

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

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

I Introduction

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.

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

This document is the Government's response to that report.

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.

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2 Procedural Issues

2.1 The Tasmanian System of Responsible Government

Tasmania has a robust system of responsible government.

It is a system, derived from the traditions of Westminster and founded on its rules and conventions, in which Parliament has two legitimate roles – consideration of legislation and scrutinising the workings of Executive Government.

The House of Assembly is the House that determines the Government of the day. The political party that has the support of the majority of Members in this chamber forms the Government. The Legislative Council is principally a house of review. By and large, its Members are independent and not aligned to any political party.

The Government has the obligation and the opportunity in both the House and the Council to fully explain its policies and the action it takes to implement them. Opposition parties and independent Members can scrutinise the conduct of the Government. This is done through various means - question time, questions on notice, private members business and through debates during the passage of legislation and the Budget, and of course the work of Standing Committees and Select Committees set up to inquire into specific matters under defined terms of reference.

There is always a tension between the Government of the day and the scrutiny under which the Legislative Council places that Government. This is part of a healthy democracy.

For many years, indeed since a bi-cameral Parliament was established here in 1856, Tasmania has benefitted from this balance. Over time, conventions, customs and practices have developed to ensure cordial working arrangements – proper procedures that ensure 'comity' between the Houses.

But this way of working is only healthy when Members of Parliament recognise the obligations and responsibilities that are part and parcel of the power with which they are entrusted. Individual Members of Parliament and Committees possess considerable powers which are essential to enabling the Parliament to act without fear or favour in the interests of the public. It is a heavy responsibility to exercise the use of these Parliamentary powers in the correct

fashion, so as not to disadvantage people who are not Members of the Parliament, and to achieve the best outcomes for the people the Parliament represents.

To emphasise this point, if any Member of either House of the Parliament 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 the provisions of the *Defamation Act 2005*. These provisions preserve freedom of speech in both Houses of Parliament. They are certainly not privileges afforded members of the general community.

Abuse of this power is repugnant, and must be condemned in the strongest terms when it occurs.

2.2 The Workings of the Committee

The Committee set out with apparently straightforward terms of reference: to primarily inquire into and report on:

- Best practice for the appointment of individuals to fill senior Tasmanian public sector executive positions; and
- The circumstances surrounding the appointment of a magistrate in Tasmania in 2007.

In the first instance these seem reasonable objectives, designed to inform debate about the appointment processes of government and perhaps suggest where improvements could be made.

Nevertheless, even in the framing of these objectives, the proposers of the Committee show some confusion and misunderstanding.

There is no relationship at all between the making of judicial appointments and the means by which senior executives in the public service are appointed. Although the judiciary and Executive Government are two arms of our system of government, they are distinct and rightly independent from each other. Senior executives of the State Service are appointed in accordance with the provisions of the *State Service Act 2000*, while Magistrates and Judges are appointed under completely different pieces of legislation (for example the *Magistrates Court Act 1987* and the *Justices Act 1959*). There is no reason why the processes applying to one group should have any bearing on the other. In fact, it is probably not desirable or indeed practicable to have one process applicable to cover senior executive, judicial and other appointments.

Members of Parliament here would only too well understand and be aware that the way by which appointments are made to the offices that support the third independent arm of the system of government, that is the Parliament itself, is not informed or influenced by the processes that apply to the judiciary or the bureaucracy that supports Executive Government.

Leaving this misunderstanding aside, it appears that the motivation for the establishment of the Committee was to consider and report on the correctness or otherwise of certain processes.

The Committee makes much of the need for correct process, but it is the appropriateness of the processes of this Committee that have caused the most concern in some quarters.

The Committee's own procedures appear to have had some deficiency. Not only has the Committee seen fit to move away from the custom and practice of normal co-operative business arrangements that have served the Parliament well over many years, instead seeking to operate within a legalistic and adversarial construct, but then it has failed to follow exactly the precise rules and orders to which Committees are subject.

At one stage, after the Premier indicated that he had written to four people named in the recommendations of the Interim Report, the Chair of the Committee counseled him to seek the advice of the Speaker of the House of Assembly and the President of the Legislative Council to ensure he did not cause procedural problems, and lead those people to *"unwittingly... breach the privilege of this Committee by divulging in camera evidence of the Committee contrary to the Standing Orders"* and that the Premier's *"conduct could be viewed as being contrary to comity between the Houses"*.

The Premier took up the Chair's suggestion and sought advice from the Speaker and the President.

In his advice the Speaker has pointed out flaws in the processes adopted by the Committee in relation to its dealings with Members and former Members of the House of Assembly. Part of that advice relates to the use of summonses.

