 Secondly, if parliamentary committees are to be able to realise their purpose, several conditions require to be satisfied.

1. *Their mandate must not be cast in ways which curtail, in any arbitrary or protective way, the matters into which they can inquire.*

> 2. *Their powers must be ample.*
> 3. *They must be provided with the support staff, resources and facilities necessary to enable research, investigation and reporting to be fully and effectively undertaken.*
>
> *We particularly emphasise the last of these. An unsupported committee is a wounded committee.*

The relative underfunding of the Parliament of this State as a whole, and the Legislative Council in particular, is worth mentioning in this respect in passing. This Committee notes the following table, which demonstrates the actual dollar value of funding provided to the Parliaments of Australia (taken from last year's Budget Papers), together with a dollar value per elected member:

	Elected Members	Global Budget	$ per Member
NSW	93	$122,300,000	$1,315,054
Vic	128	$131,400,000	$1,026,563
C'wth	226	$220,016,000	$973,522
NT	25	$23,709,000	$948,360
Qld	89	$69,336,000	$779,056
ACT	17	$10,852,000	$638,353
WA	95	$45,776,000	$481,853
Tas	40	$18,343,000	$458,575
SA	69	?	

This Committee notes that all state-level jurisdictions are required to provide the same range of Government services to their residents. This means that across jurisdictions, Parliaments are required to scrutinize the same breadth of Executive Government activity. In this respect, it is interesting to note that the budget allocation to the Tasmanian Parliament on a per-Member basis, is lower even than that of the single House jurisdictions, including the Northern Territory and the Australian Capital Territory. Indeed, the funding per-Member of the Parliament in Tasmania is less than half that of the Northern Territory, where each Member is typically returned by around 5,000 voters . The ability of the two Houses of the State Parliament to effectively scrutinize the

Executive Government is therefore hampered by a patent lack of resources. This Committee believes that the chronic under-funding of the Parliament resulting in a constrained ability to scrutinize the activities of the Executive Government is a disservice to the people of Tasmania.

The Committee notes that the process of appointment and promotion within the current State Service is governed by the *State Service Act 2000*. However, the appointment and promotion requirements of that Act are expressly limited to those levels of the State Service below the State Executive Service.[32] Senior Executive Service appointments and promotions are essentially matters to be decided by the Premier.[33] In addition, appointments of Heads of Agency are also under the direct personal control of the Premier and any Minister to whom the Premier has delegated their authority, without the necessity for reference to the State Service Principles.[34] Given this direct involvement of Ministers in the career outcomes of the State Executive Service, and the reporting arrangements for the State Service Commissioner, it is worth noting the cautionary words of Commissioner Fitzgerald where he warned (Fitzgerald 1989, 359):

> *The line between creation and implementation of policy can be further blurred by politicization of the administration. This also affects the quality and type of advice given to Ministers. New ideas and information about problems might be rejected if they do not fit in with established policies. Misconduct is less likely to be uncovered and honest public servants have no recourse if they wish to report suspected misconduct, and can be penalized for doing so. Apart from alliances based on mutual self-interest, the involvement of Ministers in public servants' career progression adds to politicization.*

This Committee once again notes that the State Service Principles apply to appointments and promotions up to, but not including, the State Executive Service. Appointments and promotions within this latter stratum, together with Heads of Agency, are heavily dependent on the decisions of Ministers,

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[32] Section 31.

[33] *State Service Act 2000*, Part 6.

[34] *State Service Act 2000*, section 10.

particularly the Premier. In addition there is nothing in the *State Service Act 2000* to suggest that the State Service Principles apply to the 1000 plus appointments made by Ministers to non-departmental public sector bodies in this State, or the within the wider public sector generally. The Committee does note, however, that where the concept of Merit is relevant to appointment or promotion under the provisions of the current *State Service Act 2000*, that Act contains a definition of appointment by merit. The relevant section of the Act, section 7 is as follows:

7. State Service Principles

(1) The State Service Principles are as follows:

(a) the State Service is apolitical, performing its functions in an impartial, ethical and professional manner;

(b) the State Service is a public service in which employment decisions are based on merit;

(c) the State Service provides a workplace that is free from discrimination and recognises and utilises the diversity of the community it serves;

(d) the State Service is accountable for its actions and performance, within the framework of Ministerial responsibility, to the Government, the Parliament and the community;

(e) the State Service is responsive to the Government in providing honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs;

(f) the State Service delivers services fairly and impartially to the community;

(g) the State Service develops leadership of the highest quality;

(h) the State Service establishes workplace practices that encourage communication, consultation, cooperation and input from employees on matters that affect their work and workplace;

(i) the State Service provides a fair, flexible, safe and rewarding workplace;

(j) the State Service focuses on managing its performance and achieving results;

(k) the State Service promotes equity in employment;

(l) the State Service provides a reasonable opportunity to members of the community to apply for State Service employment;

> *(m) the State Service provides a fair system of review of decisions taken in respect of employees.*
>
> *(2) For the purposes of subsection (1)(b), a decision relating to appointment or promotion is based on merit if –*
>
> *a) an assessment is made of the relative suitability of the candidates for the duties; and*
>
> *b) the assessment is based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required for the duties; and*
>
> *c) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the duties; and*
>
> *d) the assessment is the primary consideration in making the decision.*

The Committee also notes that the State Service Commissioner themself in this State reports to Government, rather than directly to Parliament.

