The Government's Response to the Interim Report of the Legislative Council Select Committee into Public Sector Executive Appointments

Ministerial Statement

19 May 2009

Mr Speaker, I rise to make a Ministerial Statement about the Government's response to a report of a Select Committee of the Legislative Council.

As members of this House will be aware, the Select Committee on Public Sector Executive Appointments was appointed on 11 June 2008 by the Legislative Council 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.

As the Select Committee is chaired by the Hon Paul Harriss MLC, for convenience I will refer to the Committee in this statement as the 'Harriss Committee'.

The other members of the Harriss Committee are MLCs - Greg Hall, Terry Martin and Jim Wilkinson.

The Interim Report of the Harriss Committee was tabled in the Legislative Council on 7 April 2009.

I understand that Mr Harriss has moved a notice of motion in the Council that the Interim Report be considered and noted. It is likely that this motion will be debated today.

Mr Speaker, I have stated previously that the Government wanted to make a considered response to the Interim Report of the Harriss Committee.

There are adverse recommendations in relation to four named people all of whom have links to the Government – a current member of the House of Assembly, Steven Kons; a former Premier, Paul Lennon; a former Secretary of the Department of Premier and Cabinet, Linda Hornsey; and the current Secretary of the Department of Justice, Lisa Hutton

The recommendations include that each of these people be referred to the Privileges Committee of the Council. To put these recommendations into effect I assume will require separate voting and approval of the majority of the Council.

In October last year, the Government agreed to respond to reports of Select and Joint Select and Standing Committees tabled in the Legislative Council within a period of three months after the relevant report is tabled.

Mr Speaker, given the seriousness of the recommendations in the Harriss Committee's Interim Report and the controversy surrounding them I propose to table the Government's response to that report today.

The response is in three parts. It deals with the Committee's processes, some underlying misconceptions that the Committee appears to have, and the Government's reaction to the recommendations in the Interim Report relevant to the Government.

To begin, the response addresses some procedural issues.

In doing so I am conscious that as a member of the House of Assembly I must necessarily limit my statements here to avoid any perception that I am trying to interfere with the operations of the other House of this Parliament.

But let me say, concerns have been expressed by many people about the modus operandi and approach of the Harriss Committee to its inquiry.

There is a view that this inquiry and its proceedings are changing the way the Parliament of Tasmania does business.

In the spirit of ensuring good and proper process, and with an eye to the future if similar inquiries are undertaken, I think I can make some observations without offending the fundamental principles of equality and independence of each of the Houses of this Parliament.

After all Mr Speaker, at the heart of the terms of reference of the Harriss Committee are concerns about propriety of process – the processes used to make certain appointments – and let me assure the House that the Government takes very seriously its responsibility to uphold proper process.

In particular Mr Speaker, the workings of this Committee have raised issues about the use of 'summonses' as the standard means of obtaining information or documents. In the past, Committees have requested information and the Government or individual Ministers have complied. I am told that the issuing of summonses was an extremely rare practice until recently.

Furthermore there has been improper regard for correct process in the summoning of me, as Premier and a member of this House.

Another matter I find unusual and a change in normal practice, and one which has certainly caused comment in the community, is the issuing by the Committee of a confidential summons to the Acting Commissioner of Police for files relating to a police investigation. Not only was the very act of demanding the files surprising (given both the ongoing and finalised Police investigations), but of equal concern was the manner in which information contained in those files was used by the Committee.

The Government's response also considers the treatment of witnesses and the conclusions the Committee draws from their evidence.

Mr Speaker, the courts have long recognised the frailty of human memory and the fact that memories can change over time or be completely lost. That is one of the reasons why statutes of limitations exist and why the courts sometimes exercise their powers to stay proceedings. Apparently for no better reason than that witnesses now have a poor or no recollection of the detail of events which took place nearly two years ago this Committee confidently concludes that they are *"evasive, inconsistent, incoherent and …unreliable"*.

The Committee makes much of Parliamentary Privilege, and possible breaches of it.