2.3 Use of Summons

Many people, including the Premier, were subject to a summons of the Committee. In his reply to the Premier, the Speaker states

"The issue of a summons by the Committee to you as Premier for the production of a document is of great concern as the service of a summons from the Legislative

Council or any of its Committees upon a Member of the House of Assembly unequivocally constitutes a breach of the privileges of the House."

The advice continues

"Notwithstanding the breach of the privileges of the House perpetrated by the service of a summons upon you, the summons itself was deficient as it cited as its authority, Legislative Council Standing Order 241, which expressly excludes Members of the Assembly from the operation of that Standing Order. The correct procedure for the Legislative Council to make a request of a Member of the House of Assembly for an appearance or the production of a document before the Council or one of its Committees is set out in the Council's own Standing Order 243."

It appears that by issuing a summons to the Premier, the Committee has breached its own Standing Orders. The correct procedure is mirrored in the House of Assembly Standing Orders 393 and 394, which the House of Assembly has always respected.

The importance of this matter cannot be overstated. If the Committee is going to criticise strongly the processes of others, a clear implication would be that its own processes are in order and without fault.

But leaving aside basic procedural error, it is also the manner of the operation of the Committee that has altered or, if left unchecked, has the potential to fundamentally change the way business is carried out in the Parliament.

These changes go to the heart of the Parliamentary system whereby the equality of the Houses is acknowledged by the recognition of 'comity' between the Houses. A principle extolled at some length in the Committee's Interim Report but not given effect by its own proceedings.

The use of 'summonses' as the standard means of obtaining information or documents is not the normal way for the Parliament and its Committees to do business. In the past, Committees have requested information and the Government or individual Ministers have complied. The issuing of summonses was an extremely rare practice until recently and in fact the Government is not aware of any summonses having ever been issued, at least by a House of Assembly Committee or a Joint Committee, before the recent developments.

Again, quoting from the letter to the Premier from the Speaker of the House of Assembly:

"I am strongly of the opinion that summonses should be issued only as a last resort and that witness counselling should be employed to a greater extent than is currently practiced to restore a co-operative approach which had previously worked with success. A model based upon procedural force can easily become counter-productive for all of the Parliament's Committees because by compelling the attendance of witnesses as regularly as now occurs, the co-operative nature of witnesses appearing and their willingness to give evidence freely may be eroded and the tasks assigned to Committees necessarily become much harder."

The process used to summons the Premier to provide a document (albeit via a summons that was procedurally flawed) is illustrative.

The Premier responded in writing that he wanted to consult with his colleague, the Attorney-General, and take legal advice (as the document sought by the Committee would generally attract legal professional privilege).

The Premier did not refuse to provide the document; in fact he went further and suggested a oral briefing by the most senior legal adviser to the Government, the Solicitor-General, to add context that may be helpful to the Committee. His reward was a letter insisting that he had 'resisted' the summons and that he should comply forthwith - hardly the way this Parliament has operated to date. This is despite the original summons suggesting that if required the Premier should "*seek a reasonable extension of time from this Committee*".

It is interesting to note that this approach seems at odds with the courtesy afforded the Acting Commissioner of Police, Mr Darren Hine, when he was summonsed to provide various documents. Quoting from page 7 of the Interim Report Mr Hine is commended for "*his careful balancing of confidentiality and public interest in this matter*" in deciding how to respond to the summons.

The Premier did provide the Committee with the document it sought, though the Committee decided to release its Interim Report before that advice was received and without taking up the offer of a briefing by the Solicitor-General.

2.4 Summons of Police files

The issuing by the Committee of a confidential summons to the Acting Commissioner of Police for files relating to a police investigation is another unusual matter and a change in normal

practice, one which has certainly caused comment in the community. Not only was the very act of demanding the files surprising (given both ongoing and finalised Police investigations), but of equal concern was the manner in which information contained in those files was used by the Committee.

2.5 Use of Police Statements

As mentioned above, the Committee obtained police files under summons on matters related to the appointment of a Magistrate. It appears that the Committee may have used these statements in questioning witnesses. To quote from a letter from Ms Hutton, the Secretary of the Department of Justice, to the Premier dated 7 May 2009:

"However during the course of my [Ms Hutton's] appearance on 27 October 2008 the Committee chair essentially said he was unable to confirm or deny that the Committee had the [police] file. For all I know there are sound reasons for Mr Harriss' reticence on this subject albeit that they have not been disclosed to me. However it cannot be thought acceptable that the Committee had intended to question me about matters on which I had already made statements to the Police while deliberately concealing the fact that they had the police file.