The Committee observes that the State Service Principles are a sound basis upon which to approach the promotion and appointment of all public sector officials. The question therefore arises as to why these Principles do not have universal application within the wider public sector?

4. STATE SERVICE VS. PUBLIC SECTOR

The importance of defining terminology when considering best-practice in public sector executive appointments was stressed in testimony before this Committee by the State Service Commissioner, Mr Robert Watling in the follow passage of his testimony (Watling 2008, 1):

> *I have a few points to make at the start to put things in context. I notice that the terms of reference talk about best practice for appointment of individuals to senior Tasmanian public sector executive positions. I have read that to mean the public sector and not the State Service, or to include the State Service. I think in any report you put forward you should clearly delineate the difference between the public service - and I hear it bandied around a lot;*

> *people talk generally about the public service - and the State Service, which is one aspect of the public service.*
>
> *We have, for example, government business enterprises, State-owned companies, statutory authorities, public bodies, local government, a myriad of tribunals - I think at the last count it was over 30 tribunals – and senior appointments in the police area. However, my role as State Service Commissioner only deals with matters falling within the purview of the* State Service Act*. The State Service is just one aspect of the public service, in fact probably a very narrow aspect of the Public Service. When you look at, for example, the appointments of heads of department, we are really talking about only seven appointments. The Port Arthur Authority, Public Trust Office and all these others are statutory authorities or government business enterprises.*

The Committee notes that its Order of Reference very deliberately refers to "*Public Sector Executive Appointments*". As stressed in Mr Watling's testimony above, this is a much broader concept than merely the State Service. In addressing his concerns before this Committee relating to the public sector in this broad sense, Mr Rick Snell specifically addressed the question of appointments to boards and tribunals within the gift of Ministers (Snell 2008, 28):

> *The appointment of chairs to these boards are important positions that ought to have more work done on them rather than just kind of pulling a rabbit out of a hat to put someone into the position. I think the positions should be advertised, the people carefully selected and there should be clear criteria involved in the process. I also think some scrutiny needs to be exercised when people are removed or resign in those sorts of circumstances.*

The economic significance of appointment to the boards referred to by Mr Snell varies enormously, as data tabled before the Committee by Mr Snell testifies. Remuneration levels cover the widest possible gambit from around $100,000.00 per annum with respect to the boards of larger Government Business Enterprises, all the way to honorary appointments to Ministerial advisory committees and boards. As Mr Snell has testified, these

appointments are not reported to Parliament in a single publication. This means that finding the information which Mr Snell tabled before this Committee has been highly problematical. In testimony before this Committee, Mr Snell indicated how disjointed the information system relating to these boards, tribunals and committees actually is (Snell 2008, 26):

> *As an example, many years ago in the mid-1990s I put in a FOI request when I heard that the Department of Premier and Cabinet had a register of all members of boards and public authorities in Tasmania. I asked to get a copy of it and eventually received one under FOI. It listed the board members, when they were appointed, when the appointment process would expire and how much they were getting - the sitting allowance for each member. A number of years later I had to put in another FOI request to get an updated version of that document. It took a long while to get access because the department had not updated their register. So, no particular department was responsible for the overall monitoring of what was taking place with appointment processes. So it was left to each individual department, but they would all feed their information into the Department of Premier and Cabinet, who put it all together. I eventually received that document in a spreadsheet format so I could do searches and all the rest in terms of who was a member of which board. I subsequently put in another request, only a few months ago, for an updated version, and low and behold they had not bothered to update the previous version. They had to start from scratch to provide me with a whole new system.*

In the opinion of Mr Snell, the principles of accountability and transparency enshrined within the State Service Principles should apply equally to such positions. This proposition was supported by a number of written submissions (Forsyth 2008). Specifically focussing on the vexed issue of confidentiality clauses contained within termination clauses with respect to such positions Mr Snell observed that (Snell 2008, 28)::

