Exposing corruption within senior levels of Victoria Police

Office of Police Integrity
Victoria

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WARNING - Language

This report contains language that some readers may find offensive.

LETTER OF TRANSMITTAL

To
The Honourable the President of the Legislative Council

And
The Honourable the Speaker of the Legislative Assembly

This report is presented to Parliament in accordance with section 102J (2) of the *Police Regulation Act* 1958.

It deals with matters that were the subject of Office of Police Integrity (OPI) public hearings in November 2007. The public examination of witnesses in those hearings formed part of an investigation I initiated in May 2007 following my receipt of allegations that, amongst other things, Mr Noel Ashby, then Assistant Commissioner of Victoria Police, was involved in the unauthorised communication of confidential information. A copy of my own motion determination appears as Attachment A.

As part of the investigation, I delegated to Mr Murray Wilcox QC my authority to conduct hearings. He has made a number of recommendations to me based on his assessment of the evidence obtained in the private and public hearings over which he presided. His report to me is included in its entirety in Part Two of this report. I have accepted all of Mr Wilcox's recommendations. These are set out in the Schedule to Part One of this report.

Consistent with Mr Wilcox's recommendations, I will forward a number of matters to the Chief Commissioner of Police for consideration of disciplinary proceedings. I will refer a larger number of matters to the Office of Public Prosecutions for consideration.

Mr Wilcox's report examines the evidence as it related to individuals in a thorough and measured way. Given the public profile of some of those individuals, it is of significant public interest to provide the community with an understanding of how the evidence has been assessed. However, there is perhaps a greater public interest in the cautionary tale the investigation reveals. The investigation provides a number of salutary lessons for all serving members of police and important issues for the broader community generally.

Notwithstanding the deeply concerning matters revealed in this investigation, the corrupting influences were contained to a few individuals. The resignations of Mr Ashby and Mr Linnell, in particular, should have a cleansing effect on Victoria Police Command. Without their 'behind the scenes' manoeuvring, Victoria Police Command, led by Chief Commissioner Nixon, is now in a better position to progress its strategic reform agenda.

G E Brouwer
DIRECTOR, POLICE INTEGRITY

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CHRONOLOGY

Date	Subject / Event
6 December 2006	**The "Kit Walker" Affair** Ethical Standards Department commences an investigation into misuse of Victoria Police email system.
2 May 2007	**The "Kit Walker" Affair** Mr Mullett told the investigation was suspended pending outcome of an independent review of his allegations that the investigation was biased.
30 May 2007	**OPI commences this investigation**
26 June 2007	**The Jennifer McDonald Case** Phone call from Mr Ashby to Mr Mullett regarding the reassignment of a discipline case involving a union delegate, Jennifer McDonald, from Mr Bannon to Mr Ashby.
2 July 2007	**The Jennifer McDonald Case** Phone call from Mr Mullett to Mr Ashby. Mr Mullett asks about the progress of assigning the discipline hearing file to Mr Ashby.
3 July 2007	**The Jennifer McDonald Case** Phone call from Mr Ashby to Mr Mullett. Mr Mullett asks about the case reallocation. Mr Ashby tells Mr Mullett that he is unable to get the file. Mr Ashby says he will speak to Mr Bannon. Mr Mullett tells Mr Ashby that Ms McDonald is a supporter of his (Mr Mullett).
5 July 2007	**The Jennifer McDonald Case** Phone call from Mr Ashby to Mr Mullett. Mr Ashby tells Mr Mullett he failed to have the case reassigned but says that he has spoken to Mr Bannon.
8 August 2007	**Fontainebleau** Mr Ashby finds out about a proposal for Mr Overland to attend a training course at Fontainebleau in France.
9 August 2007	**Fontainebleau** Mr Ashby tells Mr Mullett about the proposed training for Mr Overland.

14 August 2007	**Fontainebleau** Phone call from Mr Mullett to Mr Lalor. Discussion about Mr Overland's attendance at academy. **Fontainebleau** Phone call from Mr Ashby to Mr Linnell. Mr Linnell tells Mr Ashby that a journalist has been enquiring about the rumour Mr Overland is going to Fontainebleau. **Fontainebleau** Phone call from Mr Ashby to Mr Mullett. Mr Ashby tells Mr Mullett that information is out about Mr Overland going to Fontainebleau and that he is concerned that he (Mr Ashby) needs to be protected as source of the information. Both concoct a strategy for diverting attention from themselves towards a Government official. **Fontainebleau** Phone call from Mr Ashby to Mr Linnell. They discuss who else knew about Fontainebleau. **Fontainebleau** Phone call from Mr Mullett to Mr Ashby. Mr Mullett tells Mr Ashby that their strategy has been successful and that the story that the source came from someone in Government has been accepted by journalists.
15 August 2007	**Concerns about telephone interception** Phone call from Mr Ashby to Mr Linnell. Mr Ashby is responding to a message left the previous day by Mr Linnell. Mr Ashby asks Mr Linnell if Mr Mullett's telephone is being intercepted. Mr Linnell says he cannot say but needs to see him. Mr Linnell raises concerns in Mr Ashby that Mr Mullett may be subject to telephone interception. **The Briars Taskforce** Mr Linnell shows Mr Ashby the terms of reference for Operation Briars. Mr Lalor and Mr Waters identified as 'targets' of Operation Briars. **The Briars Taskforce / Concerns about telephone interception** Mr Ashby arranged for Mr Mullett to call him on his wife's phone. Mr Mullett and Mr Ashby talk for 9 minutes.

16 August 2007	**The Briars Taskforce / Concerns about telephone interception** Phone call from Mr Ashby to Mr Linnell. They speculate about who may be subject to telephone interception in relation to Operation Briars. **Staged Call** Phone call from Mr Ashby to Mr Mullett. They talk about the Enterprise Bargaining negotiations. **Concerns about telephone interception / The Briars Taskforce** Phone call from Mr Lalor to Mr Rix, responding to a message from Mr Rix that it was imperative that Mr Lalor talk to him that day. Mr Rix asks that Mr Lalor meet him at the Police Association. **Concerns about telephone interception / The Briars Taskforce** Phone call from Mr Lalor to Mr Rix telling him that he is outside the Police Association waiting to see him. **The Briars Taskforce** Phone call from Mr Lalor to Mr Waters less than 10 minutes after his call to Mr Rix. Mr Lalor tells Mr Waters that they should catch up the following week.
17 August 2007	**Staged Call re Fontainebleau** Phone call from Mr Lalor to Mr Mullett. Mr Mullett tells Mr Lalor that the journalist got the facts wrong about Mr Overland's proposed trip.
28 August 2007	**The "Kit Walker" Affair** Chief Commissioner writes to Mr Mullett to advise him that the Kit Walker investigation will resume. Investigation recommences.
6 September 2007	**The Briars Taskforce** Phone call from Mr Ashby to Mr Linnell. They discuss Operation Briars and the likelihood of securing convictions against Mr Waters and Mr Lalor.
12 September 2007	**Enterprise Bargaining Agreement** Heads of agreement signed. **The Briars Taskforce** Mr Lalor is suspended from duties.

14 September 2007 **15 September 2007**	**The Briars Taskforce media articles** Articles written by journalist Nick McKenzie appear in the "Age" about Operation Briars that name the two targets.
17 September 2007	**Integrity Test** Phone call from Mr Overland to Mr Linnell. Mr Overland tells Mr Linnell that OPI is commencing an enquiry into the McKenzie the "Age" articles. **Integrity Test** Phone call from Mr Linnell to Mr Ashby five minutes after call from Mr Overland. Mr Linnell tells Mr Ashby about OPI enquiry into media leaks.
18 September 2007	**Appointment of Mr Curran** Phone call from Mr Linnell to Mr Curran. Mr Linnell told 'in confidence' about Mr Curran's impending appointment as Chief of Staff to the Minister for Police and Emergency Services. **Appointment of Mr Curran** Phone call from Mr Ashby to Mr Linnell. Mr Linnell tells Mr Ashby about Mr Curran's impending appointment.
19 September 2007	**Appointment of Mr Curran** Phone call from Mr Ashby to Mr Mullett. Mr Ashby tells Mr Mullett about Mr Curran's appointment. **Appointment of Mr Curran** Second phone call from Mr Ashby to Mr Mullett, an hour after the first call. Mr Ashby asks about whether there is any progress in stopping Mr Curran's appointment. **Appointment of Mr Curran** Third phone call from Mr Ashby to Mr Mullett, less than 15 minutes after the second call. They continue to discuss Mr Curran's appointment.

20 September 2007	**Integrity Test** Phone call from Mr Overland to Mr Linnell. Mr Overland asks Mr Linnell if he has told anyone about the OPI enquiry into media leaks. Mr Linnell denies telling anyone. **Breach of OPI confidentiality provisions** Mr Linnell served with confidential summons to appear in OPI hearing. **Breach of OPI confidentiality provisions** Phone call from Mr Ashby to Mr Weir. Mr Weir tells Mr Ashby to call Mr Linnell and texts him safe phone number. **Breach of OPI confidentiality provisions** Phone call from Mr Weir to Mr Linnell. Mr Weir tells Mr Linnell that he had spoken to Mr Ashby and that Mr Ashby will call Mr Linnell later.
21 September 2007	**Breach of OPI confidentiality provisions** Phone call from Mr Weir to Mr Linnell. Mr Linnell says he is having breakfast with Mr Ashby and that he had spoken to him on the phone the previous evening. **Breach of OPI confidentiality provisions** Phone call to Mr Linnell from his wife. Mr Linnell says that he had just had breakfast with Mr Ashby and discussed forthcoming hearing with him.
22 September 2007	**Concerns about telephone interception/The Briars Taskforce** Phone call from Mr Ashby to Mr Linnell, each on a phone they believe to be safe. Mr Ashby tells Mr Linnell that he has a contact at the unit that monitors telephone intercepts and told him there were only nine lines 'off' (being intercepted) in relation to Operation Briars and that they are "safe" and so is Mr Mullett.
24 September 2007	**Breach of OPI confidentiality provisions** Phone call from Mr Ashby to Mr Linnell, each on a phone they believe to be safe. They discuss what evidence Mr Linnell will provide in the OPI hearing. **Breach of OPI confidentiality provisions** Phone call from Mr Ashby to Mr Linnell, each on a phone they believe to be safe. Further discussion about what evidence Mr Linnell will give in the OPI hearings.

25 September 2007	**OPI Private Hearings** Hearings presided over by Mr Wilcox commence. **Breach of OPI confidentiality provisions** Phone call from Mr Linnell to Mr Ashby, each on a phone they believe to be safe. Mr Linnell tells Mr Ashby about his OPI examination. **Breach of OPI confidentiality provisions** Phone call from Mr Ashby to Mr Linnell, each on a phone they believe to be safe. Further conversation about what happened in the OPI examination.
27 September 2007	**Breach of OPI confidentiality provisions** Phone call from Mr Mullett to Mr Ashby. Mr Mullett asks if Mr Linnell attended OPI. Mr Ashby confirms that he did.
7 November 2007	**OPI public hearings** Hearings presided over by Mr Wilcox commence.