The proper course would have been not to accept the file at all if the limitations placed on its use were such that they must cause material disadvantage to witnesses."

If all relevant witnesses were not aware that the Committee had access to their statements and other police materials, they should have been made aware from a procedural fairness perspective.

From her advice to the Premier, it appears that Ms Hutton sought access to her police statements to help her prepare for her appearances before the Committee, but was unable to replicate the entire file that was in the Committee's possession at the time, as attached to those statements were a substantial number of other documents and records that were now not in her possession or readily accessible. It seems incredible then that she was criticised by the Chair for not having prepared more thoroughly for her appearance.

Ms Hutton's note to the Premier goes on to say:

"The Committee has drawn a number of quite elaborate conclusions about the sequence of events on 8 August 2007. In doing so they have relied heavily on telephone records obtained by police under warrant and the time stamps on a number of email exchanges. I have no way of knowing which telephone records were obtained by Police as these records have not been shown to me and I am unable to say whether those records cover all of the telephone numbers which might be relevant to these events. Similarly a degree of reliance has been placed on the accuracy of time stamps on emails which I have had no opportunity to test.

The fact that the Committee has chosen to include selected extracts from the evidence I gave in camera in March this year which support their findings without publishing the whole is grossly unfair. It is a proper part of my role to be concerned about the impact of potential criticism (political or otherwise) surrounding a magistrate appointment from the points of view of maintaining confidence in the quality of judicial appointments and of protecting the reputation and privacy of candidates. The Committee has chosen instead to portray this concern as evidence of the politicization of the public service."

An inquiry conducted in this manner puts witnesses in an invidious position. Is this a process with which Members of Parliament feel comfortable? The Government contends that procedural matters such as this are worthy of further debate and work by the Parliament.

2.6 Parliamentary Privilege

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. As already mentioned, 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, parliamentarians must be very cautious about how they are used, and allegations of breaches of those privileges or contempt should not be made lightly.

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If the relevant recommendations of the Interim Report do proceed to a vote in the Legislative Council, the Government would urge Members of that House to be mindful of the implications.

On the evidence that is available to it (and accepting that it does not have access to all the evidence because a lot of it was taken by the Committee *in camera*) the Government is not aware that any person has interfered with or sought to frustrate the proper and legitimate proceedings of the Committee. The Government is not aware of anyone who obstinately 'resisted' the summons of the Committee, disobeyed an order of the Committee to attend its hearings, or to produce documents, or refused to be examined or to answer any relevant question put by the Committee. Everyone who was called fronted the Committee and answered the questions put to them.

It is not an offence for people to have incomplete or vague recollections. It is not a crime if a witness cannot recall past events with the same clarity at different points in time. After all many of the events salient to the terms of reference of the Committee, and the related incidental matters which the Committee decide to pursue, took place two years ago in 2007.

Unlike the Committee, 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. But, apparently for no better reason than that witnesses now have a poor or no recollection of the detail of events which took place two years ago this Committee confidently concludes that they are "*evasive, inconsistent, incoherent and ...unreliable.*"

The Government requests Members of the Legislative Council to ask themselves the following questions: Do you really want the Tasmanian Parliament to be a place where just because Members of Parliament state that a person is not telling the truth, then it must be so? Where Members can assert a person lacks credibility – and it is widely reported as fact - and that person has no right to reply?

The Government Members of the Parliament consider that these questions should be answered in the negative.

To do otherwise would be a clear breach of the privilege resting with Members of the Parliament and the trust placed in parliamentarians by the community, and a violation of fundamental human rights.

2.7 Ability of People to Discuss the Committee's Findings

Another process issue worthy of more consideration by all Members of the Parliament is the asserted inability of people to discuss the findings of the Committee or engage in debate about the inquiry.

As mentioned earlier the Premier received advice from the President of the Legislative Council. This followed a caution given to the Premier by the Chair of the Committee, after the Premier reported that he offered the four people named in the report the opportunity to write to him with any comments they wished to make about the findings and recommendations of the Interim Report. The Premier did this as a matter of courtesy and to ensure he was properly informed before the Government made its response.

In her advice, the President counselled the Premier 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"

and further that:

"writing to the subjects of an ongoing inquiry by the Legislative Council, in an effort to obtain information about what was said or done by those witnesses, places all affected parties in a very difficult position. Should witnesses reveal to you anything received in camera, they may unintentionally place themselves at odds with the Standing Orders and privileges of the Legislative Council."

Given the seriousness of these concerns the Premier sought legal advice on these matters from the Solicitor-General.