> *I think the appointment process, as well as the termination process, is just as important and should be just as accountable in that process. I think confidentiality agreements only serve the purpose of effectively killing any inquiry or investigation into why someone would be exiting a particular organisation before time. If there happens to be a police investigation matters at hand or something like that, that is a whole different issue, but I have a*

> *tendency to believe that these confidentiality agreements are really just there for convenience purposes.*

In his testimony before this Committee, Mr Snell indicated that current; *"best-practice"* benchmarks relating to executive positions in the wider public sector may not lift the bar high enough to reflect changing community expectations about the processes of Executive Government. This critique is supported by the work of Emeritus Professor Meredith Edwards of the University of Canberra's Centre for Corporate Governance (M. Edwards 2006) Speaking of his scepticism about current standard practice, Mr Snell observed (Snell 2008, 30):

> *I think there is clearly Australia-wide, a major deficiency in the provisions in the appointment of people like ombudsmen, police commissioners, DPPs, et cetera. At the very least, they should be made to be advertised nationally and I think that there should be at least some degree of parliamentary involvement…that there be a kind of public accountability commission of some description that has the ability to be involved in that process. In New South Wales, one of their joint committees has a veto power over the appointment of the Ombudsman, the Auditor-General and the DPP. I would disagree with having a veto power. I would like there to be a much more prospective involvement in the selection of the appointment process, but at least for those officers you have the ability of the parliamentary committee to say that this person is not suitable for the position. I would much rather the committee be able to come forward and say,* "we think this person is the suitable person for the position"*. I think it just adds to their clout, to their independent and to their reputation of being able to carry out their functions, and they not only have the endorsement of the Government but that of the Parliament.*

On the Basis of evidence before this Committee, the Committee makes the following finding:

> *Finding 10*
>
> *This Committee finds that the State Service Principles warrant application across the entire public sector.*

In light of this finding, this Committee makes the following recommendation:

RECOMMENDATION 11.

The Committee **recommends** that the Government should amend the *State Service Act 2000* to broaden the application of the State Service Principles to the entire public sector.

5. REQUIREMENTS OF ACCOUNTABILITY AND TRANSPARENCY

As was indicated in testimony by the Auditor-General, even in situations where the senior position in question that is sought to be filled is as unique as a Police Commissioner, or Solicitor-General, the default position would be that the agency should; "*always test the full field*", by way of appropriate advertising (Blake 2008, 4). In response to a question about the wisdom of advertising positions for all senior public sector positions, Dr Richard Herr responded as follows (Herr 2008):

> *I can't see a reason why they shouldn't be advertised. I don't claim omniscience; I don't know for sure. There may be someone who has a good case for whey they should not be advertised. It seems to me that, broadly speaking, an open advertisement is prudent to make sure that you get as broad a field of candidates as you can, because people are selecting themselves to come forward and say,* 'I think I have the qualities for the job'*. It does give that confidence that it isn't jobs for one's mates and that it is something that has been subject to at least some kind of open process of oversight that allows the candidate to enjoy the confidence of the process as guaranteeing their integrity."*[35]

On this point, this Committee was interested to note that, in the State Service Commissioner's Annual Report 2007-2008, it was observed that (State Service Commissioner 2008, 24):

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[35] Herr, Dr Richard, *Op. Cit.,* p. 16.

It is the fundamental position of the Office of the State Service Commissioner that, in order to uphold the merit principle, permanent vacancies should normally be publicly notified and filled on the basis of merit. It is recognised, however, that special and compelling circumstances may exist that warrant the promotion of a permanent employee without advertising.

Accordingly, section 40 of the Act allows a Head of Agency to seek the approval of the Commissioner to promote an employee without advertising the duties. The Commissioner may grant the request if he is satisfied that:

a. Special and compelling circumstances exist that warrant promotion without advertising;
and,
b. Not advertising the duties is consistent with the merit principle.

This Committee was interested to note a number of relevant tables contained within the State Service Commissioner's Annual Report for 2007-2008. The first such Table shows the size of the State Executive Service, and the number of appointments within that group during 2007-2008 (State Service Commissioner 2008, 24):

TABLE 4: Senior Executive Service 1 July 2007 – 30 June 2008

AGENCY	No of Senior Executives as at 30 June 08	No of Vacancies advertised	Appoint-ments from within the Service	Appoint-ments from outside the Service
Dept. of Economic Development and Tourism	26	4	1	1
Dept. of Education	24	2	2	0
Dept. of Environment, Parks, Heritage and the Arts	13	5	4	0
Dept. of Health and Human Services	37	11	5	1
Dept. of Infrastructure, Energy and Resources	25	2	0	0
Dept. of Justice	18	1	0	1
Dept. of Police and Emergency Management	10	1	1	0
Dept. of Premier and Cabinet	32	5	4	1
Dept. of Primary Industries and Water	17	5	3	1
Dept. of Treasury and Finance	17	2	0	1
Tasmanian Audit Office	0	1	1	0
Port Arthur Historic Site Management Authority	1	0	0	0
TAFE Tasmania	7	1	1	0
The Public Trustee	2	0	0	0
TOTAL	**229**	**40**	**22**	**6**