PART ONE – EXPOSING CORRUPTION

Since its inception, the Office of Police Integrity (OPI) has been committed to ensuring Victoria Police undergo a process of integrity reform. OPI has urged Victoria Police Command to implement a range of measures to improve the organisation's ethical health and to better protect it from corruption. The need for extensive reform has been identified through numerous OPI reports, in particular *Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct.*[1] This report tracked corruption within the Victoria Police over its 150 years. The recent OPI review of the Victoria Police Discipline System proposed a framework for further reform after identifying defects in the current disciplinary system that permit corruption to develop unchecked.[2]

Any necessary reforms identified through the work of OPI or Victoria Police itself can only be achieved through the leadership, commitment and dedication of a united Police Command. This prerequisite gives added significance to the evidence that unfolded in the OPI public examination of witnesses in November 2007. The corruption that was exposed at such a senior level of the police stood as a significant barrier to the implementation of the reform agenda.

In many respects, more important than the revelation of criminal matters that were uncovered in the hearings was the nature of the relationship between the Secretary of the Police Association, Mr Mullett, and an Assistant Police Commissioner, Mr Ashby. Mr Mullett and Mr Ashby had both been members of Victoria Police for more than 30 years. They had known each other for more than 25 years. These facts alone are not unusual amongst Victoria Police, but Mr Mullett and Mr Ashby appear to have become joined over a common rallying point - their opposition to the appointments of Chief Commissioner Nixon and Deputy Commissioner Overland. Both Ms Nixon and Mr Overland were viewed as 'outsiders'. They are proponents of a reform agenda that challenges the 'old style' of policing to which some within Victoria Police cling.

This common rallying point provided Mr Mullett and Mr Ashby with a common purpose. Working to destabilise and undermine senior police in Victoria Police Command, the end goals of this alliance were to install Mr Ashby as Commissioner of Police and to provide Mr Mullett with a 'puppet' Commissioner. Motivated to gain personal power, both men fostered the alliance without regard to the impact on either the Victoria Police or the Police Association. Even the prospect of compromising a murder investigation appears to have had secondary consideration.

Neither Mr Mullett nor Mr Ashby could have achieved their aims without a willing and, at times, gullible supporting cast comprised of Mr Linnell, then Victoria Police's Director of Media and Communications, Mr Rix, a Detective Inspector and President of the Police Association and Mr Weir, a Victoria Police Inspector who worked with Mr Linnell.

1 Office of Police Integrity, February 2007 *Past Patterns – Future Directions: Victoria Police and the problem of corruption and serious misconduct*
2 Office of Police Integrity, October 2007 *A Fair and Effective Victoria Police Discipline System*

Each of these individuals was required to account for his actions to the community through the public hearing examinations. Those in attendance or following the media coverage were provided with an opportunity, not previously seen in this jurisdiction, to hear or read for themselves repeated examples of betrayal, collusion, deceit, and abuse of authority. Observers were provided with a unique insight into the characters and personal qualities of people whose public profiles had previously given a very different image of them. Public officers with obligations to act with integrity were exposed as individuals prepared to deceive and plot to undermine their colleagues in their pursuit of personal ambition. Sworn police with obligations to uphold the law were exposed as individuals prepared to thwart the efforts of other police who were discharging their duties in investigating serious crimes.

As can be seen included in the matters I will refer to the Director of Public Prosecutions for consideration is whether criminal charges should be laid against Mr Ashby and Mr Linnell on the grounds, amongst others, that their conduct constitutes misconduct in public office and, in the case of Mr Mullett, that he attempted to pervert the course of justice. The parameters of the offences are discussed in Mr Wilcox's report at paragraphs 174, 240 and 261 respectively.

Misconduct in Public Office

Increasingly, whether the conduct is criminal or not, 'misconduct in public office' is emerging as an important feature in the work of anti-corruption agencies such as OPI.[3]

In this and other recent anti-corruption investigations, examples of misconduct by public officials include those who have inappropriately disclosed confidential information and used their position of authority to advance personal or private interests to the detriment of the public interest.

Until recently, charges for the offence of misconduct in public office had been rare in this jurisdiction.[4] This situation seems to be changing.[5] The increased willingness to charge public servants, in particular police, with the offence and the success rates in prosecutions may relate to the fact that misconduct in public office is increasingly emerging as a prominent and recurring theme in corruption investigations both here and in other jurisdictions.

In noting the seriousness of the offence of misconduct in public office involving a police officer, a Court of Appeal Judge recently said:

> *Corruption in those responsible for enforcing the law has significant social consequences... it may undermine public confidence in the police force, erode the morale of honest police officers and encourage other police to turn a blind eye to similar behaviour. The community*

3 See generally Peter M Hall, 2004 *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures;* Corruption and Crime Commission of Western Australia – Address by Commissioner the Hon Len Roberts-Smith at Edith Cowan University 30 October 2007 'Misconduct – Is that all there is?'; NSW Police Integrity Commission, December 2007, *Report to Parliament – Operation Mallard*

4 Nettle J A in DPP v Marks [2005] VSCA 277 (24 November 2005)

5 See R v Bunning [2007] VSCA 205 (27 September 2007), DPP v Armstrong [2007] VSCA 34 (1 March 2007) and DPP v Marks [2005] VSCA 277 (24 November 2005)

is entitled to rely on the integrity of members of the police force in investigating and prosecuting offenders.[6]

Fundamental to the concept of misconduct in public office is the principle that public officials have an obligation not to betray the public trust vested in them. In this case, Mr Ashby, Mr Linnell and to a lesser extent, Mr Weir, not only betrayed their individual colleagues and the reputation of Victoria Police as a whole, they undermined the public trust Victorians are entitled to have in their public servants.

Mr Ashby and Mr Linnell were in the top echelons of the public service, they were both paid out of the public purse, at a rate well above that of the average citizen.

The public was entitled to expect from Mr Ashby that he would spend his taxpayer-funded time working in the public interest to uphold his oath as a sworn member of police; that he would be impartial and act faithfully to uphold the law.[7] Instead Mr Ashby:

- Undertook to use his position to do favours for Mr Mullett;
- Undertook to provide information to Mr Mullett about the whereabouts of fellow police officers, some of whom were Mr Mullett's factional opponents;
- Released confidential information he was not authorised to release;
- Conspired with others to avoid being identified as the source of unauthorised releases of information;
- Obtained information about a covert investigation from Mr Linnell that he was not entitled to know and did not need to know;
- Disclosed to Mr Mullett that he (Mr Mullett) and Mr Lalor had probably been recorded in a lawfully intercepted telephone call;
- Colluded with Mr Mullett, Mr Linnell and Mr Weir to avoid being heard on lawfully intercepted telephone calls;
- Colluded with others in an attempt to undermine this OPI investigation; and
- Traduced the reputation of a fellow police officer, working in a specialist unit, by falsely naming him as the source of information about Victoria Police telephone interceptions thereby implying the other police officer had committed a criminal offence under the *Telecommunications (Interception and Access) Act* 1979 *(Cwth).*

Mr Linnell, although not a sworn member of Victoria Police, also failed to live up to the expectations Victorians are entitled to demand from their public servants. Victorian public servants are required to demonstrate responsiveness, integrity, impartiality, accountability, respect, leadership and to promote human rights.[8]

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6 J A Neave in DPP v Armstrong [2007] VSCA 34 (1 March 2007)
7 *Police Regulation Act* 1958, Second Schedule
8 *Public Administration Act* 2004 s7

Mr Linnell reported direct to the Chief Commissioner, he was part of the senior management team and met regularly with her and the Deputy Commissioners. He was one of a select few trusted within Victoria Police to be part of the reference group for Operation Briars, the highly sensitive investigation into possible police links to the murder of Shane Maurice Chartres-Abbott. Yet Mr Linnell appeared to have no qualms in breaching the confidentiality and trust implicit with his inclusion in these meetings by supplying confidential information to his 'best friend and mentor', Mr Ashby. The duplicity of his actions in continuing to attend meetings with Mr Overland, after feeding Mr Ashby material to assist him to undermine his perceived rival in his bid for Chief Commissioner, strikes at the heart of integrity. Perhaps Mr Linnell gained personal insight into what it feels like when trust is betrayed when he discovered that Mr Ashby's coaching about how to conduct himself in OPI's hearings had backfired and that he had been falsely assured that their phone calls were not under surveillance.

Both Mr Ashby and Mr Linnell knew the value of information. The strategic 'leaking' of it gave them both currency with which to advance their personal ambitions. Their conduct mirrors that seen recently in other jurisdictions.

As Mr Wilcox has noted:

> *Mr Linnell's disclosure of information about* (Operation Briars) *was an egregious breach of his obligations towards his employer. The breach went to the heart of the Chief Commissioner's ability to properly manage Victoria Police. She is entitled to have the "need to know" principle punctiliously observed by everyone under her command, including non-police officers attached to the service.*[9]

The hearings also gave the public, including rank and file members of the Police Association, insight into the conduct of Mr Mullett and Mr Rix. Mr Wilcox has concluded that Mr Mullett and Mr Rix were not acting as public officials when they participated in the events that are the subject of this investigation.

Pervert the Course of Justice

Mr Mullett and Mr Rix were both sworn members on leave without pay from Victoria Police. However, in the context of their oaths as sworn members of Victoria Police and their responsibilities as representatives of serving police, their conduct in warning Mr Lalor that his telephone was probably being intercepted is no less dishonourable than a betrayal of public trust, particularly for those police who were investigating Mr Lalor. As Mr Wilcox has noted:

> *For a police officer, particularly, to tip off a person, whom he must have known was suspected of having committed a serious offence, that his phone may be subject to interception is highly reprehensible.*[10]

9 See Part Two para 167
10 See Part Two para 95

There is a long and colourful history of successful prosecutions against police for the offence of perverting the course of justice. *Past Patterns – Future Directions* contains numerous examples of police interfering in criminal investigations or criminal proceedings to achieve an end decided upon by the accused police officer rather than our system of justice. Sometimes associated with bribery, the offence is also associated with police who take the law into their own hands and supplant criminal justice processes with their individual notions of justice, thereby making a mockery of their oath to uphold the law.

Mr Wilcox has concluded that Mr Rix's involvement in these events was to act as a messenger for Mr Mullett. Whilst recommending that the Chief Commissioner consider discipline charges against Mr Rix, he does not consider that his conduct amounts to criminal conduct. However, Mr Wilcox has come to an opposite conclusion in relation to Mr Mullett. In discussing the evidence in support of his recommendation that the Office of Public Prosecutions consider charging Mr Mullett with perverting the course of justice, he notes:

> *Mr Mullett himself said, in the course of his evidence, that for him to have passed on information about murder suspects being under surveillance would be "one of the worst things a police officer could do". Mr Mullett thought this would be a "denial of the very purpose of a police officer" which is the protection of the public, and could put lives of both innocent people and police officers at risk. Mr Mullett agreed that, for the Secretary of the Police Association to have done this, would be a betrayal of his own members.*
>
> *I fully appreciate the seriousness of my finding that this is exactly what Mr Mullett did do.*[11]

Despite Mr Mullett's insistence, Mr Wilcox found it untenable that he believed any interception on Mr Lalor's phone was in relation to the "Kit Walker" investigation. Mr Wilcox rejected the notion that the "Kit Walker" investigation had anything to do with the message Mr Mullett sent to Mr Lalor via Mr Rix "to be careful who he talks to".[12]

Propensity of Police Witnesses to Lie on Oath

In addition to highlighting the emerging issue of misconduct in public office, this case highlights a matter I raised in the *OPI Annual Report 2006 – 2007.* I commented on the repeated instances seen in OPI investigations of witnesses lying on oath.[13] The sort of dishonesty seen in this investigation, where an oath taker obviously has no intention of telling the truth despite taking an oath to do so, corrodes the very foundation of the justice system police have sworn to serve. It is the antithesis of integrity. The OPI will be relentless in pursuing those who have so little regard for this fundamental precept upon which our justice system is built.