He advised 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.

In relation to the issue of contempt by obstructing a House of Parliament, Odgers' Australian Senate Practice, 6th Ed says (at p. 1014),

"It is a high breach of privilege to utter, or publish, words slandering either House of the Parliament, its proceedings or its members.

The modern trend, however, leans to the view that criticism, even if intemperate and wrong-headed, of Parliamentary institutions or of the conduct of members should not be stifled unless and until it reaches the point of improper obstruction, or is likely to cause substantial interference with the performance of their functions.

The dignity of the House may best be served by ignoring those reflections on Parliament or its members which, while technically a contempt, do not really obstruct proceedings..."

In relation to the possibility that witnesses who have given evidence to a Committee *in camera* and who afterwards reveal that evidence may "*unintentionally place themselves at odds with the Standing Orders and privileges of the Legislative Council*", the Solicitor-General makes the following observations about the proceedings of the Committee and the President's advice to him.

If the Committee has taken evidence *in camera* and has made findings based on that secret evidence but has not disclosed that evidence in its Interim Report, then not only those who are the subject of adverse findings, but every Tasmanian, should be gravely concerned about the procedures adopted by the Committee. On the other hand, if all of the secret evidence received by the Committee has already been made public, then the President's warning would seem unnecessary.

Given that at this time none of the Committee's findings or recommendations have been considered or adopted by the Legislative Council, it is surprising that the Committee, or some of its Members, have held media conferences to publicise the findings and recommendations when it is acknowledged that the Legislative Council – on whose behalf and with whose authority the Committee acted - may yet vote to reject those findings and recommendations.

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, ([Lange v Australian](#)

Broadcasting Corporation [1997] HCA 25; 189 CLR 520), 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.

What is more, it would also appear to be contrary to the Legislative Council's own Standing and Sessional Orders.

In November last year, the Legislative Council passed Sessional Orders for the current session. By Sessional Order 3, it would appear that anyone may publish or disclose (and presumably discuss) any evidence or documents given to a Select Committee of the Legislative Council while the proceedings of the Committee were open to the public and the news media but that no-one, not even a Select Committee or one its Members, may publish or disclose any evidence or submission given or made to a Committee *in camera* until that evidence or submission has been reported to the Council as a whole – after which anyone may publish or disclose the evidence or submission.

In concluding, the Solicitor-General advises that it is not clear from the construction of the Standing and Sessional Orders or, as a matter of logic, how it is said that witnesses before a Select Committee must not disclose evidence given *in camera* but that Members of the Committee are free to do so.

Clearly there is confusion and differences of opinion. The Government considers that it is essential as a matter of some urgency that the Parliament clarifies how these arrangements are meant to work in practice. It is unfair to witnesses and makes their position impossible. Surely witnesses must be in a position to defend, refute or, at the very least, respond to allegations about them once they have been aired publicly.

All four of the people named in the recommendations have or had connections with the Executive Government. It must be acceptable for them to discuss with the Premier (the head of the Government) and his ministerial colleagues matters related to their current and past duties and responsibilities. Their evidence may have entailed matters over which the Premier

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or other Ministers may have had prior knowledge and for which they have an ongoing responsibility and right to publicly comment.

It is not sustainable to assume that members of the Government do not have prior knowledge of the matters discussed at the hearing of the Committee. It cannot be sensible that the people called before the Harris Committee are unable ever to speak or write of these matters until a time to be chosen by the Committee, the Legislative Council or, conceivably, never if not authorised by them.

3 Report Misunderstandings

There are some misunderstandings that seem to flow through the Interim Report.

Much is made in the Interim Report of the nature of the State Service and the role of apolitical impartial state servants.

3.1 Role of the State Service/Public Servants

The first misconception is that implementing government decisions is evidence of the politicisation of the Tasmanian public service. This is not the case.

In our Westminster tradition, the public service owes its allegiance to the Government of the day. Paraphrasing the Australian Public Service Commissioner in a speech she gave on Public Sector Ethics in the 21st Century earlier this year:

- It is the Government that makes the decisions about policies and programs.
- The public service provides advice - comprehensive, frank, timely, evidence-based advice – and information that helps the Government make those decisions, and once those decisions are made it implements the decisions of Government (irrespective of what advice has previously been provided).

State Servants are apolitical (it's a fundamental principle enshrined in the Tasmanian *State Service Act 2000*), but what does 'apolitical' mean?

Apolitical does not mean that public servants provide information and advice which is not mindful of the Government's interests, existing policy frameworks, party platforms and election commitments, and decisions that have already been made. Senior state servants work at the political/bureaucratic interface – knowing the 'politics' is a large part of their job.