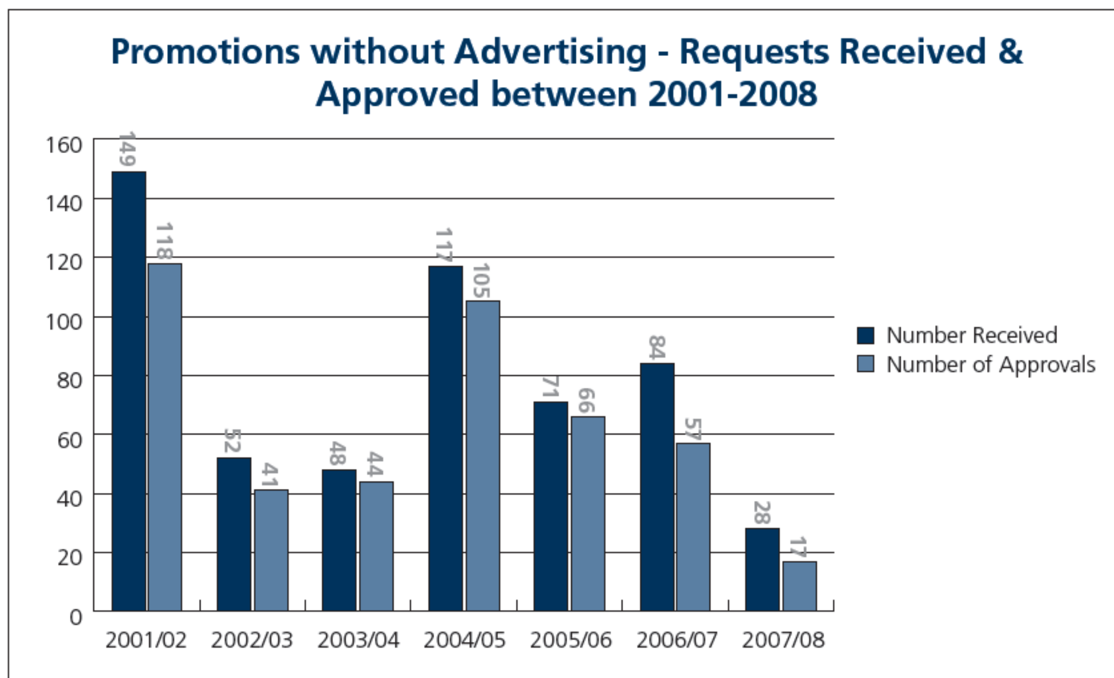
The second Table produced by the State Service Commissioner that was of interest to this Committee is that immediately following. The Table shows the number of applications made to the State Service Commissioner for approval to make promotions without advertising within the State Executive Service that occurred in the 2007-2008 year:

TABLE 5: Promotions without advertising, 1 July 2007 – 30 June 2008

AGENCY	B/F	Received	Approved	Not Approved	C/F
Dept. of Environment, Parks, Heritage & the Arts	-	2	-	2	-
Dept. of Health and Human Services	-	9	2	7	-
Dept. of Justice	-	13	13	-	-
Dept. of Premier and Cabinet	-	2	2	-	-
TAFE Tasmania	-	2	-	2	-
TOTALS	**-**	**28**	**17**	**11**	**-**

The Committee notes that Table 5 above relates to *promotions* without advertising rather than *appointments per se*, but it is nonetheless a useful data set. The significance of Table 5 can be better appreciated by reference to the following Table which compares the reported period with the six immediately preceding reporting periods in chart form:

TABLE 6: Promotions without advertising, 1 July 2001 – 30 June 2008



The Annual Report of the State Service Commissioner contains the following commentary relevant to the above Table:

> *The application of a strict test as to the existence of special circumstances sufficient to warrant promotion without advertising continues. The sharp decrease in approvals during the reporting period is a reflection of this continued policy. Furthermore, the majority of these approvals – 13 of the 17 – related to the outcome of the Legal Practitioners Agreement translation review process in the Department of Justice. Under this Agreement, Legal Practitioners were able to seek a review of their translation by a translation review panel chaired by the President of the Tasmanian Industrial Commission. Requests for promotion without advertising resulting from this*

> *formal process were considered to satisfy the special and compelling circumstances requirements of Commissioner's Direction No. 1.*

Although not strictly relevant to the question of; "*appointments*", the above information taken from the State Service Commissioner's latest Annual Report does indicate that appropriate mechanisms currently exist within the public sector which, with the appropriate development and oversight, could encompass all appointments relevant to this Committee's inquiries. The Committee does, however stress once again that, as it is presently framed, the ultimate authority under the *State Service Act 2000* is the Premier (and relevant Ministers), and not the State Service Commissioner. Although Ministers are technically answerable to the Parliament, it remains the case that the State Service Commissioner has limited jurisdiction with respect to the State Executive Service appointments, no jurisdiction with respect to appointments of Heads of Agency, and no jurisdiction with respect to the wider public sector beyond the State Service.