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11 See Part Two paras 258 and 259
12 See Part Two paras 91 - 95
13 Office of Police Integrity *OPI Annual Report 2006 – 2007* p23

Information 'Leaks' and the 'Need to Know Principle'

Another matter foreshadowed in last year's annual report relates to the unauthorised sharing of information by Victoria Police employees.[14] I have previously commented on my concern with what I termed 'the cavalier attitude' to sharing confidential police information with others that exists amongst some police.[15] This investigation highlights that attitude and worse.

Mr Wilcox points out:

> *Both Mr Linnell and Mr Ashby gave evidence strongly supporting the "need to know" principle. This principle, which applies to all police activities, but is particularly important in connection with operational matters, is that information should be confined to those who need that information in order to do their work. Mr Linnell needed to know about Operation Briars; Mr Ashby and Mr Mullett did not.*[16]

Despite the fact that Mr Linnell acknowledged that it was obvious that the 'Briars material' required a high degree of confidentiality, he let Mr Ashby know the names of the targets (Lalor and Waters) when the information had nothing to do with Mr Ashby's work related responsibilities.

I am concerned that the conduct exposed in this investigation, whilst perhaps unique amongst the very senior ranks of Victoria Police, may not be so unique amongst lower ranks.

All Victoria Police men and women should be aware that the unauthorised accessing or release of information is now subject to increased penalties, in line with recommendations I made in my report *Investigation into the Publication of One Down One Missing* in 2005. They should note that recent amendments to the *Police Regulation Act* 1958 make it an offence punishable by up to two years imprisonment for a police officer to access or disclose information without authority. Knowingly or recklessly releasing unauthorised information that leads to a person being harmed or assists in the commission of an offence or interferes in the administration of justice has become an indictable offence punishable by up to five years imprisonment.[17]

Reflecting heightened concern about the seriousness of unauthorised releases of information, the Victorian Court of Appeal in a recent decision upholding convictions for the offence of misconduct in public office when a police officer released confidential information said:

> *The accessing of confidential databases held by Victoria Police for the purposes of providing information to (an unauthorised person) must be regarded as most serious. The public is entitled to rely upon the integrity of police officers in investigating and prosecuting agencies. It is entitled to expect that police officers will not abuse intentionally the trust reposed in them in relation to confidential information.*[18]

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14 Office of Police Integrity *OPI Annual Report 2006 – 2007* p22
15 OPI *Annual Report 2006-2007* p22
16 See Part Two para 42
17 s 8 of the *Justice and Road Legislation Amendment (Law Enforcement) Act* 2007 was proclaimed on 17 October 2007 and had the effect of amending s127 of the *Police Regulation Act* 1958
18 Kellam J A in R v Bunning [2007] VSCA 205 (27 September 2007)

There is a plentiful supply of people who want access to confidential police information. For Victoria Police to maintain the integrity of its information systems and the ethical health of its employees it must instil a proper regard for the importance of information security and adherence to strict protocols of professional information management amongst all of its employees.

Vulnerability of the Discipline System

In my report *A Fair and Effective Victoria Police Discipline System*, I criticised the current Victoria Police disciplinary system as being archaic, punitive, bureaucratic and slow. I identified its failure to support the integrity of police members. The recent hearings have revealed how vulnerable to corruption it is. This investigation has strengthened the need for urgency in measures to reform it. Mr Wilcox has noted his concerns regarding the practice of hearing officers discussing the merits of particular cases outside the formal hearing.[19] I reiterate those concerns and am alarmed at the ease with which Mr Mullett received an assurance from Mr Ashby that he (Mr Ashby) would intervene on behalf of one of Mr Mullett's factional supporters who faced dismissal.

Conclusion

The public should take comfort from the fact that aside from those named in this report, no other current Victoria Police employee appears to have been caught up in Mr Ashby's drive for power.

However, the thwarting of Mr Ashby's ambitions and the demise of his and Mr Linnell's careers should serve as a salutary lesson for others who may be tempted to ignore the responsibilities that accompany public office. Police, in particular, have been entrusted with significant powers and have sworn an oath not to betray the trust vested in them.

In this case, the public exposure of Mr Ashby's conduct led to his resignation. Mr Wilcox has concluded that despite Mr Ashby's senior position in Victoria Police, Mr Mullett appears to have been able to manipulate him at will. He surmises Mr Mullett's scheme was to install Mr Ashby as Chief Commissioner. In addition to thwarting his own aspirations, it may be that Mr Ashby's resignation thwarted Mr Mullett's scheme.

This investigation also demonstrates that without proper commitment to ensuring personal standards of integrity accord with the public trust vested in police and public officials, corruption can occur at any level. It demonstrates senior Victoria Police men and women are not immune to corrupting influences simply by virtue of their seniority.

19 See Part Two para 38

The unique circumstances of this case demand that there is the utmost transparency and public accountability in the way matters are dealt with. The community is entitled to have timely advice about the allegations that have been made, the issues involved and what action I am taking in response to what the investigation has revealed.[20] For this reason Part Two of this report, which follows, comprises an unabridged version of Mr Wilcox's report to me including his detailed assessment of the evidence obtained in both the public and private examinations of witnesses.[21]

20 Office of the Special Investigations Monitor, 2007 *Report by the Special Investigations Monitor Pursuant to section 86ZM of the Police Regulation Act* 1958 *(as amended) and section 105M of the Whistleblowers Protection Act* 2001 *(as amended)* p124

21 The name of an individual referred to in attachment D1 to Mr Wilcox's report has been deleted to preserve anonymity.

SCHEDULE OF DELEGATE'S RECOMMENDATIONS

Offences for consideration by the Office of Public Prosecutions in relation to Mr Noel ASHBY

1. Wilfully making a statement which the person knows to be false or misleading in a material particular or misleads or attempts to mislead the Director (offence under section 86K(1)(c) of the Act)
2. The common law offence of Perjury and section 314 *Crimes Act* 1958
3. The common law offence of Misfeasance/Misconduct in Public Office
4. Breach of Confidentiality Notice (offence under section 86KA(3) of the Act)
5. Breach of Confidentiality Obligations (offence under section 102G(1) of the Act)

Offences for consideration by the Office of Public Prosecutions in relation to Mr Paul MULLETT

1. Wilfully making a statement which the person knows to be false or misleading in a material particular or misleads or attempts to mislead the Director (offence under section 86K(1)(c) of the *Police Regulation Act* 1958 (the Act))
1. The common law offence of Perjury and section 314 *Crimes Act* 1958
2. The common law offence of Attempt to Pervert the Course of Justice
1. Counselling and procuring breach of Confidentiality Obligations (offence under section 102G(1) of the Act and sections 321G and 324 of the *Crimes Act* 1958))

Offences for consideration by the Office of Public Prosecutions in relation to Mr Stephen LINNELL

1. Wilfully making a statement which the person knows to be false or misleading in a material particular or misleads or attempts to mislead the Director (offence under section 86K(1)(c) of the *Police Regulation Act* 1958 (the Act))
1. The common law offence of Perjury and section 314 *Crimes Act* 1958
2. Breach of Confidentiality Notice (offence under section 86KA(3) of the Act)
3. Breach of Confidentiality Obligations (offence under section 102G(1) of the Act)
4. The common law offence of Misfeasance/Misconduct in Public Office

For consideration by the Chief Commissioner in relation to Mr Glenn WEIR

1. Disciplinary action

For consideration by the Chief Commissioner in relation to Mr Brian RIX

1. Disciplinary action

PART TWO – DELEGATE'S REPORT

The Director,
Office of Police Integrity,
459 Collins Street,
Melbourne 3000.

Dear Sir,

1. On 30 May 2007, you decided to conduct an investigation on your own motion into the conduct of Assistant Commissioner Noel Ashby, with particular reference to alleged unauthorised communication of confidential information and improper associations. A copy of your decision is Attachment A.

2. On 25 September 2007, you appointed me, as your Delegate, to conduct hearings in respect of that investigation. A copy of the instrument of delegation is Attachment B.

3. Pursuant to the delegation, I conducted private hearings on 25 September and 11, 15 and 19 October 2007. Public hearings were conducted over six days: 7, 8, 9, 12, 14 and 15 November 2007. I was assisted by counsel (Counsel Assisting) and an instructing solicitor at each hearing. Each witness was also represented by counsel for the duration of his evidence.

4. I formed the view, in respect of five witnesses, that there were matters that might give rise to adverse findings, comments or recommendations. Lists of those matters were supplied to counsel for each of the witnesses with an invitation to each counsel to make submissions about them. Copies of those lists are Attachments C to G to this report.

5. I have now received submissions from each witness' counsel and taken those submissions into account in preparing this report.

BACKGROUND

6. At material times, the senior people in Victoria Police were the Chief Commissioner, (Ms Christine Nixon), two Deputy Commissioners, (Mr Simon Overland and Mr Kieran Walshe) and eight Assistant Commissioners. One of those Assistant Commissioners was Mr Noel Ashby, head of the Traffic and Transit Safety Department of Victoria Police.

7. Mr Ashby was an ambitious man who, I infer, had fancied himself for the position of Chief Commissioner when it had fallen vacant prior to Ms Nixon's appointment in 2000. He must have been disappointed when he was passed over.

8. In 2002, Mr Overland, a younger man, moved from the Australian Federal Police into a position in Victoria Police equivalent to Mr Ashby. Mr Ashby must have become concerned for his long-term prospects when, in July 2006, Mr Overland was promoted to Deputy Commissioner. Presumably for this reason, Mr Ashby set out to undermine Mr Overland whenever possible.

9. There is no evidence that Mr Ashby actively sought to undermine the Chief Commissioner. However, the telephone intercept tapes contain disparaging comments by him about her and passages in which Mr Ashby speculated about Ms Nixon's early retirement from the position.

10. Mr Ashby's attitude to Ms Nixon, and antagonism towards Mr Overland, was shared and supported by Mr Paul Mullett, Secretary of the Police Association. The Association is, in effect, the Victorian police trade union. It currently has about 11,000 members. It is currently governed by a council comprising 51 members ("delegates") who are elected by the members. There is a small executive committee and a full-time President, currently Mr Brian Rix.

11. Before becoming Secretary of the Police Association nine years ago, Mr Mullett had served as a police officer for some 20 years, reaching the rank of Senior Sergeant. Upon his election as Secretary, he was given indefinite leave of absence, without pay, from Victoria Police. He draws his remuneration from the Association.

12. Mr Mullett is a forceful, even intimidating, person. He seems to be an assiduous networker, with contacts in both politics and the media, which he does not hesitate to use. As he readily admits, Mr Mullett is also a controversial figure. During the course of his evidence, he made numerous references to a "faction" opposed to his continuance in office, but claimed to have the support of a majority of the delegates. It is apparent that the Association has suffered from intense factional warfare in recent years.

13. In their evidence at the private hearings, both Mr Mullett and Mr Ashby portrayed their relationship as being no more than an amicable, fairly formal, business relationship. In their respective positions, Mr Mullett and Mr Ashby would necessarily need to interact. Moreover, the two men had worked together at St Kilda in the early 1980s. That connection may have been a factor in Ms Nixon asking Mr Ashby to maintain contact with Mr Mullett in relation to a

new Enterprise Bargaining Agreement ("EBA"), which was negotiated between Victoria Police and the Association between April and 12 September 2007, when Heads of Agreement were signed. Mr Ashby was not himself a negotiator.