The notion of Parliamentary Privilege is a significant aspect of the law relating to the Parliament. These privileges or immunities and the powers of each House of this Parliament to protect the integrity of its processes are a very strong right. Members of this Parliament are indeed very privileged to enjoy this immunity – an advantage that isn't enjoyed by others in the community. Because these privileges are so powerful, I think we must be very cautious about how they are used, and allegations of breaches of those privileges or contempt should not be made lightly.

Another process issue worthy of more consideration by us as members of this Parliament is the apparent inability of people to discuss the findings of a Committee or engage in debate about its inquiry.

In advice to me the President of the Legislative Council counselled that:

"it would not be appropriate for the Executive or any other person to undertake an inquiry into matters before either House of Parliament in circumstances where such an inquiry would question or impeach a proceeding in parliament or have the potential to

interfere with the adjudication by the House of Parliament of a matter that is for its sole determination"

Given the seriousness of these concerns I have taken legal advice on these matters from the Solicitor-General.

He advises that the right of citizens (including the Premier or members of the Executive Government) to conduct inquiries into any matter (provided it is done according to law) is one of the hallmarks of a free society and although, in some rare circumstances, public comment on the proceedings of a House of Parliament might possibly have the capacity to obstruct the business of that House, such occasions are likely to be rare. The possibility of contempt will arise only where comment is made in circumstances in which that comment actually does or is likely to have a real tendency to obstruct the business of a House of Parliament.

The right to freedom of speech in parliamentary democracies is at least as old as the Tasmanian Parliament and arguably no less important.

In a case involving a former Prime Minister of New Zealand, Mr David Lange, and the Australian Broadcasting Corporation, the High Court of Australia has recognised an implied constitutional freedom of Australian citizens to speak freely in relation to political matters holding that "*freedom of communication on matters of government and politics is an indispensable incident of [the] system of representative government*". Accordingly, the idea that the proceedings of either House of the Tasmanian Parliament, or of committees of those Houses, are not proper subjects of public debate and comment is not only undemocratic, it is not the law.

As a Parliament I think we need to address some of the procedural issues that the operation of the Harriss Committee has raised. Clearly there is confusion and differences of opinion. I think we need to clarify how these arrangements are meant to work in practice. The current arrangements appear to be unfair to witnesses and make their position impossible.

Secondly, the Government's response points out some misconceptions that I think have resulted in the Committee producing flawed findings and recommendations.

The Interim Report is undermined by several mistaken assumptions and an imperfect understanding of some of the legitimate roles and responsibilities of senior public servants, and the status of certain documents.

The first misconception is that implementing Government decisions is evidence of the politicisation of the Tasmanian public service.

Patently Mr Speaker, this is not the case.

The second misconception advocated by the Committee is that it is inappropriate for public servants to prepare question time briefs. This is part of the normal work of many senior public servants.

The third misconception evident from the Interim Report relates to a misunderstanding of the breadth of the role of a Secretary of the Department of Premier and Cabinet and the supposed inappropriateness of a person in that role providing advice to the Attorney-General on matters related to the appointment of a magistrate. The Secretary of the Department of Premier and Cabinet, who is also Secretary to Cabinet, has a broad ranging job that involves dealing frequently with complex

and contentious issues at the highest levels across all aspects of government.

Providing advice to any Minister on matters related to his or her portfolio responsibilities is a legitimate part of that role.

Misconception number four concerns the 2002 protocol for appointment of judicial officers put in place by the then Attorney-General, Peter Patmore (the 'Patmore Protocol'). Non-compliance with this protocol is used by the Committee as a major justification for its criticism of the Secretary of the Department of Justice. Let me be clear Mr Speaker, despite the Committee's assertions, the 'Patmore Protocol' was not a departmental policy and certainly it had no relevance to the way a magistrate was to be appointed in 2007.

Misconception number five follows from a flaw embedded in the terms of reference of the Committee; that is the considerations around selecting and appointing a judicial officer are the same as those that might apply in, say, selecting a divisional director or branch manager in a government department. There is no relevance of one process to the other.