The Secretary for the Department of Premier and Cabinet, Mr Rhys Edwards touched on some of these questions in testimony before the Committee, as the following extract of testimony reveals (Edwards 2008, 14):

> *The principles in the State Service Act around appointment on merit are sensible. I think there is a debate about what merit means, what processes are needed to surround to ensure that merit has been undertaken. I think it is not necessary to jump to the conclusion that merit has only one form. An advertisement, a panel with three people, a set of selection criteria with a written application against the selection criteria - I think they are some of the dilemmas over custom and practice in the public sector. We have become used to this as being the only way of doing things. I think particularly the issue around selection criteria aids people who are used to writing public sector applications. I have seen over recent years people who don't understand the idea of selection criteria and they write a general letter addressing why they have the right qualifications for the job. They will then get a polite letter back saying;* "Your application cannot be accepted because you haven't addressed the selection criteria"*.*

The State Service Commissioner could see clear opportunities where it would be appropriate to appoint without advertisement, especially giving the example of specialist medical fields (Watling 2008, 9).

Some of the ambiguities relating to the appointment of senior executives were highlighted before this Committee by Mr Rhys Edwards as follows (Edwards 2008, 16):

> *... you have a set of principles in the State Service Act that talk about what employment should be based on. One of those is about knowing that the opportunities are there, so I think there is an obligation to make opportunities known by advertising or promulgating them somewhere or getting people to hunt out potential candidates. Then there is the question of merit. To show that you have used merit in the process, what do you need to document to show that you have used that so that the decision was not made without merit? My sense is that we do not have a problem in that. The processes are quite involved and so if anything we are a workplace where those questions are documented and detailed inside out.*
>
> *As a modern employer we need to be reasonably flexible. We need to make our processes relatively applicant-friendly otherwise we will turn away people who are just not interested in that. We also need some flexibility so when I have a cohort of senior managers I need to be able to use them relatively flexibly. I would not want to see anything that stopped the ability to do that because you always have to be able to meet emerging demands and emerging needs.*

This Committee accepts the strength of argument in favour of flexibility of process in order to ensure that the best person is placed in any given position. However, as with any circumstance of choice, the final decision will always be the real-world task of assessing the best perceived fit between applicant and position, rather than the illusory ideal of securing the absolute best person for the job. In reality, other than the position of Saint, there is usually always more than one possible alternative candidate for any given position.

Speaking of the particular issue of Heads of Agency appointments, Mr Rhys Edwards made the following observations (Edwards 2008, 23):

> *In terms of heads of agency, I think the important aspect is that there is a huge incentive for the government of the day and ministers to get the very best chief executives. The performance of a minister is also reflected in the performance of their agency and their head of agency, so there is a very strong incentive to get the right person. I think that needs to be taken into account. I think the relationship between a minister and a head of agency is also very important. You wouldn't want to design a process that divorced it completely from the Premier or the ministers of the day. I think that would be a mistake. It is a bit like a CEO from a private sector board. The board needs to have confidence that their CEO is the best person to do the job and if that confidence in that relationship doesn't exit it would make work very difficult. If you're thinking about processes, I think there needs to be some mechanism to take that into account.*

This Committee notes that, in the process of determining the best perceived fit between applicant and vacant position, any selection agent's perception of both the applicant and the job is at play, neither of which perceptions may be entirely accurate. In addition to imperfect knowledge of both job and applicant, the perception held by the selection agent of both the applicant and the job may also be subject to innate and conscious bias on the part of that selection agent. In the event that a Minister is evaluating the suitability of a prospective Head of Agency, such biases could mean that they are precisely the wrong person to make a clinical decision about which applicant would be the most suitable option. Then there is the question of whether or not a given selection agent is capable of actually negotiating the complex task of comparing a real human being with a conceptualised model of the vacant position in question.