14. At the private hearings, both men sought to convey the impression that their contact was limited to business matters. However, at the public hearings, when telephone intercept tapes were played, it became apparent that their relationship was much closer than they had admitted. It seems they were in almost daily telephone contact. They had frequent café meetings, including at weekends. Their recorded conversations ranged over many topics, including events within the police service that had nothing to do with the work responsibilities of either of them. The tapes also revealed their shared hostility to Mr Overland.

15. The evidence does not clearly establish the reason for Mr Mullett's antipathy to Mr Overland. The antipathy may have had something to do with the fact that Mr Overland, like Ms Nixon, was a "foreigner", a person not brought up in the Victoria Police. However, I think the reason was more than that. There are references on the Ashby-Mullett intercept tapes to the possibility of Mr Ashby succeeding Ms Nixon as Chief Commissioner; however, Mr Overland seemed to stand in the way. The tapes reveal that, despite Mr Ashby's senior position in Victoria Police, Mr Mullett was able to manipulate him at will. I think Mr Mullett believed that, if he could use his contacts to install Mr Ashby, he would have a puppet Chief Commissioner. If he was to install Mr Ashby, he needed first to undermine Mr Overland.

16. Mr Stephen Linnell is a trained journalist with some 17 years' newspaper experience. In December 2003, he became Director of Media and Corporate Communications for Victoria Police, heading a department of about 100 people and answering direct to the Chief Commissioner. Mr Linnell was a public servant, not a police officer. The Deputy Director was Ms Nicole McKechnie, also a public servant.

17. In order to do his work, Mr Linnell necessarily had to have frequent contact with Mr Ashby, within whose portfolio fell many events of media and public concern. However, the relationship between the two men developed beyond the necessities of their work. As the Linnell-Ashby telephone intercept tapes show, the two men had frequent, sometimes daily or several times daily, telephone contact and regular face-to-face meetings. Their telephone conversations ranged well beyond their work responsibilities and included gossip antagonistic to Deputy Commissioner Overland. During the course of his evidence to this inquiry, Mr Linnell described Mr Ashby as his "best friend" and "mentor".

18. Although Mr Linnell was himself a civilian, his department included a number of police officers. One of them was Inspector Glenn Weir, manager of the Police Media Unit since January 2007. At an earlier stage of his career, Mr Weir had been Mr Ashby's staff officer.

19. The telephone tapes reveal that Mr Weir and Mr Linnell also had developed a close relationship. They frequently engaged in telephone conversations, in cryptic language, that ranged over subjects well beyond their work responsibilities.

The "Kit Walker" Affair

20. This affair was recounted, in detail, in a recent report by you to the Parliament: see "Report on the 'Kit Walker' investigations", December 2007, PP No 57. I will mention only those aspects that impinge on this investigation.

21. During 2005 and 2006, numerous aggressive emails were distributed, through the Victoria Police computer system, to Police Association members. The emails seem to have been written by protagonists in a bitter factional dispute within the Police Association. I am not aware who started the email war, because I took the view that its rights and wrongs were outside the scope of this investigation. However, it seems the war involved, no doubt amongst others, the then President of the Association, Senior Sergeant Janet Mitchell, and a person who wrote under the name "Kit Walker". Ms Mitchell was not an admirer of Mr Mullett. "Kit Walker" defended Mr Mullett and made strong (perhaps defamatory) criticisms of Ms Mitchell. It is now clear that "Kit Walker" was a pseudonym adopted by Detective Sergeant Peter Lalor, a delegate who supported Mr Mullett.

22. In his evidence, Mr Mullett conceded he had always known that "Kit Walker" was Mr Lalor. Indeed, it seems Mr Mullett may have contributed to his emails.

23. Two complaints about the emails were made to the Ethical Standards Department of Victoria Police ("ESD"), apparently on the basis that the Victoria Police computer system had been used for the email war. On 6 December 2006, the Department commenced an investigation, including into the identity of "Kit Walker". Mr Mullett took exception to this investigation. As he was keen to inform me at every opportunity, he thought an employer had no business investigating a dispute internal to an employee organisation. This argument tends to overlook the fact that the employer's computer system was being used to prosecute the dispute.

24. On this same day, 6 December 2006, Mr Mullett wrote to the Chief Commissioner alleging that the Police Association had been the subject of surveillance by an officer of Victoria Police. On the following day, the Association emailed a copy of that letter to its delegates. Apparently, Deputy Commissioner Walshe issued an instruction to all delegates to delete this email, and not to use, access or forward it, on the ground that it contravened VPM Instruction 207.4.

25. On 12 December, solicitors acting for the Association wrote to the Chief Commissioner alleging that Mr Walshe's direction was a breach of the freedom of association provisions of the (Commonwealth) *Workplace Relations Act* 1996.

26. The ESD investigation continued. By that time, however, the investigation related only to past events. The exchanges of emails had ceased. Ms Mitchell had stood down as Association President.

27. On 1 May 2007, Mr Mullett contacted Assistant Commissioner Luke Cornelius, the head of ESD, concerning the ongoing investigation into the "Kit Walker" emails. Apparently as a result of this initiative, on 2 May 2007, the Chief Commissioner and Mr Cornelius met with Mr Mullett. Mr Mullett expressed concerns about ESD's conduct of the inquiry. The three people reached an agreement that involved three principles, which were set out in a confirmatory letter Mr Mullett sent to the Chief Commissioner on 16 May:

    i. *The investigation would cease.*

    ii. *An independent Assistant Commissioner would evaluate the file and recommend the appropriate forum in which the matter should be addressed.*

    iii. *That recommendation would be accepted by the Force and the Association.*

28. In a telephone conversation after the meeting of 2 May, Mr Mullett told Mr Lalor that it had been agreed, amongst other things, "that the investigation will cease".

29. With the agreement of Mr Mullett, the Chief Commissioner chose Assistant Commissioner Ken Lay as the person to conduct the review. Mr Lay entered upon his task and provided a report to the Chief Commissioner on 27 June 2007. It was not until 28 August that the Chief Commissioner wrote to Mr Mullett informing him that Mr Lay had concluded that ESD had not acted improperly and that she had decided the investigation would continue. Mr Mullett replied with a letter of 14 September 2007, in which he expressed disappointment at Ms Nixon's response to Mr Lay's report, but did not claim the Chief Commissioner had breached the agreement of 2 May or that any investigatory action had occurred between that day and 28 August.

The Jennifer McDonald Case

30. Senior Constable Jennifer McDonald has been a long-time delegate of the Police Association and supporter of Mr Mullett. Some time ago, she was involved in an altercation with police officers who stopped a vehicle in which she was a passenger, apparently in order to administer a breath test to the driver.

31. Ms McDonald's conduct was reported to someone in Victoria Police executive command, presumably ESD. It was determined that disciplinary action should be taken against her. Adjudication of her case was entrusted to Acting Assistant Commissioner Brendan Bannon. Mr Bannon apparently received the file, which was supposed to be kept confidential and in a locked safe, in June 2007.

32. On 26 June 2007, Mr Mullett discussed the McDonald case with Mr Ashby (intercepted telephone call 1803). It is apparent from their discussion that both men had expected the case would be assigned to Mr Ashby, apparently because he normally heard prescribed content of alcohol ("PCA") disciplinary cases. Mr Mullett told Mr Ashby that the case had gone to Mr Bannon. Mr Ashby said he would make an inquiry, "it wouldn't hurt for it to be reallocated".

Mr Ashby assured Mr Mullett: "I'll be bloody pumping…I was supposed to be getting them all."

33. One week later, on 2 July (call 2170), Mr Mullett inquired about progress. Mr Ashby said he had asked about the case "and I haven't really got a completely satisfactory response". However, he thought "by Friday I might…get it sent back to me".

34. On the following day, Mr Mullett asked again about Ms McDonald's case (call 2243). Mr Ashby said he was not happy: "They're really reluctant to pull it. Luke's being obstinate." Mr Ashby said he did not think "they will withdraw it": however, he would try once more. Mr Mullett asked Mr Ashby to get back to him on that, saying: "We'll speak to Brendan otherwise." Mr Ashby then offered to speak to Mr Bannon. Mr Ashby sought information from Mr Mullett about Ms McDonald. Mr Mullett included information about her factional position.

35. Two days later, on 5 July, Mr Ashby rang to report he had failed to have the case reassigned to himself. However, he said, he had already discussed the case with Mr Bannon and put to him the available alternatives to dismissal.

36. Mr Bannon gave evidence, at a private hearing, confirming that Mr Ashby had discussed the case with him. However, he claimed that Mr Ashby did not go as far as Mr Ashby had represented to Mr Mullett and that he (Mr Bannon) had been uninfluenced by the discussion. In his evidence at the public hearing, Mr Ashby also said he did not do everything that he told Mr Mullett he had done.

37. On 20 August 2007, Mr Bannon heard the disciplinary proceeding against Ms McDonald. He imposed a penalty that fell short of dismissal. It is not possible to say whether Mr Bannon was influenced, even unwittingly, by Mr Ashby's approach.

38. I make no criticism of Mr Bannon. However, I note with concern that it appears to be accepted practice for hearing officers to be approached for a discussion about the merits of a particular case outside the formal hearing. This should not be regarded as acceptable behaviour. I recommend that steps be taken by ESD to ensure that hearing officers understand they must immediately, and firmly, rebuff any attempt, by any person, to discuss the merits of a case outside the formal hearing. It is also important that the Police Association advocates handling disciplinary matters be clearly told that hearing officers will not tolerate such attempts. Clandestine approaches inevitably diminish confidence in the integrity of any judicial, or quasi-judicial, system. Justice must not only be done; it must be seen to be done.

The Briars Taskforce

39. On 4 June 2003, a man named Shane Maurice Chartres-Abbott was fatally shot as he left his home in Reservoir. Subsequently, a known criminal informed police that he was the gunman. He claimed to have been given prior assistance by Detective Sergeant Lalor and a former police officer, David "Docket" Waters.

40. Victoria Police and OPI set up a special joint taskforce to investigate this claim. The investigation was code-named "Operation Briars". A reference group was established, which included Ms Nixon, Mr Overland and also Mr Linnell, who was to prepare – and did prepare – a strategy for dealing with any media inquiries. The reference group met on three occasions, 1 March, 18 May and 29 August 2007.

41. Mr Ashby was neither a member of the reference group, nor a person consulted about its formation or activities. Its work fell outside his portfolio of responsibility.

42. Both Mr Linnell and Mr Ashby gave evidence strongly supporting the "need to know" principle. This principle, which applies to all police activities but is particularly important in connection with operational matters, is that information should be confined to those who need that information in order to do their work. Mr Linnell needed to know about Operation Briars; Mr Ashby and Mr Mullett did not. Mr Linnell agreed with Counsel Assisting that it was obvious from its content that the "Briars material" required a high degree of confidentiality. The same comment might be made about another taskforce, the Petra taskforce, which had been set up to investigate the murders of a police informer, named Hodson, and his wife.

43. On 6 June 2007, Mr Mullett asked Mr Ashby about the work being performed by Detective Gavan Ryan. Mr Mullett said he had been told that Mr Ryan was on the "Hodson" taskforce. Notwithstanding the obvious relevance of the "need to know" principle, Mr Ashby told Mr Mullett he did not think Mr Ryan was on that taskforce, but he would be interested to find out. Mr Mullett asked him to "make an inquiry". Mr Mullett also referred to the work being performed by two other detectives, Superintendent Rod Wilson and Detective Senior Sergeant Ron Iddles.