The Australian Public Sector (APS) Commission's 2003 guidelines about the APS Values and Code of Conduct state:

“good advice from the Public Service is unbiased and objective. It is politically neutral but not naïve and is developed and offered with an understanding of its implications and of the broader policy directions set by the Government.”

So what does it mean for a public servant to be apolitical?

It means that policy advice and implementation is provided on a basis that is independent from the party political system, and free from personal political bias and beliefs - not being 'political'

in their public comments, that is not supporting one party over another, and not publicly refuting current government policy. It is also about having a willingness to implement an agenda and the decisions of the Government of the day with which the public servant may disagree.

An apolitical public servant would provide the same high standard of policy advice and professional support to the elected Government irrespective of which political party is in power. As already mentioned, a public servant has to implement decisions with which they may personally disagree and which they may have advised against. This is what the Government and the Tasmanian community expect of its impartial apolitical professional public service.

In a discussion paper, *Truth in Government and the Politicisation of Public Service Advice*, the author, the Director of the Policy and Governance Program at the Australian National University's Asia Pacific School of Economics and Government, observes that:

"The public service is not neutral between the government and the government's opponents but is in fact obliged to serve the government party, often against the interest of its opponents... political neutrality, as it is usually understood, requires public servants to abstain from only that degree of partisanship which will compromise their capacity to serve alternative governments with equal loyalty" .

3.2 Role of Public Servants in Preparing Question Time Briefs

The second misconception purported by the Committee is that it is inappropriate for public servants to prepare question time briefs.

Public servants in Westminster systems often participate in the drafting of speeches, media releases and letters defending government decisions, and help to prepare their Ministers for the cut and thrust of parliamentary questions and debate on legislation, motions etc.

Question time briefs are not the formal policy advice of public servants. They are not intended to be the comprehensive, frank, timely, evidence-based advice that help governments make decisions.

Question time briefs are speaking points to be used by Ministers in answering questions in Parliament. They are written knowing this purpose and the views and interests of the Government or Ministers and they reflect the decisions the Government has already taken. They are scripts that need to be clear, consistent with the Government's view and capable of

being read aloud in Parliament. Often they may be drafted by public servants with the more overtly 'political' lines added in ministerial offices.

The drafting of a question time brief by a public servant is appropriate, and not a sign of political compromise. A professional public servant will understand the purpose and nature of a question time brief and compose it accordingly.

3.3 Role of the Secretary of the Department of Premier and Cabinet

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 supposedly 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.

The role of the Secretary of the Department of Premier and Cabinet is replicated in each of the Premier's departments in other States, the Chief Minister's departments in the territories and the Commonwealth Department of the Prime Minister and Cabinet. They are high-profile, influential and demanding positions.

A core function of a Department of Premier and Cabinet is to lead the public sector and in Tasmania we do this successfully by working collaboratively both within government and with the community. In fact the degree by which the Tasmania public sector can work together co-operatively and closely is the envy of some larger jurisdictions.

The Secretary of the Department of Premier and Cabinet is a direct link between all Ministers and agencies - as Secretary to Cabinet, he or she co-signs Cabinet decisions with the Premier (under our system these are the decisions of the Government that the State Service is to implement under our system of government).

As the head of the Department of Premier and Cabinet, the Secretary has a legitimate role across the entire public service, to be aware of emerging issues and to provide advice and direction. In their day to day business public servants collaborate, talk with each other, discuss their problems and jointly work on solutions. The Secretary of the Department of Premier and

Cabinet is pivotal to this approach and the communication required to make it work – a functional public service cannot afford to operate in silos.

As the chief executive of the central government agency, as a source of authoritative advice, as a conveyor of the decisions of government, as a facilitator of co-operative working, as an agent of the Premier, the Secretary of a Department of Premier and Cabinet rightfully has the imprimatur to play a role across all portfolios and all agencies.

There is an appropriate role given the sensitivity of the issues dealt with or the frequent open contact the incumbent has with Ministers – a responsibility which can often involve vigorous and forceful debate.

3.4 The Patmore Protocol

The Committee has a misconception concerning the 2002 protocol for appointment of judicial officers put in place by the then Attorney-General, Dr 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. It is clear, despite the Committee's assertions, that the *Patmore Protocol* was not a departmental policy and has no relevance to the way a Magistrate was to be appointed in 2007.

It was the process approved by Dr Patmore when he was Attorney-General to be used for bringing any nominations for substantive judicial appointments to Cabinet.