This Committee believes that there is room in any such process for trained professionals who are capable of developing, monitoring and reviewing the kind of sound selection procedures that will assist the senior public service to find the best fit between applicants and vacant positions. As with most things in life, a professional approach, rather than an *ad hoc* amateur approach

offers greater assurance of a favourable outcome. To misquote a classic Australian film; the; *"vibe of the thing"*, is rarely a solid basis for confident judgement. Given that the consequences flowing from an inappropriate appointment to the senior executive service are likely to be significant, this Committee believes that there is an even greater need for a professional approach to selection at this level. It is of significant concern to this Committee that the term; *"flexibility"*, when applied to senior executive service appointments could be read as code for; *"Ministerial preference"*.

While this Committee believes there is a place for Ministerial preference, it is not appropriate to design an entire selection methodology around this single consideration, to the exclusion of modern professional selection processes.

On the question of whether the existing systems pertaining within the State Service at lower levels than the State Executive Service meet organisational needs, the Committee was interested to note the following remarks of the State Service Commissioner, Mr Robert Watling (Watling 2008, 9):

> *The panel doesn't do the appointment. In most cases in the State Service they make a recommendation to someone higher and all the paperwork that goes with it explains why they selected the person. I think at a lower level, lower than the SES, I would give people 10 out of 10 for the work they do on these panels. I have another problem: the process is taking too long and we are missing out on good candidates in the public sector because they can't hang around for that long. I am trying to get the system sped up a bit but because of all these things along the way that it is taking 70-80 days to make an appointment.*

In commenting on his notion of a best practice ideal, Mr Frank Ogle, Director, Public Sector Management Office, testified before this Committee that (Ogle 2008, 19):

> *If you become too prescriptive – down at the* [State Executive Service] *it is the head of agency that is accountable and responsible for the business that they run, so it is reasonable to expect that they should take the employment decisions that relate to that agency. So I would be reluctant to have a central body selecting and appointing. I think it is up to the central body to outline the*

> *framework under which that occurs, but you have to give the responsibility and accountability and all those things that go with it to the head of agency. And on that score, we have some standards and procedures around senior executive appointments that date back to 2002. There has always been confusion around those standards, because they just came out as a standard and not a ministerial direction or commissioner's direction.*

While accepting that the responsibility of the appointment and promotion of State Executive Service positions should rest with the Head of Agency, this Committee believes that there is still an imperative for professionalism in selection and promotion processes under the supervision of appropriately trained professionals. This proposition was supported by a number of written submissions (Webster 2008). There is, in fact, a greater need for such an approach to extend throughout the whole public sector rather than limit its benefits to the lower levels. The Committee posits the rather obvious question; *"If the selection processes utilised at levels below the State Executive Service are inferior to those utilised at higher levels, why not use the same processes throughout the whole State Service?"* As a matter of principle, it is simply not sound science to build a system by reference to exceptions. Competent system design should be by reference to the observable norm, with the possible facilitation of positive exceptions.

On selection processes generally, Mr Watling commented (Watling 2008, 6):

> *I don't necessarily think that the interview process is the be-all and end-all to getting the best candidate. For example, I sat on an outside body to appoint a person no so very long ago and we gave them a task and told them to go away and give a PowerPoint presentation at our next gathering. When we came back together those people had put forward their view of the world, they told us myriad things: whether they understood the work, the legislation under which they were working and whether they were articulate enough to put if forward. That is a method of selection, too. I would hate one method of selection to be adopted as the only method. I am encouraging the State Service generally to move away from this one-cap-fits-all attitude because I don't think a panel made up of so many people – so many women, so many men, so many disabled – necessarily gets you the best candidate for the job,*

> *nor do I believe that someone sitting around a panel asking a series of questions will get you the right answer. Not everyone fronts up really well to an interview.*

Once again the Committee takes the point made above that the practicalities of any process are matters of detail, about which, an appropriate degree of flexibility is desirable. However, principles of documented, robust investigation, rigorous *ex ante* due diligence, ethical procedural fairness, independent accountability mechanisms, and scientifically assured equal opportunity are not matters about which flexibility is necessarily desirable.

This Committee notes that currently, there is evidence of significant gender bias within the State Executive Service. This point was conceded in evidence by Mr Frank Ogle, who commented (Ogle 2008, 20)

> *Gender is an issue that we need to look at. We have about 27 per cent female in the Senior Executive Service and yet we have 67 per cent female in the State Service general.*

Regardless how this statistical mismatch is addressed, the bald fact of the statistics indicates that the State Executive Service is patently <u>not</u> an equal opportunity employer. Such a conclusion is not so much the consequence of carefully drawing an inference as it is simply stating the obvious. This Committee notes that an undiscerning application of the merit principle is highly susceptible to criticism on the basis of opportunity. Merit is a function of both ability and opportunity. It follows therefore, that where opportunity is denied to highly able people, they will be denied favourable promotion and appointment outcomes based on merit assessments, <u>unless the issue of opportunity is rigorously and proactively pursued</u>.