44. The evidence does not reveal whether Mr Ashby did make the requested inquiry about Mr Ryan. However, four weeks later, on 3 July, he had a further conversation with Mr Mullett about the membership of the Petra taskforce.

Fontainebleau

45. During the afternoon of 8 August 2007, Mr Ashby learned, from a former Victoria Police colleague, Ms Anne Tibaldi, that there was a proposal, not yet announced, for Mr Overland to attend a six-week training course at an academy in Fontainebleau, France. Mr Ashby immediately informed Mr Linnell, telling him the story "needs to get out there"; that is, into the media. Mr Linnell suggested using "The Rumour File", a program on Radio 3AW. Apparently, one of them took action to bring the story to the notice of the program's producers; it is not clear exactly what was done or by whom.

46. On the following evening (9 August), Mr Ashby told Mr Mullett about the Fontainebleau proposal, expressing himself in terms derogatory of Mr Overland. When asked by Counsel Assisting why he had told Mr Mullett, Mr Ashby said:

"It was part of my own strategy to put myself out there to be available to him" (that is, Mr Mullett) "at any time and to talk about any matter generally, and, of course…there was professional jealousy, there's no question."

47. At 10.30am on 14 August 2007, Mr Mullett and Mr Lalor had a telephone conversation (call 3) in which they discussed Mr Overland's proposed attendance at Fontainebleau, still not publicly announced. Mr Mullett and Mr Lalor agreed the proposal was a "disgrace", but it is not clear from the tape whether this was because of its likely cost or because the trip should have gone to another officer, named by Mr Lalor.

48. The conversation between Mr Mullett and Mr Lalor was intercepted by ESD pursuant to warrants that had been issued under the (Commonwealth) *Telecommunication (Interception and Access) Act* 1979 ("the TI Act"). Warrants are issued by designated persons, who must be either judges or senior members of the Administrative Appeals Tribunal, where a law-enforcement authority is able to make out a case of reasonable suspicion of serious crime. ESD reported the Mullett-Lalor call to Mr Overland.

49. On that same day, 14 August, a journalist contacted Ms McKechnie, inquiring about the Fontainebleau proposal. Ms McKechnie informed Mr Linnell, who reported the inquiry to Mr Overland. In the course of their discussion, apparently, Mr Overland told Mr Linnell about the intercepted Mullett-Lalor conversation on that topic.

50. The evidence does not reveal the time of Mr Linnell's meeting with Mr Overland on 14 August. I suspect it ended shortly before 3.05pm, because, as Mr Linnell agreed in evidence, at that time he left a panicky message on Mr Ashby's voicemail for Mr Ashby to ring him urgently and telling him not to go and see Ms McKechnie. Mr Linnell agreed the cause of this message was Mr Overland's information about the Mullett-Lalor call. Mr Linnell was concerned that Mr Mullett's phone might be "off".

51. Mr Ashby gave evidence that he did not pick up this message until the following day, 15 August. In the meantime, however, at 3.11pm on 14 August, Mr Ashby called Mr Linnell (call 4459), apparently in response to an earlier message on a different telephone line. In call 4459, Mr Linnell told Mr Ashby about the journalist's inquiry. He did not mention the Mullett-Lalor conversation, but he sought reassurance that Mr Ashby had not spoken to Ms McKechnie and commented: "fucking problem". He said to Mr Ashby: "You're not to say a word of this to anyone."Mr Linnell told Mr Ashby that the journalist's inquiry had come through Ms McKechnie, who had called him (Mr Linnell). He then said: "I go to Overland. He goes through this spiel which I'll tell you about, which is very fucking interesting." He said Mr Overland had stated the Fontainebleau story was not true, so he (Mr Linnell) had told this to Ms McKechnie.

52. In this conversation, Mr Ashby asserted to Mr Linnell that he had not mentioned Fontainebleau to anyone. That was not true, as Mr Linnell suspected at the time. In his evidence at the public hearing, Mr Linnell speculated that Mr Ashby may have spoken to Mr Mullett about Fontainebleau. When he was asked by Counsel Assisting why he mentioned Mr Mullett's name, Mr Linnell said: "Occasionally he speaks to him." Counsel Assisting asked whether Mr Linnell knew from what Mr Ashby had told him "that things that you told Mr Ashby, Mr Ashby passed to Mr Mullett." Mr Linnell replied: "Not everything, no."

53. Immediately after this conversation, Mr Ashby telephoned Mr Mullett (call 4461). He told Mr Mullett about the journalist's inquiry and said the matter "needs to be managed carefully at this point of time". Mr Ashby pointed out that "only a very tight group...could possibly have known". Mr Ashby said that people would be thinking "it could only have come from me". He added that people were thinking "you have…put it out there, got it from me". The two men then concocted a strategy for diverting attention from themselves, by suggesting the leak came from a source within the government. This line was to be given to interested journalists and spread within Victoria Police; in particular at a meeting Mr Mullett was about to have with the EBA negotiator, Mr Sanjib Roy.

54. As soon as he concluded this conversation, at 3.44pm on 14 August, Mr Ashby phoned back Mr Linnell (call 4467). The tape is not very clear, but it is apparent that, after Mr Ashby had Mr Linnell go outside to talk, the two men discussed how many people knew about the Fontainebleau story. They persuaded themselves the number must be higher than they first thought.

55. During the course of his evidence, Mr Ashby agreed that, at some time on 14 August, Mr Linnell had told him that he knew from Mr Overland "that phones were being intercepted" and that "Mullett had mentioned it" (Fontainebleau) "in a conversation".

56. Later that day, at 6.23pm, Mr Mullett called Mr Ashby (call 4486) to report that the journalist had contacted him and accepted that the story was not true. Mr Mullett also reported that he had put the agreed line to Mr Roy. Judging by the conversation, the two men seem to have been satisfied they were out of danger, but Mr Ashby said the story was going to be on "The Rumour File", apparently the following morning, and commented: "It would be good if it wasn't".

57. In the event, it was not. After a telephone conversation with Mr Linnell early the following morning, Mr Ashby phoned a producer at 3AW and succeeded in having the item "pulled".

The Briars Leak: Events of 15 August

58. As previously mentioned, on 15 August 2007 Mr Ashby retrieved the panicky message that had been left for him by Mr Linnell at 3.05pm the previous day. Immediately after retrieving the message, Mr Ashby phoned Mr Linnell (call 4503), with a note of anxiety in his voice. After establishing that Mr Ashby was speaking on his mobile phone, not his landline, Mr Linnell said: "I was going to talk to you when I come back…about that other matter". Mr Ashby asked whether there was a problem. Mr Linnell said: "No, no, no, but…I do need to talk to you about it." Mr Ashby asked Mr Linnell to come over to his office but Mr Linnell could not do so at that moment: "the vehicle policy thing's on in a minute". After an expletive from Mr Ashby, Mr Linnell said: "Yeah, I know. No it's not …terribly urgent but did you talk to Mullett on the phone yesterday?" Mr Ashby replied affirmatively and said he talked to him regularly. Mr Ashby asked: "Why?" Mr Linnell said: "Just got to be careful, that's all." Mr Ashby asked whether Mr Mullett was "being recorded" but Mr Linnell repeated: "Just be careful." Pressed again, Mr Linnell said: "I can't say. Talk to you later." After expressing some frustration, Mr Ashby said he would ring Mr Linnell on a hard line.

59. Under questioning from Counsel Assisting, Mr Linnell agreed that Mr Ashby's question whether Mr Mullett was being recorded was "right on the money".

60. Mr Ashby confirmed at the public hearing that he had been concerned that Mr Mullett's telephone was being intercepted. He said he did not know this was the position, but he had made an assumption from what Mr Linnell had said. Mr Ashby said that, shortly after the recorded conversation, Mr Linnell came to see him. However, he did not say what was discussed. Mr Ashby rejected Counsel Assisting's suggestion that Mr Linnell had mentioned the interception of a call between Mr Mullett and Mr Lalor.

61. Mr Ashby may have been wrong in saying that, shortly after call 4503, Mr Linnell came to see him. Certainly, there was a reverse visit; Mr Ashby went to Mr Linnell's office. As both Mr Linnell and Mr Ashby eventually agreed, Mr Linnell there showed Mr Ashby a document on his computer regarding the Briars Taskforce. It is not clear whether the names of the "targets" were in the document or whether Mr Linnell disclosed them orally; but is now conceded by both men that, during this visit, Mr Linnell informed Mr Ashby of those names, (Lalor and Waters).

62. Mr Linnell told Counsel Assisting that his reason for the disclosure to Mr Ashby was that he "was concerned that Mullett's phone may be off", it was "to get his experience, as a policeman", presumably in relation to the possibility of telephone interceptions. That explanation only makes sense in the context that Mr Linnell told, or had told, Mr Ashby that there had been an interception of a call between Mr Mullett and one of the persons whom he was revealing as "targets". In fact, Mr Ashby eventually agreed that Mr Linnell had passed on to him "what transpired between him" (Mr Linnell) "and Mr Overland". So Mr Ashby presumably knew that the other party to the 14 August Mullett conversation was Mr Lalor.

63. Mr Ashby agreed in evidence that it was improper for Mr Linnell to have given him information about Operation Briars and it was improper for him to have received that information; he had no need to know.

64. Mr Ashby had been a police officer for over 30 years. He had had considerable experience in criminal investigation, including a period as a Detective Superintendent in the Crime Department. With this background, he was necessarily well aware of the requirements for obtaining a telephone intercept warrant. Even if Mr Linnell did not tell him the name of the person to whom Mr Mullett was speaking in the intercepted call reported to Mr Overland, Mr Linnell's disclosure of the "target" names must have led him to "put two and two together" and conclude that person was Mr Lalor or (less likely) Mr Waters.

65. When he was first asked about the matter at the public hearing, Mr Ashby denied that he gave Mr Mullett the names of the Briars "targets". He later repeated that claim, stating that the names he got from Mr Linnell "didn't mean anything" to him. He said he did not know that Mr Lalor was a Police Association delegate and did not pass on Mr Lalor's name to Mr Mullett. However, when directly challenged by Counsel Assisting on that statement, he made the less confident response: "I have no recollection of ever talking about that name to Mr Mullett."

66. In relation to Mr Ashby's claim that he knew nothing about Mr Lalor, it is relevant to note the terms of two later conversations between Mr Ashby and Mr Linnell.

67. The first conversation took place on 6 September 2007 (call 736). The two men were discussing the likely actions of the Police Association "in defending Lalor". Mr Linnell expressed the opinion that the police would "be hard pressed to get a conviction on this one". Mr Ashby replied: " Yeah, yeah but might get Docket". Mr Linnell said he did not care about that. Mr Ashby responded: "No, but getting the next step up". Inferentially, Mr Ashby did care if "the next step up", Mr Lalor, was convicted.

