



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

INQUIRIES:
OUR REF: 21600
YOUR REF:

22 September, 2008

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

Dear Acting Commissioner

I have examined and considered the several files containing the results of the two investigations into the 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 the crime of bargaining for public office, the office being that of 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.

As you know, although I always give more detailed reasons than above to investigating Police, they remain confidential and are not given publicly, for policy reasons concerning fairness to people who will not be charged and who are presumed innocent, and the privacy of witnesses. However, in the present two cases a great deal of what was investigated has found its way into the public domain (together with the inevitable misconceptions and misinformation), and both matters involve the activities of elected politicians or senior bureaucrats in exercise of the functions or powers of government, rather than the private behaviour of private citizens.

In these exceptional circumstances, I believe some departure from the usual policy in order to give more detail is appropriate, and what follows is in publishable form, if you so choose.

In September 2007, as a result of contact between him and Crown counsel while being briefed as a witness, Mr Nigel Burch made a statutory declaration to Police. It ought to be noted that as Mr Burch was employed as an advisor, he was not a "public officer" as defined in the *Public Interest Disclosures Act 2002*, nor a "contractor" as his contract of employment was with the Premier, who in turn was not a "public body" as defined in that Act. His disclosures were thus outside the severely limited scope of the Act and unable to be given with its protection.

The declaration contained an account of how Mr Simon Cooper's appointment as a Magistrate did not proceed. In summary, he alleged that Mr Cooper was to be put forward by the then Attorney-General, Mr S Kons, to Cabinet for appointment as a Magistrate. A minute for that purpose had been prepared and signed, but following a telephone call which Mr Kons told Mr Burch had been from Ms Linda Hornsey (then Secretary of the Department of Premier & Cabinet) that minute was shredded and a new minute proposing appointment for Mr G Hay instead was prepared and signed. The investigation found no evidence contrary to those allegations.

According to Mr Burch, Mr Kons told him, after shredding the document, that information regarding Government appointment had been leaked to Ms Sue Neales from The Mercury and this is why the Premier did not want the appointment approved. (One infers that Ms Hornsey was calling at the Premier's behest.)

That is, of course, hearsay only and not admissible to prove anything except (if it were relevant in proceedings) that Mr Kons said it.

The only possible crime revealed by those allegations is a breach of s 69 of the *Criminal Code*, Interfering with an Executive Officer ("*Any person who does any act intended to interfere with the free exercise by ... a Minister of the Crown, of any of the duties or authorities of his office is guilty of a crime*"). If Ms Hornsey intervened, and if she was instigated to do so by the (then) Premier, in order to consider if any crime might thereby have been committed by either or both of them, it must be asked: what was the "*duty or authority of (Mr Kons') office*" the free exercise of which might have been interfered with?

Magistrates are not appointed by the Attorney-General, they are appointed by the Governor (*Magistrates Court Act 1987*, s 4(1)). "*Governor*" means the Governor acting with the advice of the Executive Council (*Acts Interpretation Act 1931*, s 43(1)) so the appointment would ordinarily have to have been approved by Cabinet before it was the subject of Executive Council advice. By convention, but not by force of law, the Attorney-General's nomination of judicial officers is accepted by Cabinet. However, the Tasmanian Cabinet may well have operated differently. If so, it was entitled to if it chose. It may be that the Premier regularly told the Attorney-General who he wanted appointed to office, and the Attorney-General accepted that. It is an "*authority*" of the office of Attorney-General to nominate for Magistrate who the Attorney-General wants to, but if he wanted to ensure his choice matched the Premier's choice, he was entitled to.

As was held in *Tasmania v Green, Nicholson & White* [2007] TASSC 54 at [54], "*Argument, persuasion or lobbying does not interfere with the free exercise of the duty or authority. Interference within the meaning of the Code, s 69, only actually arises if the Minister's freedom is diminished in some manner*".

So a crime would not have been committed if whatever Ms Hornsey said in the call to Mr Kons which caused him to change his mind amounted to no more than "*argument, persuasion or lobbying*".

This would be so even if (for example) Mr Kons was told in strong terms that the choice of Mr Cooper would not meet the Premier's approval. Nor would it be a crime to advise Mr Kons that the Premier would see to it that his choice of Mr Cooper would not pass Cabinet, as the Attorney-General only has an "authority" to put forward a choice, not to have it accepted.

So it would take evidence of very strong terms indeed – perhaps amounting to an express or clearly implied threat of some kind – before there would be found to be a breach of s 69.