On the Basis of evidence before this Committee, the Committee makes the following finding:

Finding 11

This Committee finds that the office of the State Service Commissioner provides assurance of transparency, accountability and independence with respect to appointments and promotions within the narrowly defined State Service, up to, but not including the State Executive Service.

6. BEST PRACTICE FROM OTHER JURISDICTIONS:

In advising this Committee on a world's-best-practice model for executive public sector appointments, adjusted for Australian cultural conditions, the Auditor-General, Mr Mike Blake, observed that (Blake 2008, 2):

> *I like the Western Australian approach … What I liked about it is that it is very independent and transparent, the process is managed by the Commissioner of Public Sector Standards. There is a role to play for the minister that maybe a head of agency is going to be working for. I think that's appropriate but there is a very clear arm's length approach that is followed here. It includes transparent open processes for recruiting such as advertising every time there's a vacancy at that level.*

The merits of the Western Australian model that the Auditor-General highlighted to this Committee included (Blake 2008, 2):

> *… the very clear transparent process this follows where there is a role for the minister, for the Standards Commissioner, for the public sector standards minister whomever that might be – in most cases it's the Premier and so on. Those roles are very well spelt out and very difficult to fall foul of because the process is so clear, which I don't think happens here.*
>
> *... one of the processes that they follow is that if the minister is unhappy with the proposed candidates nominated to the position in an agency under his or her particular portfolio, the minister is entitled to reject those recommendations and make his or her own appointment. If that happens the minister is required to make that clear in the public gazette so that becomes a clear process*

The Auditor-General advised this Committee that, in her *Ten-Year Review* of the Office of the Public Sector Standards Commissioner in Western Australia, Commissioner Maxine Murray observed that no such appointment had occurred (Blake 2008, 3). However, Dr Richard Herr stressed the need for caution about resort to legislative totems, based on his reading of the Western Australian *Ten Year Review*, when he testified before the Committee (Herr 2008, 13):

> *… one of the points it made is that you need to be constantly vigilant. You cannot just change one Act or set up one public service commissioner or whatever and say the job is done. It is a continuing, ongoing process. It is important to have that constant supervision and monitoring available.*

Dr Herr observed that the Western Australian model; "*had merit from the point of view of identifying the issue* [this Committee is] *dealing with, that the appointment process is the start of the corruption process*." As indicated above, this was one of the key findings flowing from the WA Inc Royal Commission into public sector corruption.

Recent statements at a federal level, indicate that policy at the centre is also in the process of change. Although the changes that have been announced there do not go anywhere near as far as the Western Australian model, the sentiments that have been expressed are familiar enough, and give the impression of a step in the right direction. According to the federal Cabinet Secretary, Senator John Faulkner (Faulkner 2008):

> *Under the new arrangements all relevant positions will be advertised, the assessment process will be based on merit, and each process will be oversighted by the relevant departmental secretary and the Public Service Commissioner.*
>
> *There will be some limited exceptions to these arrangements – a Minister may not wish to advertise a particular position in special circumstances, for instance where there is another office holder at a similar level who could be moved to the position. Any exception will require the Prime Minister's approval. As well, where a board is responsible for appointments, it will have responsibility for the process.*

Finding 12

This Committee finds that currently the world's-best-practice model of senior public sector executive appointments adjusted for Australian cultural conditions is that utilised in Western Australia. The Committee notes that this fining is in accordance with the conclusion of the Auditor-General.

7. THE WESTERN AUSTRALIAN MODEL IN PRACTICE:

As explained in Part Three of the *Ten Year Review* conducted by the then Commissioner for Public Sector Standards in WA, Commissioner Maxine Murray (Office of the Public Sector Standards Commissioner WA 2006):

> *The* Public Sector Management Act 1994 *gives the Commissioner for Public Sector Standards (an independent statutory officer reporting directly to parliament) the responsibility for nominating suitable candidates for public sector CEO vacancies (s. 45).*

The nomination to a Minister by the Commissioner for Public Sector Standards is normally by way of a; *"short-list"* containing the top-ranked applicants. The Minister then makes a selection from the shortlist provided. The purpose of delegating these functions to the Commissioner is that such a (Office of the Public Sector Standards Commissioner WA 2006, 26):

> *... process ensures independence and political impartiality, whilst acknowledging ministerial responsibility and accountability.*
>
> *Before making a nomination, the Commissioner is required to invite the minister responsible for the agency to indicate any matters the minister wishes taken into account in nominating a person or persons as suitable for appointment (this is specifically authorised by s45 of the* [Public Sector Management Act]*).*

If the Minister for Public Sector Management in Western Australia does not accept any of the Commissioner's nominations, a further nomination may be sought. The Minister may also recommend to the Governor that another person (other than a person nominated by the Commissioner), should be

appointed to the position, but in that case the Minister must publish in the *Government Gazette* that the person appointed is not a person nominated by the Commissioner, and provide the reasons for that decision (s45(12)). As indicated above, this has not occurred in Western Australia since the new procedures were adopted in 1996 in response to the WA Inc Royal Commission into corruption in government..