Because Dr Patmore did not remain Attorney-General after the State election in 2002 (in fact he did not stand for re-election), it appears the protocol was not used to make any appointments.

As soon as he ceased to be Attorney-General, the *Patmore Protocol* had no status or relevance. It was then the responsibility of the incoming Attorney General, Judy Jackson, to mandate the processes she would use to appoint judicial officers.

The Deputy Secretary of the Department of Justice at this time was Mr Peter Hoult and he has written to the Committee to clarify the situation. It is a letter he has copied to other people and so can be quoted here.

“Early in Judy Jackson's term as Attorney General I [ie Mr Hoult] was present at meetings where she was made aware of the 'Patmore Protocol'. She, as was her absolute right, chose to adopt her own processes of judicial appointment. The proof of

this is that the then Secretary, Richard Bingham, and then later myself as his successor, administratively managed judicial appointments on behalf of Judy Jackson using the processes she, as Attorney General, chose to utilise. The 'Patmore Protocol' was never used. Under Judy Jackson's successor as Attorney General, Steve Kons, I was Secretary and I administratively managed the process of appointment of a number of judicial officers. Attorney General Kons decided the processes that would be used and I acted on his decisions. The 'Patmore Protocol' was never used."

Three other permanent Magistrate appointments have followed processes substantially similar to those adopted in 2007 without attracting adverse comment. It is also noted that there have been other judicial appointments without formal advertisement or an assessment panel but these appointments have been met with universal acclaim.

Does the Committee claim these appointments are flawed? If they are not flawed by the nature of the process used to make the appointments, the Government fails to see how the appointment of Mr Hay as a Magistrate is somehow flawed.

Ultimately, it is the Attorney-General's decision what name or names are brought to cabinet, and in doing so may take advice from any person or indeed be guided by his or her own counsel.

3.5 The Relevance of Judicial Appointments to the General Public Service

As has already been noted there is a flaw embedded in the terms of reference of the Committee, that is the considerations around selecting and appointing a judicial officer are not the same as those that might apply in, say, selecting a divisional director or branch manager in a government department. It is not at all helpful to assume the two processes are the same – they are mutually exclusive.

The Committee appears to not understand that the process for appointing a Magistrate is not at all related to the process used for appointing senior executives in the public service. Many of the criticisms and recommendations in the report relate to processes and procedures of the Tasmanian State Service and its governing legislation, the State Service Act. There is no acknowledgement within the Interim Report that the appointment of a judicial officer has absolutely nothing to do with the State Service Act and therefore many of the criticisms and recommendations have no foundation in the justifying material presented by the Committee.

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4 Reaction to the Recommendations of the Report

Several of the recommendations of the Interim Report relate to the Government.

4.1 Recommendation concerning the Archives Act

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.

Prior to the tabling of the Interim Report, the Premier had already provided advice to the House of Assembly that the Government has a legal opinion that there has not been a breach of the Archives Act. The Premier has also provided that advice to the Committee.

As a matter of common sense, and the law, it is unnecessary and no doubt totally impractical for every draft or each iteration of the thousands of documents prepared each day in the public service to be retained. Every day public servants would properly and legitimately dispose of draft documents, records of a trivial nature, duplicates of information held elsewhere and other records with little or no administrative value.

It is also important to put on the record again that the document at the centre of this matter, the shredded document, was not a Cabinet document as has been widely and erroneously reported.

It had the potential to be a Cabinet document, but only if:

- It had been signed by the relevant Minister (which it had not);
- Transmitted to and received by the Cabinet Office; and
- Approved by the Premier (as the chair of Cabinet) for consideration as part of an agenda for a meeting of the Cabinet.

The document met none of those criteria. At best it can be described as a draft of a Cabinet document – it had no status higher than that.

Not only was the document treated in a manner consistent with the obligations of the Archives Act, it was also disposed of in accordance with the approved protocols described in the Cabinet Handbook.

There is no need for an investigation of this matter in relation to the Archives Act by the Auditor-General – who, in any event, may not have been the most appropriate statutory officer if such a review was warranted.

If the Committee had taken up the Premier's offer of a briefing by the Solicitor-General or waited one day until it had received a copy of his advice, it may not have made this recommendation.

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 the Premier as Minister responsible for this Act has 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.

Apart 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, the Premier 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.

4.2 Recommendation concerning a Judicial Appointment Protocol

Recommendation 6 of the Interim Report advocates, with one modification, reinstatement of what the Committee refers to as the *Patmore Protocol* for judicial appointments. As already indicated above, one premise of this recommendation is wrong: that the *Patmore Protocol* is current policy. It has no status apart from being a historical record of the a process Dr Patmore chose to follow for making judicial appointments when he was Attorney-General, and in fact only for a brief period of his time as Attorney-General in 2002.