68. On 13 September 2007 (call 700), Mr Linnell and Mr Ashby were discussing a media interview that Mr Ashby was about to give. Mr Lalor had been suspended the previous day. Mr Linnell offered some advice about the reply Mr Ashby should give if he was asked about that event: Mr Ashby should say he was unaware of the suspension. Mr Linnell commented: "cause you're not, so". Mr Ashby responded: "No, but every cunt's talking about it. Mullett told me." Mr Linnell asked what he (Mr Mullett) had said. Mr Ashby replied: "He just said … 'They're having a…dip at Peter' and I said: 'Peter who?'" Mr Linnell said: "Yeah" and laughed. Mr Ashby joined in the laugh and went on to recount how he had pretended to believe that Mr Lalor was the son of a deceased policeman, "Pud" Lalor. Mr Ashby then told Mr Linnell that Mr Mullett had said to him: "that'll be another round that we've got to go with OPI", because Mr Lalor was "suspected of committing a crime". Mr Ashby then said to Mr Linnell: "I then finished when…you know, I said: 'You know mate', I said, 'you know the names of some people but if he walked in the bloody room now I wouldn't know who he is'. So I thought I'd put that on the tape too."

69. Counsel Assisting asked Mr Linnell about the laugh, "because you knew that Ashby knew exactly who Peter was?" Mr Linnell agreed.

70. These two conversations each took place a few weeks after the events of 15-16 August. However, I have no reason to believe that Mr Ashby acquired any new knowledge of Mr Lalor during that time. The conversations suggest to me that Mr Ashby had long known something about Mr Lalor, to the point where it was laughable that he should pretend otherwise. It may be true that he would not have recognised Mr Lalor if he had walked into the room, but that does not mean he would have been unaware of who he was or his closeness to Mr Mullett.

71. That closeness is illustrated by the fact that Mr Mullett continued to keep Mr Lalor informed of developments in relation to Fontainebleau. In a telephone call between them at 12.25pm on 15 August, Mr Mullett told Mr Lalor about the story being denied and the withdrawal of the item from "The Rumour File".

72. During the afternoon of 15 August, Mr Ashby arranged that Mr Mullett would call his (Mr Ashby's) wife's mobile phone at 7.30pm that night. Mr Ashby was obviously anxious to convey some sensitive information to Mr Mullett and concerned about the security of his own mobile. Mr Mullett did call Mrs Ashby's mobile, at 7.32pm. A conversation of nearly nine minutes ensued. The evidence does not disclose its content.

The Briars Leak: Events of 16 August

73. It seems Mr Ashby awoke on 16 August in a more confident frame of mind. In a telephone conversation at 7.20am (call 4555), he told Mr Linnell : "I wouldn't be too worried, after reading those TORs and stuff" (Mr Ashby referred to the documents he had seen on Mr Linnell's computer as "terms of reference" (TORs)). Mr Ashby went on to discuss the logistical difficulty of supporting a telephone tapping operation over a period of time. During the course of the conversation, Mr Linnell said: "I was just worried about those phones, that's all…The more I think about it, it's more it's on the target." Mr Ashby agreed. The two men went on to speak of the absence of "a full-on backlash by now" which, as I understand their point, is what they would have expected if it had been Mr Mullett's phone that was being tapped. The inference is that Mr Ashby, now also knowing the identity of the "targets", on reflection agreed with Mr Linnell that the Mullett-Lalor conversation about Fontainebleau was intercepted on Mr Lalor's line, not that of Mr Mullett.

74. Shortly after this conversation, at 7.39am on 16 August, Mr Ashby had a telephone conversation with Mr Mullett (call 4556). The tone of the conversation is formal. It deals only with the EBA negotiations. Mr Mullett, in evidence, accepted the possibility that it was "a throw-off in case calls were being intercepted", and had been set up the previous evening. Counsel Assisting put to him that Mr Ashby had told him, in the previous evening's conversation, that "he had real information, concrete information" that he (Mr Mullett) had been recorded in a

telephone call with Mr Lalor. Mr Mullett did not deny that suggestion. He merely said: "I can't recall that detail"; he did recall Mr Ashby's panic.

75. On the morning of 16 August, Mr Mullett enlisted the aid of Mr Rix, the Police Association President. Mr Mullett claimed in evidence that he told Mr Rix the "Kit Walker" investigation was continuing and asked him "to contact both Peter Lalor and Rod Brewer, who were the real suspects for being Kit Walker, to tell them to be careful what they were saying to people". Mr Rix did contact Mr Lalor. There is no evidence that he, or anyone else, contacted Mr Brewer. In relation to Mr Lalor, Mr Mullett agreed that the reason to warn him was because he believed "there was at least a possibility that his phone was being tapped".

76. Counsel Assisting questioned Mr Mullett about his claim that the warning was connected to the "Kit Walker" investigation. Counsel Assisting pointed out that, early that morning, Mr Ashby and Mr Linnell had been worried about the phones, but thought it was "more on the target". Mr Mullett said he could not recall Mr Ashby telling him that he had read the Briars terms of reference. Counsel Assisting suggested there was "no doubt that the information was passed at your request through Mr Rix to Mr Lalor that there's a real possibility that your (Mr Lalor's) phones are off". Mr Mullett did not dispute that suggestion but explained: "Because of the continuing Kit Walker investigation…That was my state of mind." Mr Mullett said he had reached the conclusion that Mr Lalor's phone was being tapped, but not his own.

77. Mr Rix gave evidence that, at 9.57am on 16 August, he left a voicemail message for Mr Lalor, saying he would see him next week but adding it was imperative they talked that day. He asked Mr Lalor to ring him back.

78. Mr Lalor did ring back, at 10.26am (call 2069). Mr Rix asked him whether he was at work or at home. Mr Lalor said he was about to pick up another officer, whom he named, "and we are heading off to Adelaide on a 12.20 flight". He said it was "a bit of an office trip for two days". Mr Rix asked Mr Lalor where he was. Mr Lalor said he was "in North Road heading over to Carnegie". Mr Rix told Mr Lalor he was in the office and asked whether there was a chance of Mr Lalor dropping by.

79. Although it was obviously well out of his way to do so, Mr Lalor promised to try to drop by the Association's premises in East Melbourne on his way to the airport. Mr Rix said: "Just let us know how you are going. If you can't I'll pass the message on."

80. Mr Lalor did drop by the office. As he approached the building, at 10.53am, Mr Lalor called Mr Rix again (call 2072). Mr Rix went outside to speak to him. There is no evidence as to what was said. However, at 11.06am, apparently as he resumed his journey to the airport, Mr Lalor called Mr Waters (call 2073). He told Mr Waters he would like "to catch up" during the following week.

81. Mr Rix gave a different account of his mission that morning. He said Mr Mullett told him that something had got back to the Chief Commissioner or executive

command about Fontainebleau "and that it must be via Kit Walker or that investigation, and that needed to be stopped as quickly as possible from getting out". Mr Rix already knew the Fontainebleau story, but, on this morning, Mr Mullett asked him to speak to Mr Lalor. Mr Rix said in evidence that Mr Mullett "wasn't happy". Mr Rix said Mr Mullett did not mention anything about Mr Lalor's phone; "it was all about Paul Mullett's phone".

82. Counsel Assisting asked Mr Rix whether, when Mr Lalor came to the Association's premises, he (Mr Rix) said anything to him about the possibility that his (Mr Lalor's) phone was off. Mr Rix replied: "I can't remember exactly what was said, sir, but I can say that I wanted to know who he'd spoken to about the Fontainebleau stuff and I didn't want it getting out." Mr Rix thought Mr Lalor had named one person, not previously mentioned by me, but assured Mr Rix he could fix the situation with him.

83. Mr Rix denied that Mr Mullett had mentioned to him the name "Operation Briars" or the word "target". He was not sure about "telephone intercepts", but Mr Mullett's concern was all about his own phones, not those of Mr Lalor.

84. Mr Rix later said his own position was that he did not believe there was an intercept on either phone. However, he went on to agree with Counsel Assisting that he was not prepared to talk about "Kit Walker" over the phone because he "thought the phones were off". Mr Rix specifically denied that he had told Mr Lalor "that he was the target of Operation Briars or of a police investigation". He said this would have been impossible "because I knew nothing about Operation Briars or the fact that Peter Lalor was a suspect for anything".

85. I accept that Mr Rix may not, in terms, have informed Mr Lalor he was a Briars target or suspect. He may not have known that fact. Even if Mr Mullett had this information, there is no reason to believe he told Mr Rix. However, I cannot accept that Mr Rix did nothing more than ask Mr Lalor whom he had spoken to about Fontainebleau, and warn him not to talk about it.

86. First, the Fontainebleau story had been effectively "dismantled", to use Mr Mullett's term, more than 24 hours earlier. Both the inquiring journalist and people within Victoria Police had swallowed the concocted government leak. Also, the primary story had been branded untrue. Why would it matter if it now went further? Why was it so "imperative" that Mr Rix and Mr Lalor should speak before Mr Lalor left for Adelaide that it was worth taking him out of his way to the airport?

87. Second, it is apparent, even from Mr Rix's evidence, that, on the morning of 16 August, there was panic about phone tapping. When he gave his evidence, Mr Rix first said he had not believed there was any phone tapping, although Mr Mullett was worried about that; then said he had believed Mr Mullett's (but not Mr Lalor's) phone was being tapped; and ended by telling Counsel Assisting he had thought his own phone might also have been under interception. Although Mr Rix had been a police officer for over 30 years, with experience in

the Homicide Squad, he claimed not to have asked himself how the "Kit Walker" investigation could support the grant of a telephone interception warrant.

88. A genuine fear of current phone tapping would explain both the perceived urgent need to convey a warning to Mr Lalor and the reluctance of Mr Rix (and Mr Mullett) to convey it by telephone; only, however, if the fear related to Mr Lalor's phone. If it was thought it was Mr Mullett's, not Mr Lalor's, phone that was "off", why was there an "imperative" need to see Mr Lalor that day? Indeed, why speak to Mr Lalor at all? Mr Mullett could have unilaterally resolved the problem by ceasing to use his usual phone: a course he would presumably take, in any event and whether or not Mr Lalor had been contacted.

89. On the following day, 17 August, Mr Lalor called Mr Mullett (call 2101). The recording is of poor quality. However, it is clear that Mr Lalor told Mr Mullett he was at Glenelg, enjoying the sunshine and the sound of the waves. Mr Mullett referred to "Simon the Likeable going to (indistinct) a business course". Mr Mullett commented that "a journalist may have got her facts wrong on that". In evidence, Mr Mullett conceded he believed the conversation was being listened to. He described it as "part of the dismantling process assisting Mr Ashby to not be identified as the person who provided the information on Fontainebleau". Of course, for what Counsel Assisting described as a "staged throw-off" to succeed, Mr Lalor had to be in on the joke.

90. By the end of his evidence, Mr Mullett was freely admitting that he warned Mr Lalor that his (Mr Lalor's) phone might be "off". Mr Mullett expressly conceded each of the following propositions:

    (a) he had learned through Mr Ashby that a conversation he (Mr Mullett) had had with Mr Lalor had been recorded;

    (b) there was therefore, at least, a possibility that Mr Lalor's phone was being intercepted and conversations recorded;

    (c) accordingly, he "sent a message to Mr Lalor, through Mr Rix, to be careful who he talks to".

91. However, I reject the explanation upon which Mr Mullett insisted: that the interception of Mr Lalor's phone was attributable to a recommencement of the "Kit Walker" investigation. For two reasons, this proposition is untenable.

92. First, the "Kit Walker" investigation was all about the possible misuse of the Victoria Police computer system. Even if participants had published defamatory matter, during the course of their email war, their conduct could not, even arguably, have amounted to a "serious offence", within the definition of that term in section 5 of the TI Act. Unless the relevant designated person is persuaded that the person under investigation is reasonably suspected of having committed, or being likely to commit, a "serious offence", he or she has no power to issue a warrant. As the posting of the "Kit Walker" emails could not have amounted to a "serious offence", there would have been no possibility of a designated person

issuing a telephone intercept warrant to obtain evidence about the identity of the responsible persons. Mr Mullett and Mr Rix, both experienced investigators, must have known this.