Lastly, Mr Speaker, the response details the Government's reaction to relevant recommendations of the Interim Report.

Recommendation 1 deals with possible breaches of the *Archives Act 1983* in relation to the shredding of a document. This matter has been the subject of much debate by the Committee and others.

I have already provided advice to this House that the Government has a legal opinion that there has not been a breach of the Archives Act. I have provided that advice to the Committee.

The Government rejects recommendation 1 of the Interim report.

However the legal opinion by the Solicitor-General does raise some important questions about the current Archives Act and its efficacy. There do appear to be definitional problems and consistency issues within the legislation and today, as Minister responsible for this Act, I announce that I have asked for its review, and at the appropriate time a submission recommending any necessary changes to the Act will be brought to Cabinet for its consideration.

Mr Speaker, aside from the matters raised by the Solicitor-General and others, this is a timely move.

As part of this Government's commitment to open and transparent Government, I announced a 10-point plan to restore trust in Government by enhancing good governance, transparency, integrity and accountability. This program of initiatives included a review of the *Freedom of Information Act 1991* with a view to improving, if necessary, access to information for all Tasmanians, as well as the administration of the Act.

The Attorney-General has oversight of this work and it is progressing well, but clearly there is a fundamental link between any improved legislation to advance the right of Tasmanians to government information and the Archives Act, which provides clarification about what is government information and the rules for the custody and retention of those records.

Recommendation 6 of the Interim Report advocates, with one modification, reinstatement of what the Committee refers to as the 'Patmore Protocol' for judicial appointments.

Mr Speaker, the Attorney-General has already announced and released an enhanced Judicial Appointments Protocol for the appointment of Judges and Magistrates.

These guidelines have been the subject of broad stakeholder consultation. The consultations revealed a range of opinion on some details of the protocol in draft form but overall it attracted significant support. Not one of the people or organisations consulted expressed the view that the 'Patmore Protocol' should be revived.

For the benefit of members, those consulted were:

- The Chief Justice;
- The Chief Magistrate;
- The Law Society;
- The Bar Association;
- The Independent Bar;
- The Women Lawyers Association;
- The Shadow Attorney-General; and
- The Leader of the Greens.

In any event Mr Speaker, the terms of the protocol proposed by the Government are not far removed from the 'Patmore Protocol', but benefit from wide endorsement from relevant

stakeholders. As such, the Government rejects recommendation 6.

I now want to turn to recommendation 5 which concerns the actions of Ms Hutton, the Secretary of the Department of Justice.

This recommendation derives from assumptions that are untrue or at least flawed.

To recap:

The Committee asserts that Ms Hutton is at fault for not following the 'Patmore Protocol'. This criticism is not justified and is based on a misunderstanding of the proper roles of the Attorney-General of the day and the Secretary of the Department of Justice, and the status of the 'Patmore Protocol'. Ms Hutton cannot be criticised for ignoring the protocol of an Attorney-General who left office five years before; she was bound to act under the instructions of the Attorney-General at the time the appointment was being considered - that person was Steven Kons, not Peter Patmore.

The second criticism of Ms Hutton is that she prepared a question time brief for the Minister to use in Parliament, and provided some words for a Ministerial response to a media

enquiry, and that somehow the preparation of these items was inconsistent with her apolitical role as a public servant.

This is rejected as not a valid criticism of a public servant. The drafting of a question time brief or media release by a public servant is not an offence; it's normal business for many public servants. A professional public servant will understand the purpose and nature of these documents and compose them accordingly.

The wording of recommendation 5 is also curious. The recommendation proposes that I, as Premier, issue a direction to the State Service Commissioner under section 14 of the *State Service Act 2000* to delegate his powers of investigation to an independent judicial officer to investigate alleged but undefined breaches of the State Service code of conduct.

A direction under Section 14 of the State Service Act cannot be given to the State Service Commissioner.

The Government rejects recommendation 5.

I now turn to recommendation 4 which deals with Linda Hornsey.