Another premise of the recommendation - that the *Patmore Protocol* is world's best practice - is conjecture on the Committee's behalf and not a view that the Government supports. There

does not appear to be evidence to support this assertion. Who did the Committee consult in relation to this assertion – the Law Society, senior legal officers?

The current Attorney-General, Hon Lara Giddings MP, 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. No stakeholder expressed the view that the *Patmore Protocol* should be revived.

For the record, those consulted were:

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

The support of this group is important and weighs significantly in favour of the Government agreeing to the protocol proposed by the Attorney-General.

In any event, 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.

4.3 Recommendations concerning Ms Lisa Hutton

Recommendations 5 and 10 concern the actions of Ms Lisa Hutton, the Secretary of the Department of Justice.

Most Members of Parliament will know Ms Hutton - she has worked for both Liberal and Labor Governments in senior roles with a direct link to the Premiers of the day since the Hon Ray Groom. She has certainly appeared before many Standing and Select Committees to brief Members on legislation or policy matters, and provided advice during debates.

Ms Hutton is regarded as a professional and experienced public servant. She is known to have the highest integrity and a profound understanding of the role of a public servant. She is certainly impartial and a robust apolitical adviser. All Ministers who have worked with Ms Hutton have valued her advice.

Whatever the facts of the case, the treatment of Ms Hutton by the Committee can only be described as questionable and, as previously stated, the recommendations derive 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 Mr Steven Kons, not Dr Patmore. In correspondence from Mr Peter Hoult, the Secretary of the Department of Justice immediately before Ms Hutton, he observes that:

"If the Committee continues to hold that failing to follow the 'Patmore Protocol' is a matter of such import as to warrant public castigation of a senior public servant, it must then add me [ie Peter Hoult] to the list of offenders. I did not follow it either – I followed the proper and reasonable directions of the Attorney General of the day".

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 response has already made clear about what it means to be an apolitical 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 and again demonstrates that, despite the tenor of the Interim Report that strict and legalistic adherence to proper process be maintained at all times, the Committee demonstrates a limited understanding of proper processes in

relation to public servants in Tasmania. The recommendation proposes that the 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.

Section 14 of the State Service Act provides that Ministerial Directions may be issued to apply to employees generally or to a specified class or classes of employees; and to officers (that is members of the senior executive service or heads of agency) generally or to a specified class or classes of officers. The Directions may apply generally or to a particular class or case, or be time-specific or location-specific. The State Service Commissioner is not an employee or an officer under the State Service Act, and the Premier has no power to issue directions to the State Service Commissioner. Section 18(f) of the State Service Act specifically provides for the State Service Commissioner to investigate alleged breaches of the State Service Code of Conduct by heads of agencies and to report to the Premier on the results of such investigations.

This is an example of defective assumptions leading to an impossible recommendation. The Government could not even accept this recommendation even if it was so inclined; which it is not.

The Government rejects recommendation 5.

In relation to Recommendation 10, to reaffirm what has already be stated in relation to privilege earlier, that when voting on this matter, if it gets to that stage, the Government would urge Members of the Legislative Council to be very cautious in the exercise of this power.

Some points to consider - it is not contempt even in a court of law to fail to have incomplete recollection of past events, and when under oath it would be an offence to claim such recollection, if it is not true. What is the level of evidentiary proof that should be required for procedural fairness to support a claim that a witness was untruthful – evasive, inconsistent, incoherent and otherwise unreliable? Did the Committee have this evidence? Was it obtained reasonable and fairly? Is it fair that the Committee held police statements made by Ms Hutton and related documents and records and asked questions about them when Ms Hutton was unable to access them as part of her preparation? Has Ms Hutton had the chance to defend herself against the allegations, to correct the record if needed?

It is acknowledged that recommendation 10 is a matter for the Legislative Council, but the Government asks the Members of the Council to consider these issues before any vote.

The Government sees no reason for Ms Hutton to be referred to the Privileges Committee of the Legislative Council. Government Members of the Legislative Council will not support any motion to effect recommendation 10.

4.4 Recommendations concerning Ms Linda Hornsey

Recommendations 4 and 9 deal with Ms 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.

The first thing to note is that the Committee does not seem to understand the role of the Secretary of the Department of Premier and Cabinet. This role has been described earlier in this response. It is a broad ranging job that involves dealing frequently with complex and contentious issues at the highest levels within Government. The Secretary is the primary adviser to the Government on any and all matters that fall within the bailiwick of the public service.