93. Second, and perhaps even more telling, the recommencement of the "Kit Walker" investigation, on or before 16 August 2007, would have been a major breach of faith by either or both the Chief Commissioner and Assistant Commissioner Cornelius. On 2 May 2007, those two senior officers had met with Mr Mullett and reached an agreement with him in relation to the "Kit Walker" investigation. Mr Mullett subsequently confirmed in writing the terms of that agreement. It was agreed the "Kit Walker" investigation would cease, pending consideration of a report by an independent reviewer concerning ESD's conduct of that investigation. The appointed reviewer was Assistant Commissioner Lay. As of 16 August 2007, the Chief Commissioner had yet to consider his report. Accordingly, the suspension of the investigation was required to remain in place. If either the Chief Commissioner or Mr Cornelius had covertly revived or continued "Kit Walker" by use of telephone interceptions, that person would have placed herself or himself in an untenable position. And Mr Mullett, who had no love for either of them, would have been merciless in holding them to account for their breach of faith. Mr Mullett was not a shy man. In relation to this very investigation, he had already twice made written complaints. If Mr Mullett had really believed the "Kit Walker" investigation had been recommenced, Mr Lay's report not yet having been considered, he would have "kicked down the door" of the Chief Commissioner's office. Probably, he would have done much more.

94. Mr Mullett explained his failure to protest to Ms Nixon, or anyone else, by pointing to the then unfinished EBA negotiations. I doubt that would have inhibited him. However, the negotiations were concluded on 12 September 2007, when Heads of Agreement were signed. On 14 September, Mr Mullett wrote to Ms Nixon in relation to Mr Lay's "Kit Walker" report. Even the mildest union secretary would surely have taken that opportunity to complain about any alleged breach of the 2 May agreement. Mr Mullett said nothing.

95. The only possible explanation of Mr Mullett's failure to complain is that he knew full well that the telephone tapping about which he had warned Mr Lalor had nothing to do with "Kit Walker"; but rather, as he was reported by Mr Ashby to Mr Linnell on 13 September (call 700) as saying, because Mr Lalor was "suspected of committing a crime". Whether, at that stage, Mr Mullett knew the suspected crime related to the murder of Mr Chartres-Abbott is impossible to say. That depends on the amount of information that Mr Ashby had passed on to Mr Mullett in unrecorded phone conversations or at face-to-face meetings. However, it does not really matter. For a police officer, particularly, to tip off a person, whom he must have known was suspected of having committed a serious offence, that his phone may be subject to interception is highly reprehensible. Not only does a tip-off reduce the prospect of the interception garnering useful evidence or information; more generally, especially in the case of an informed person such as a police officer, it warns him he is a suspect.

Subsequent Events

96. It is possible for me to deal relatively briefly with three subsequent events.

97. First, on about 12 September 2007, Mr Lalor was suspended from his employment, on full pay. That event gave rise to the Ashby-Linnell conversation which I recounted at para 68 above.

98. Second, on each of 14 and 15 September 2007, the "Age" newspaper published an article about the Briars investigation. The information set out in the articles included the names of the two "targets", but not that of the alleged gunman. There is no evidence as to who supplied the information set out in the articles.

99. Third, on 18 September 2007, Mr Linnell received a telephone call (call 1214) from Inspector Brett Curran, an officer attached to the office of the Chief Commissioner. Mr Curran informed Mr Linnell that he had been asked by the Police Minister to become his chief of staff. Mr Curran told Mr Linnell he was informing him because "something could crop up". He said: "You have to be very tight. I know I can rely on your discretion." Mr Linnell replied: "Yep."

100. Mr Curran went on to make clear to Mr Linnell that the Chief Commissioner and Assistant Commissioner Lay knew, and approved, of the appointment, but it was not yet certain because the Premier had yet to agree. Mr Linnell summarised the position by saying: "So not signed, sealed and delivered but maybe soon."

101. Despite his pledge of confidentiality, and the good reason for it, Mr Linnell discussed the news with Mr Ashby (call 1225). Mr Ashby had apparently heard a rumour about the appointment, and rang Mr Linnell wanting confirmation. He asked Mr Linnell his source, which Mr Linnell readily gave to him. Mr Ashby was disturbed by the news, seeing the appointment as adverse to his own long-term interests. The two men discussed Mr Ashby's chances of becoming Chief Commissioner and the possibility of presenting the Curran appointment as politically risky for the government. Mr Ashby concluded by saying: "We've got to keep painting the risk factor. I reckon Overland is getting further and further away. It's probably good to talk Ken Lay up as an opportunity "cause that'll fucking off-set Overland a bit even more".

102. At 9.38am on the following day (call 1032), Mr Ashby told Mr Mullett about the proposed appointment, which was to be announced at a function that evening. Mr Mullett expressed outrage. Mr Ashby asked Mr Mullett to let him know what he was going to do. Mr Mullett asked Mr Ashby to have Mr Linnell "send the media-whatever media, send them to us".

103. One hour later, at 10.46am, Mr Ashby again rang Mr Mullett (call 1037). Mr Mullett told him: "We're trying to get some calls in at the moment, see if we can stop it." They again discussed the problems in the appointment, including embarrassment to "the new Chief Commissioner…who comes in". Given they knew that Mr Overland and Mr Lay both supported the appointment, it is not difficult to

guess who they might have had in mind. Mr Ashby suggested some more people to call and left Mr Mullett to get on with this task.

104. A few minutes later, at 10.59am, Mr Ashby called again (call 1038). His purpose was to report information that he had just received from Mr Linnell about Mr Lay's assessment of the public relations issues surrounding the appointment. Mr Ashby summarised this as: "One day of bad press and then it's business as usual." Mr Mullett responded: "We'll have to get someone to hook into it...I think it needs never to be let go."

105. At 1.24pm that day, 19 September, Mr Ashby took a call from a journalist. He told her about the projected appointment and argued it was wrong. Nonetheless, the appointment went ahead.

106. As the Curran evidence unfolded, I found myself becoming increasingly critical of Mr Ashby's conduct in relation to it. I felt that, in fairness, I should raise my reaction with Mr Ashby. So I had a short conversation with him about loyalty. Mr Ashby agreed with me that he expected loyalty from his subordinates, and their respect for his decisions, even if they thought them wrong. Referring both to the Curran appointment and Fontainebleau, I asked him why he did not give the Chief Commissioner's decisions, right or wrong, what "you would expect to be given to you by your subordinates". Mr Ashby responded that he "was seeing this in the prism of politics at the time, across the whole organisation". Mr Ashby claimed there were "a number of political players across the organisation", but admitted it was he who had stirred up both the Fontainebleau and Curran issues with Mr Mullett. He agreed he had failed to show the Chief Commissioner the loyalty he would expect to get from his own subordinates.

Mr Linnell's Attendance at this Inquiry

107. On 17 September 2007, Mr Overland had a telephone conversation (call 1192) with Mr Linnell in which he mentioned the recent "Age" articles and said: "The OPI is going to have a look at that. They're going to start an inquiry into how McKenzie" (the journalist who wrote the articles) "got hold of all that information…"

108. Mr Linnell immediately phoned Mr Ashby (call 1194) and told him about the proposed OPI inquiry. Mr Ashby told Counsel Assisting: "It's likely I would have told Mr Mullett that OPI intended to conduct an inquiry into the media leaks".

109. Three days later, at 8.29am on 20 September, Mr Overland again rang Mr Linnell (call 1383). He asked Mr Linnell whether he had said anything to anyone about their conversation "the other night" about "OPI having a look at the other leak". Mr Linnell responded: "No, God no, no." Mr Overland instructed him not to tell anyone. Mr Linnell again denied telling anyone.

110. Later that day, Mr Cornelius left a voicemail message asking Mr Linnell to come to his office at 4.45pm that afternoon to see someone from OPI. At the time of the message, Mr Linnell was at a meeting in Horsham.

111. During the afternoon, Mr Linnell rang the office in Melbourne and spoke to Mr Weir. Mr Weir said he would await Mr Linnell's return. When Mr Linnell reached the office, he had a conversation with Mr Weir in which he asked him to contact Mr Ashby and arrange for Mr Ashby, from his home that evening, to call Mr Linnell on a number which Mr Weir would send him by text message.

112. Counsel Assisting asked Mr Weir whether he knew that Mr Linnell and Mr Ashby were concerned that their phones may be being tapped. Mr Weir replied that both Mr Linnell and Mr Ashby "were behaving very oddly". After some prevarication, Mr Weir conceded to Counsel Assisting that, when Mr Linnell spoke to him after his return from Horsham, "it was obvious to me that he thought that perhaps his phone or Ashby's phone or both were being intercepted". Mr Weir also conceded he had considered the possibility that Mr Linnell wished to speak to Mr Ashby about the OPI summons, which Mr Linnell was obviously expecting.

113. It was not until 6.34pm that Mr Weir spoke to Mr Ashby (call 1158). He asked Mr Ashby to call Mr Linnell from his home phone at a number to be sent to him (Mr Ashby). Mr Ashby was curious as to what it was all about but Mr Weir did not tell him. Mr Weir then sent the number by text message.

114. In the meantime, at 4.45pm, Mr Linnell had attended at Mr Cornelius' office. A summons had been served on him, requiring his attendance at the OPI private hearing scheduled for 25 September 2007. The summons contained a notice concerning the need for confidentiality, in the following terms:

> *TAKE NOTICE that pursuant to sub-section 86KA of the Police Regulation Act, 1958, the Director hereby gives notice-*
>
> *(a) That the summons is a confidential document: and*
>
> *(b) That it is an offence to disclose to anyone else the existence of the summons unless you have a reasonable excuse,*

115. The confidentiality notice then stated it is a reasonable excuse if the disclosure is made for the purpose of seeking legal advice; obtaining or providing information in order to comply with the summons or the administration of the Police Regulation Act.

116. Notwithstanding the confidentiality notice, Mr Linnell disclosed the existence of the summons to both Mr Weir and Mr Ashby.

117. Mr Linnell may have told Mr Weir about the service of the summons immediately after it occurred. Certainly, Mr Weir knew what Mr Linnell was talking about when, at 6.57pm, Mr Weir rang (call 1456) to convey, in cryptic language, that he had spoken to Mr Ashby, who would ring Mr Linnell before 9.00pm. I say this because Mr Linnell went on to talk about "reading through some of this stuff". He thought he had found an "outage"– Mr Linnell liked to add "age" to words when speaking to Mr Weir – in relation to his obligation of non-disclosure. He quoted from the confidentiality notice and the two men discussed what it required.

118. On his way to work next day, 21 September, Mr Weir called Mr Linnell (call 1458). He asked Mr Linnell: "How much time did you spend on the phone last night?" Mr Linnell replied: "Just a little bit", which Mr Weir understood as a confirmation that Mr Ashby had called, as arranged. Mr Linnell added that he was going "to have breakfast with Leon" (Mr Ashby).

119. Some 90 minutes later, Mr Linnell rang his wife (call 1462). He told her he had just had breakfast "with Leon" and recounted to her "Leon's" experience when he had been called to an OPI inquiry the previous year. Obviously, the two men had discussed, over breakfast, Mr Linnell's forthcoming appearance at this inquiry.