As was the case with Ms Hutton, the Committee criticises Ms Hornsey's actions as Secretary of the Department of

Premier and Cabinet and goes so far to suggest she be charged with a breach of the State Service Code of Conduct.

As I mentioned earlier, there appears to be a flawed understanding by the Committee of the role of the Secretary of the Department of Premier and Cabinet.

Mr Speaker this is undoubtedly one of the, if not the, most difficult jobs in the public sector. Ms Hornsey held this role for nearly 10 years. I know that she was held in high regard by both the Premiers for whom she worked. It's not a job for the faint-hearted and I do not know of many public servants who have held the job for such a long period of time – certainly not in Tasmania. Both Jim Bacon and Paul Lennon would attest to Ms Hornsey's professionalism, the soundness of her advice and her ability to fix problems and get the job done. In a letter to me, Mr Lennon says of both Ms Hornsey and Ms Hutton:

"During my time as Premier and Deputy Premier I had many dealings with them both. At all times they displayed professionalism, a strong commitment to proper process and fair play. The holding of a senior position in the Public Service means that from time to time you will be called upon to make tough judgement calls that you believe are warranted in the public interest. It also means that you will be required to give frank and

fearless advice to Cabinet and Ministers. That is what they did, nothing more nothing less."

As head of the public service and Secretary to Cabinet, the role of Secretary of the Department of Premier and Cabinet requires that the incumbent engage in sometimes robust and tough discussions with Ministers, which may include providing unwelcome or difficult advice - advice which Ministers must consider, but ultimately may choose not to follow.

Ms Hornsey did provide advice to the Attorney-General. This was a legitimate action, within the scope of her role. In fact, to not provide advice to a Minister when necessary could be seen to be an abrogation of her responsibilities. I see no evidence in the report or elsewhere that Ms Hornsey acted contrary to the role she held. For this reason alone recommendation 4 has no merit.

But again Mr Speaker, I must point out procedural and process errors. This recommendation is also so flawed that it is incapable of implementation.

The State Service Act and the State Service code of conduct apply to existing state servants; which Ms Hornsey is not. Even if investigation was warranted, which it is not, and then undertaken, the most serious sanction is termination but that,

Mr Speaker, is pointless, as are all the other available sanctions under section 10(1) of the State Service Act.

Ms Hornsey does not work in the State Service any more so there is no sanction that is capable of application to Ms Hornsey. The recommendation is nonsensical.

The Government rejects recommendation 4.

I now want to refer to Recommendations 7 and 8 of the Interim Report concerning the Member for Braddon, Mr Kons, and the former Premier, the Hon Paul Lennon.

It is recommended to the Legislative Council that Mr Kons and Mr Lennon be the subject of an investigation by the Legislative Council's Privilege Committee.

First let us reflect on the proper process – on which you have provided advice to me Mr Speaker.

I note that the recommendations can only be put into effect if the Legislative Council votes to pursue them. Assuming it does, Mr Kons may not appear before that Committee unless and until a Message is first received by this House requesting his attendance; and secondly, the House votes to agree to grant Mr Kons leave to appear. Members will recall that this is the

process that occurred when the House gave Mr Kons leave to attend the Harriss Committee.

In addition, the House of Assembly Standing Orders provide that "the House may authorise such a Member to attend if that Member thinks fit". This emphasises the rights and immunities of the Houses cannot be overturned by a vote of one House only. Because of the basis of the House's rights and immunities at common law, a Member of one House cannot be compelled by a vote of either House to attend a Committee of the other.

The recommendation in respect of Paul Lennon is similar.

Although the recommendation states that the matter to be investigated by the Legislative Council Privileges Committee is "the testimony of, or otherwise concerning, Hon Paul Lennon before the Select Committee on Public Sector Executive Appointments Committee", the issues which were being discussed before the Committee were matters which took place whilst Mr Lennon was Premier, but more importantly, when he was a Member of the House of Assembly.

Mr Lennon chose to appear before the Committee voluntarily, without summons, but by invitation, so there is no issue of him being summonsed to give evidence against his will.