The Secretary of the Department of Premier and Cabinet is expected to:

- Provide strategic direction and leadership to the State Service;
- Provide strategic advice on policy and management issues across government;
- Formulate strategies to resolve complex emerging problems;
- Manage strategic relationships with other tiers of Government, non-government organisations and the private sector; and
- Be accountable for achieving agreed performance outcomes for the Department of Premier and Cabinet.

This is undoubtedly one of the most difficult jobs in the public sector. Ms Hornsey held this role for nearly 10 years. She was held in high regard by both the Premiers for whom she worked. It's not a job for the faint-hearted and not many public servants 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 the Premier dated 13 May 2009, Mr Lennon says of both Ms Homsey 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 difficult discussions with ministers which may include providing unwelcome or hard to follow advice - advice which Ministers must consider, but ultimately may choose not to follow. Ms Homsey did provide advice to the Attorney-General about the appointment of a Magistrate. It was part of a discussion about which meritorious candidate of a number recommended to the Attorney-General for the appointment should be submitted to Cabinet. 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. There is no evidence in the report or elsewhere that Ms Homsey acted contrary to her legitimate role.

For this reason alone recommendation 4 has no merit.

But again there are procedural and process errors and confused thinking by the Committee, that mean that 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 Homsey is not. Even if investigation was warranted, which it is not, and then undertaken, the most serious sanction is termination but that is pointless, as are all the other available sanctions under section 10(1) of the State Service Act. Ms Homsey does not work in the State Service anymore so there is no sanction under the State Service Act that is capable of application to Ms Homsey. The recommendation is nonsensical.

The Government rejects recommendation 4.

In considering the Interim Report in relation to Ms Hutton, this response has already dealt with the matter of recollection of past events and testimony. The arguments do not need repeating;

suffice to say that the Government sees no reason for Ms Homsey to be referred to the Privileges Committee of the Legislative Council.

Government Members of the Legislative Council will not support any motion to effect recommendation 9.

4.5 Recommendations concerning the Hon Paul Lennon and Mr Steven Kons

Recommendations 7 and 8 of the Interim Report concern 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.

On 6 May 2009, the Speaker provided advice to the Premier on these matters and proper process.

It is again noted 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 was first received by the House of Assembly requesting his attendance; and secondly, the House voted to agree to grant Mr Kons leave to appear. This is the process that occurred when the House gave Mr Kons leave to attend the Committee as a witness.

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 Mr 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 while Mr Lennon was Premier, but more importantly, when he was a Member of the House of Assembly.

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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. 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 the Premier received from the Speaker discusses the case of the former Prime Minister Bob Hawke and Federal Treasurer 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. That advice has been tabled by the Premier in the House of Assembly.

The 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 the House of Assembly will not vote to agree to grant Mr Kons and Mr Lennon leave to appear.

4.6 Recommendation concerning the Scope of the State Service Act

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 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.

The Government rejects Recommendation 11.

4.7 Recommendation concerning a Public Sector Management Act and an appointment of a Public Sector Standards Commissioner

One of the main purposes of the Committee was to consider the appointment processes for senior public servants. 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.

The arrangements in relation to Senior Executive Appointments & Selections, Structures & Conditions and Instruments of Appointment have been reviewed recently and updated. The Premier as responsible Minister 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.

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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 employees.

This delegation reflects the level of autonomy that a Head of Agency may reasonably be expected to exercise, and certainly ensures any potential for political interference in these appointment processes is removed.

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. It is anticipated the review will be completed later this year.

4.8 Recommendation concerning an Apology to Mr Hay and Mr Cooper

In a Ministerial Statement to the House of Assembly on 19 May 2009 the Premier, on behalf of the Government, and in support of the personal apology already issued by Mr Kons, expressed sincere regret on behalf of the 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.

5 Conclusion

Any Committee comprised of independent non-aligned Members of the Legislative Council, must engage in behavior that meets the expectations of the Tasmanian community; that their Parliament is a place where fundamental democratic principles such as procedural fairness should be paramount.

At least one commentator has labeled the 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.

The Committee that saw fit to inquire into matters that had already been investigated by the police; an investigation about which the Director of Public Prosecutions has already publicly stated that a prosecution was not warranted.

In a letter in September 2008, the Director of Public Prosecutions wrote to the Acting Commissioner of Police to advise that

"I [the DPP] 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."

Was another inquiry or investigation really warranted?

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 Committee.

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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. No Member of Parliament can afford for parliamentary processes to disregard procedural fairness and the sensible customs and practices that have developed over the previous 150 years.