The investigation not having revealed anyone who claimed to have overheard either end of the conversation between Mr Kons and Ms Hornsey which immediately preceded his shredding of the document by which he was to recommend Mr Cooper, any admissible account of it must come from the parties themselves.

Mr Kons says he can recall a call relating to the nomination of the Magistrate but is not sure who telephoned him, whether it was Ms Lisa Hutton, Secretary of the Department of Justice, or Ms Hornsey (although telephone records suggest it was Ms Hornsey). He says all he can recall about it was that the female caller said "shred it", but doesn't recall the detail surrounding those words. He was given to understand new documentation for a different nomination would be prepared but says he recalls no discussion concerning a different candidate or about the nomination of Mr Glenn Hay, although he says he was pleased with that choice.

There is simply insufficient clarity in what Mr Kons says to say there is any evidence of a breach of s 69 of the *Criminal Code* fit to form the basis of a charge.

Ms Hornsey, on legal advice and as was her perfect entitlement, declined to be interviewed. Of course, her silence as of right adds nothing to the evidence, which remains as the insufficiently clear recollection of Mr Kons. Despite an extremely thorough investigation, it appears there is no other admissible evidence available of the conversation. I add for completeness that Mr P Lennon, former Premier, denied having instructed or encouraged Ms Hornsey to relay anything to Mr Kons concerning the proposed appointment of Mr Cooper.

Mr Burch's statutory declaration of September 2007 also contained allegations of another matter. He declared that on 12 July 2007 he was driving with Mr Kons when the latter received a phone call. He could hear a female, and Mr Kons said, "Yes Linda". After the call, in his Burnie office, a shaken and upset Mr Kons told him the caller had been Ms Linda Hornsey who had said a deal had been done between the Premier, Mr Bryan Green and Mr Stephen Estcourt QC. The deal was that Mr Estcourt would be appointed as the next Solicitor-General if he acted pro bono for Mr Green during his trial. However, because this information had been leaked to Ms Sue Neales of The Mercury this deal would not be able to proceed.

The statutory declaration thus contained a hearsay on hearsay allegation of the crime of Bargaining for a Public Office, contrary to s 111 of the *Criminal Code*.

The Police Commissioner, Mr McCreadie and I discussed both aspects of the statutory declaration and agreed that to commence investigation would be likely to jeopardise the imminent trial of Mr Green, and no further investigation would proceed until after that was completed.

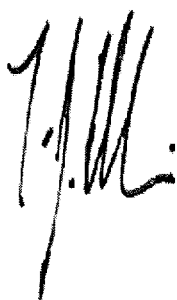
This course was advised to Mr Burch, who agreed with it. Mr Green's trial became two trials, not completed until March 2008. By then, Mr Leigh Sealy SC had been appointed Solicitor-General, but it was not a necessary condition of the crime of Bargaining for Public Office that it be completed – if there had been an arrangement made as alleged, the crime would have been complete.

All three alleged participants denied that there was such a "deal". It must be said that there was found quite strong supporting evidence to suggest that there was indeed a telephone contact between Mr Kons and Ms Hornsey on 12 July 2007 in which Mr Estcourt and the Solicitor-General's position were discussed, notwithstanding that Mr Kons told investigators he was unable to recall such a conversation. There is no present point in detailing that evidence, nor other circumstantial evidence collected as none of it is in any way sufficient to make a case contradicting the strong denials of Messrs Lennon, Green and Estcourt.

The above seeks to distil evidence to that of essential relevance to a criminal prosecution, rather than to summarise the extensive material gathered for consideration by the investigators.

Given that my advice is that no prosecution should proceed from Mr Burch's statutory declaration, some might ask why he ought not be prosecuted for (for example) False Swearing contrary to s 95 of the *Criminal Code*. The answer to that is that the statutory declaration essentially concerned what Mr Kons said to him. It has not been proved Mr Kons did not say those things to him, and hence falsity has not been proven. Even if Mr Kons had strongly denied the conversations, and it was his word against Mr Burch's, that would still be insufficient for a charge as s 96 of the Code provides that "*No person shall be convicted of any crime under the provision of ... Section 95 solely upon the evidence of one witness as to the falsity of any statement alleged to be false*".

Yours sincerely

A handwritten signature in black ink, appearing to be 'T.J. Ellis', written in a cursive style.

T J Ellis SC
DIRECTOR OF PUBLIC PROSECUTIONS