The Committee states that there is no reason why a former Member of one House should not be called before a Committee of the other House by way of summons.

This is only partially correct. If the Committee was investigating a matter with which the former Member was involved after he ceased being a Member and it had no relation to anything regarding his membership of the House, of course he could be summonsed.

However, in the case of Mr Lennon, it is clear that he would not have been in a position to take such actions (about which the Committee was inquiring) if he were not a Member of the House. As he possessed the rights and immunities as a Member of the House at the time, the immunity in respect of those actions remains beyond his time as a Member. It would render the protection meaningless if it lapsed when his membership of the House ceased.

To emphasise the point, if any Member of either House makes remarks in a speech in their respective House which are defamatory they are afforded protection pursuant to Article 9 of the Bill of Rights and provisions of the *Defamation Act 2005*. These provisions preserve freedom of speech in both Houses

of Parliament. Such protection does not end when a person ceases to be a Member.

In-other-words, the immunity from prosecution given to a Member of Parliament remains in place when he ceases to be a Member in the same terms it existed when he was a Member.

It must be recognised that these rights and immunities exist for all former Members of both Houses.

The advice I have received from you Mr Speaker also discusses the case of the former Prime Minister Mr Bob Hawke and Federal Treasurer Mr John Kerin attending a Senate Committee under summons and the summons issued by the Senate to a former Member of the House of Representatives, Mr Peter Reith, to appear before it.

I table that advice and refer members to it.

Mr Speaker, I advise that Government members of the Legislative Council will not support any motion in the Council to effect recommendations 7 and 8, and the Government members in this House will not vote to agree to grant Mr Kons or Mr Lennon leave to appear.

Likewise the Government sees no reason for Ms Hutton or Ms Hornsey to be referred to the Privileges Committee of the

Legislative Council. Government members of the Legislative Council will not support any motion to effect recommendations 9 or 10.

Recommendation 11 recommends that the scope of the State Service Act be broadened to apply the State Service principles to the entire public sector.

Since the mid-1990s there have been separate employment management powers for the Tasmanian public service (under the State Service Act) and the broader public sector which includes Government Business Enterprises (GBEs) and State Owned Companies (SOCs).

This separation recognises that the Tasmanian Government provides public services directly to the Tasmanian community (through the State Service) and also conducts commercially based activities on behalf of the Tasmanian community through GBEs and SOCs.

Employment management powers required by these government entities are by necessity different as public service principles in the State Service Act including merit are different to the commercial focus of GBEs and SOCs, which run primarily along business lines.

This distinction makes 'whole of public sector' management legislation problematic in the Tasmanian context and the Government rejects recommendation 11.

Mr Speaker, one of the main purposes of the Harriss Committee was to consider the appointment processes for senior public servants. I am pleased to see some content does address this term for reference. Surprisingly though, the model the Committee suggests at recommendation 12 is open to direct political interference - a panel puts up three names and the Minister can reject them and appoint someone else? The current Tasmanian approach does not allow this interference.

Our arrangements in relation to Senior Executive Appointments & Selections, Structures & Conditions and Instruments of Appointment have been reviewed recently and updated. I am pleased to announce that I will soon issue new guidelines as a Ministerial Direction.

Heads of Agencies will be bound by the Ministerial Direction, which provides guidelines on the appointment process which may include executive search, assessment of short-listed candidates, outsourced selection processes, expressions of interest as well as making a traditional selection via interviewing applicants who respond to an advertisement in the media.

The focus of the Ministerial Direction is to ensure that the knowledge, skills and expertise of the appointee is assessed as meeting the requirements for the office (meeting the principle of matching the right person to the right job).

It is not considered necessary to 'insert' an independent statutory officer into the selection and appointment process for Senior Executives and Equivalent Specialists. The Premier's appointment power under the current State Service Act has been delegated to Heads of Agency since 2001 on the basis that Heads of Agency should be able to appoint senior executive service officers in their own agencies as they do general employees.