Independent statutory authorities are specifically exempted from this appointment process, but these are also free from Ministerial interference (Office of the Public Sector Standards Commissioner WA 2006, 28). In addition (Office of the Public Sector Standards Commissioner WA 2006, 30):

> *In Western Australia and New Zealand, nominations for CEO appointments are totally the responsibility of an independent authority and there is a clear separation of the roles of the government and the state. In four of the other jurisdictions, a Commissioner for Public Employment (the title may vary, but the role is similar) provides advice on suitable nominees to the actual appointing authority. Nevertheless, it is only in South Australia that the Commissioner's endorsement, as opposed to advice, is required.*

This Committee does not agree with the South Australian notion that the Public Sector Standards Commissioner's preferred candidate should be the one endorsed by the Executive Government. The Committee believes that such an innovation has two perceived weaknesses, namely; the opportunity for the development of patronage would have the potential to grow up around the Commissioner; and secondly, such an arrangement could conceivably undermine the concept of ministerial accountability to Parliament. It is the Committee's view that any recommendations from a Public Sector Commissioner should be advisory to a defined Minister. At that point in a properly professional selection process, the suitable application of Ministerial decision-making processes is, and should remain, the final word on the matter of senior executive appointments.

It had been thought that the use of an employment; *"pool"*, could speed up the selection processes in the Western Australian Executive Service. However,

the Western Australian *Ten Year Review* found that the idea of creating a pool for appointment to senior executive appointments was not supported by those surveyed, with the preference remaining among those surveyed to nominate for specific positions (Office of the Public Sector Standards Commissioner WA 2006, 63).

This Committee was interested to discover that New Zealand operates a model of public sector appointment that is very similar to that employed in Western Australia. The *Ten Year Review* noted that the system employed in that jurisdiction was more restrictive than that used in Western Australia (Office of the Public Sector Standards Commissioner WA 2006, 72):

> *However, there are three important differences with the Western Australian process: only one name is recommended to the Minister; the Minister refers nominations to the Governor-General in Council, not to Cabinet; and it is the Commissioner who negotiates salary and conditions with the preferred applicant (not the DPC), although agreement must obtained from the Prime Minister and the Minister of State Services.*

This Committee accepts the Western Australian practice that, once a Ministerial decision is made, the Public Sector Standards Commissioner should, thereafter be the responsible officer for negotiating salary and conditions in consultation with the relevant Minister.

In light of the foregoing, this Committee makes the following recommendations:

RECOMMENDATION 12.

The Committee **recommends** that the Legislative Council do call upon the Government as a matter of legislative priority, to replace the current *State Service Act 2000* with a Public Sector Management Act along the lines of those in place in Western Australia and New Zealand. One of the central features of such a legislative model must be the appointment of a Public Sector Standards Commissioner, reporting directly to Parliament, with jurisdiction to prepare shortlists of suitable

candidates to all public sector executive appointments, up-to and including Heads of Agency, for Ministerial approval. Ministers should have the power to refuse such shortlists and request replacement short-lists, on the proviso that they publish their reasons for so doing in the *Gazette*.

8. THE IMPERATIVE FOR ACTION

This Committee realises that any outcomes flowing from this Report will be determined, at least in part, by the wider social and economic environment. Currently this State is potentially facing its greatest economic challenges since the Great Depression. Uncertainty and moral panic, created as the implications of these challenges become widely understood could give rise to the criticism; "*So what? We've got bigger problems to solve right now*."

The Committee therefore has cause to reflect on the observations of Dr Peter Hay, Reader in the School of Geography and Environmental Studies at the University of Tasmania, from more than thirty years ago (P. Hay 1977, 117):

> *In terms of priorities, minimization of corruption will usually be viewed as an issue of marginal importance compared with more pressing problems.*
>
> *Possibly of even greater significance is the strain placed by social upheaval on structures. In periods of fundamental economic restructuring or rapid population increase, for example, institutions adapted to a quieter, less complex reality may well be found wanting. Informal decision-making processes, often involving corruption, are likely to arise spontaneously, filling the vacuum thus created.*

The Committee endorses the above comments of Dr Hay, and finds them to be an eloquent argument in favour of the imperative for action on the matters addressed in this Interim Report. For this reason, this Committee urges the Executive Government to make the implementation of the recommendations contained within this Interim Report a matter of urgent priority.

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