This delegation reflects the level of autonomy that a Head of Agency may reasonably be expected to exercise.

The recommendation calls for a Public Sector Standards Commissioner, but the State Service Commissioner already has this role.

The current State Service Commissioner, which is a statutory appointment under the State Service Act, already has broad functions and powers under the Act and reports to Parliament annually on the performance or exercise of those functions and powers.

The Commissioner may only be removed from office by the Governor through a resolution of both Houses of Parliament, which ensures the independence of the role. I see no need to change this role.

The employer functions of the Commissioner have been delegated to the Secretary of the Department of Premier and Cabinet since 2004 on the basis that the then Commissioner (Mr Robert Watling) saw a potential 'tension' between acting as the employer and having responsibility for review of employment decisions.

Following the retirement of Commissioner Watling in January 2009, a review was established to determine the governance arrangements under the State Service Act particularly as it relates to the State Service Commissioner's functions.

The review will consider various models including those that operate in other jurisdictions. I anticipate that the review will be completed later this year.

Mr Speaker, I now want to come to one of the most important aspects of this matter.

I want to take this opportunity, as Mr Kons has already done personally, to express sincere regret on behalf of my Government to both Mr Hay and Mr Cooper and their families, for the hurt and publicity caused by the appointment process and the inquiry into it, and any detriment this may have caused them.

I understand that they are both well regarded by the legal profession, peers and colleagues and each was assessed as having the capacity to be a magistrate. Of course Mr Hay is now a magistrate, and clearly Mr Cooper was a potential appointee. However, this was not the decision ultimately made.

Mr Speaker, it is paramount that the operations of a committee of this Parliament should be underpinned by fundamental democratic principles such as procedural fairness. That is the expectation of the Tasmanian community.

What we have seen Mr Speaker is something altogether different - at least one commentator has labelled the Harriss Committee as *"a grossly unfair public circus that has failed to respect the rights of individuals, and which has been used as a forum to smear reputations"*; hardly a good advertisement for sound, democratic government.

We have seen a committee that saw fit to inquire into matters that had already been investigated by the police, and about which the Director of Public Prosecutions decided that charges should not be laid.

Let me quote from a letter in September last year from the Director of Public Prosecutions to the Acting Commissioner of Police:

"I have examined and considered the several files containing the results of the two investigations into circumstances of whether and if so why the appointment of Mr Simon Cooper as a Magistrate did not proceed, and of whether there had been committed a crime of bargaining for public office, the office being that of the Solicitor-General.

I do not believe any charge should proceed against any person, as there is no reasonable prospect of conviction for any crime or offence against any person."

I ask, Mr Speaker, how many times do we need to investigate the same matter?

In response to another Committee of the Parliament and its inquiries, the Joint Select Committee on Ethical Conduct, the Government has supported the establishment of a well-founded, soundly-based Ethics Commission with investigatory powers underpinned by principles of natural justice, bound by rules of evidence and dismissive of mere hearsay, and allowing individuals the right of reply and representation.

There is no more compelling argument for the need for a properly established constituted independent Ethics Commission with clearly articulated powers and functions than the Harriss Committee.

Mr Speaker, while the Committee process may have been flawed and caused unnecessary distress for many individuals, the Government is determined to ensure robust, co-operative and transparent processes are employed in future.

We must not allow our parliamentary processes to disregard procedural fairness and the sensible custom and practice that have developed over the previous 150 years.

Members will recall that I decided to give the four people named in the Interim Report the opportunity to write to me with any comments they wished to make about the findings and recommendations of the Interim Report.

I did this as a matter of courtesy and to ensure I was properly informed before the Government made its response.

I indicated at that time that I would table the responses I received and I do that now.

At the urging of the chair of the Committee, Mr Harriss, I sought advice from the Speaker and the President of the Legislative Council. I have already tabled the advice I received from the Speaker and for completeness I also now table the advice I received from the President.

Finally Mr Speaker, I table the Government's Response to the Interim Report of the Legislative Council Select Committee into Public Sector Executive Appointments.