120. On the evening of the following day, 22 September, Mr Ashby and Mr Linnell had a long conversation on their respective wives' mobile phones (call 4). Mr Ashby told Mr Linnell about a police officer, whom he named and claimed to know well, who managed the unit in Victoria Police that carried out the recording of telephones. Mr Ashby claimed to have learned, from this officer, that only nine lines were currently "off", in the whole range of Victoria Police activities. Mr Ashby said he had given his contact "a series of numbers". He intended Mr Linnell to believe they had included Mr Mullett's number; Mr Ashby told Mr Linnell: "Mullett's is not off." He added: "If Mullett's not off we ain't fucking anywhere near it".

121. After some self-congratulatory conversation about their phones not being intercepted, Mr Ashby and Mr Linnell had a discussion as to the answers Mr Linnell would give to particular questions, if asked at the OPI inquiry. The two men then engaged in a gossip about many matters and people. In the course of that activity, Mr Ashby referred to Mr Mullett and said "we know, under that Kit Walker shit, that… Mullett rang Walker and it was recorded". Mr Linnell responded: "That's right, yeah." Mr Ashby said: "But no-one else was. And how long ago was that?" Mr Linnell replied: "Yeah, that's about three or four weeks ago." Mr Ashby agreed. This was clearly a reference to the Mullett-Lalor conversation of 14 August.

122. Towards the end of the call, Mr Linnell reverted to the matter of telephone taps on their phones, saying he was "happy with this call". Mr Ashby replied: "Yeah, I'm pretty cool with it too."

123. The officer identified in this conversation by Mr Ashby, as being from Victoria Police's Special Projects Unit ("SPU"), does exist. The officer was summoned to give evidence at a private hearing. In the course of that evidence, he strenuously and convincingly denied that he ever improperly provided information about telephone interceptions. He seemed distressed that such a serious breach of duty should be attributed to him. When Mr Ashby came back into the witness box, he admitted he had not contacted this officer. He said the story he gave Mr Linnell was false; it was designed to boost Mr Linnell's confidence in giving evidence at the OPI hearing. It is a serious reflection on Mr Ashby that he should have thought it acceptable, for his own ends, to traduce the good name of another police officer.

124. Although Mr Ashby still had no information about telephone taps, he says, early on 24 September, he sent text messages to both Mr Linnell and Mr Weir informing each of them there were no tapes. He said, in evidence, his purpose was: "Just to reassure".

125. Later that day, Mr Ashby told Assistant Commissioner Gassner that: "there's another round of…nasty, coercive hearings rumoured to occur…over leaks and stuff". He said he understood it was "about the taskforces".

126. On the evening of 24 September, Mr Linnell and Mr Ashby had three conversations (calls 47 and 49 and an unrecorded call on a mobile phone number that had been supplied by Mr Ashby by text message to Mr Linnell). The two recorded conversations, at least, concerned Mr Linnell's projected appearance the next day at this inquiry. In each of them, Mr Linnell spoke about his conference with his barrister and, in each of them, Mr Ashby gave some advice about good answers. In the second recorded conversation, there was more talk about telephone taps, Mr Ashby repeating his assurance that "they did not have Mullett's phone". Both men were apparently surprised by this. Mr Linnell said; "you'd think they would... given the nature of the investigation". He added: "Yeah, because if Lalor was ringing him…" Mr Ashby interpolated: "Yeah, and he's ringing Lalor." Mr Ashby went on to assert his contact at SPU had "run our numbers" but they "didn't come up".

127. During the course of his evidence, Mr Ashby was referred by Counsel Assisting to a question that Mr Linnell told him had been posed by his own counsel during the conference: "Have you discussed this with anybody outside of the reference group?" Mr Ashby agreed he understood this to be an inquiry about discussing operational issues outside the taskforce. Mr Ashby added: "and, as I said… he showed me quite clearly the TORs on his computer, and that was to try to determine whether our phones were off…"

128. Counsel Assisting put to Mr Ashby that Mr Linnell told him, in effect, that he intended to lie at the inquiry. Mr Ashby responded: "I think he's saying he's not going to be as frank as he could be." Mr Ashby agreed he should have counselled Mr Linnell against that course.

129. After his appearance at the private hearing of this inquiry, Mr Linnell contacted Mr Ashby. There was a short conversation at 5.26pm (call 67), Mr Linnell ringing on his next door neighbour's phone. He arranged for Mr Ashby to ring back on a family member's phone. Notwithstanding this precaution, the call was recorded (call 69).

130. Immediately before he was released from the hearing, Mr Linnell had been reminded of his continuing obligation of confidentiality, "and, in particular, today's examination". Nonetheless he proceeded to give Mr Ashby a lengthy and detailed account of what had happened, including the questions and his answers.

131. It seems Mr Ashby had informed Mr Mullett of Mr Linnell's projected appearance at this inquiry; certainly, Mr Mullett knew about it. In a telephone conversation on 27 September, (call 1378), Mr Mullett asked Mr Ashby: "did your mate attend that, er, location?" Mr Ashby replied: "Oh yeah, absolutely." Mr Ashby agreed with Counsel Assisting that this was a reference to Mr Linnell's attendance at OPI. Mr Ashby also agreed that, on the following Sunday, he met Mr Mullett at a café and had a conversation that included that "there was this hearing going on" and "fathoming what …had occurred and what it may be about".

132. Mr Ashby also told Ms Tibaldi about Mr Linnell's attendance at the inquiry. He discussed the subject with her both before (20 and 21 September) and after (25 September) Mr Linnell's attendance.

Mr Ashby's Attendance at this Inquiry

133. Mr Ashby gave evidence at the private hearing on 15 October that he had discussed only with counsel and his wife the fact that he had been summoned to give evidence that day. This was not true. At a supplementary private hearing on 13 December, Mr Ashby admitted the authenticity of two telephone intercept transcripts (calls 1547 and 1549) of 12 October in which he informed Ms Tibaldi about the summons and discussed the circumstances with her. Ms Tibaldi confirmed she was told about the summons on 12 October. Mr Ashby's disclosure to Ms Tibaldi occurred despite the fact that the summons served upon him contained a confidentiality notice in terms similar to that contained in Mr Linnell's summons; see para 114 above.

Findings, Comments and Recommendations

(1) Two preliminary observations

(a) The standard of proof

134. It is part of my task to consider what findings, comments or recommendations ought to be made, having regard to the evidence, in relation to particular individuals, being the five people to whose counsel notices were given: see para 4 above. As has been submitted by counsel for some of those people, such findings, comments and recommendations ought not lightly be made. Clear and cogent proof is required.

135. Australian law knows only two standards of proof: the criminal standard ("beyond reasonable doubt") and the civil standard ("on the balance of probabilities"). See *Neat Holdings Pty Ltd v. Karajan Holdings Pty Ltd* (1992) 110 ALR 449. However, it has long been recognised that there are certain cases in which a tribunal of fact should take particular care before declaring itself to be satisfied on the balance of probabilities: see *Briginshaw v. Briginshaw* (1938) 60 CLR 336 at 362. These are cases in which adverse findings would be likely to have particularly serious consequences for the persons against whom they are made. As Justice Owen observed in the HIH Royal Commission Final Report, "the more serious

the allegation the greater the caution needed in deciding whether to make any particular finding."

136. Findings, comments and recommendations in relation to the matters raised with counsel have the potential adversely to affect both the reputations and future employment prospects of the affected people. Consequently, in considering the evidence about those matters, I have followed the *Briginshaw* principle.

137. In relation to many matters, there is no doubt about the facts; they are either expressly admitted by the relevant person or rendered indisputable by one or more telephone recordings. Nobody challenged the authenticity of any of the recordings played during the hearings; indeed authenticity was expressly conceded, usually by both participants, in relation to most of the recordings. Whenever a recording was played to a witness, a transcript of the whole of the recorded conversation was provided to the witness' counsel. The idea was to allow counsel the opportunity to see the context of the extract put to the witness and to consider whether they wished to draw attention to any other portion of the conversation. No counsel took that course.

138. Some matters are not covered by direct evidence. In such a case, it is generally necessary to consider circumstantial evidence, as to which it is particularly important to be cautious. In relation to findings about such matters, I have carefully considered what inference should be drawn from the established facts, asking myself whether the evidence supports any competing inference.

(b) Recommendations about criminal proceedings

139. As will appear, I have formed the opinion, in relation to several witnesses, that they may have committed one or more criminal offences. I have not concluded that any witness definitely is guilty of any offence. Such a conclusion could properly be reached only as a result of a proceeding in an appropriate criminal court at which any issue of guilt or innocence was resolved in accordance with the relevant law and to the criminal standard of proof. My function is not to determine guilt or innocence but, rather, to identify offences that may possibly have been committed by a witness, and which it seems proper to draw to the attention of the Office of Public Prosecutions ("OPP"). It will be for the OPP to decide what prosecutions (if any) should be initiated and, if so, against whom and for what offences.

(2) Mr Linnell

(a) Preliminary

140. Mr Linnell resigned his position in Victoria Police during the course of this inquiry. Consequently, there can be no question of disciplinary action against him. Nonetheless, it is appropriate for me to discuss the matters raised against him by the notice issued to his counsel (Attachment C to this report). That is because those matters involve possible criminal actions requiring consideration by the OPP.

141. The matters listed in the notice fall into three categories: false evidence at this inquiry (items one and two), failure to comply with the confidentiality requirements of the *Police Regulation Act* (item three) and improper conduct that was in breach of the obligations of his employment with Victoria Police (items four and five). It is convenient separately to consider each category.

(b) False evidence

142. Attachment C sets out the alleged false evidence. It also identifies the material, Mr Linnell's own evidence to this inquiry and telephone interception tapes, that seem to establish the falsity of each item of evidence. I need not discuss that material; it speaks for itself.

143. In the submission lodged by him in response to the notice, counsel for Mr Linnell did not contend the cited material failed to establish the allegations of falsity. Rather, counsel's approach was to put some submissions about the circumstances of Mr Linnell's behaviour in relation to Mr Ashby.

144. It is difficult to see how an argument about the Linnell-Ashby relationship could affect the question whether or not Mr Linnell had given false evidence at this inquiry. However, in deference to counsel, I have considered the points made by him in respect of items one and two. I have reached the conclusion that none of them has any substance.

145. First, counsel argues that "any breach of confidentiality was as a direct result of pressure and obligation that Mr Linnell felt from Assistant Commissioner Ashby". Perhaps this should be read with counsel's subsequent claim, in relation to item three, that "Mr Linnell was subordinate to Mr Ashby".

146. In response, two points should be made. First, Mr Linnell was not "subordinate" to Mr Ashby. Mr Linnell had been appointed, as a public servant, as Director of the Media and Communications Section of Victoria Police. He reported to the Chief Commissioner, not to Mr Ashby. No doubt it was expected that Mr Linnell would treat Mr Ashby, like every other senior officer, with courtesy and respect and assist him, to the best of his ability, in his work; but Mr Linnell was under no obligation to provide Mr Ashby with information that fell outside the "need to know" principle. Indeed, it was his duty not to do that. That proposition was expressly acknowledged, in their evidence, by both Mr Linnell and Mr Ashby.

147. Second, no listener to the recorded conversations between Mr Linnell and Mr Ashby would agree that Mr Linnell's disclosure of confidential information flowed from pressure by Mr Ashby or any feeling of obligation towards him. On the contrary, any listener would sense that Mr Linnell delighted in scheming and sharing gossip, including confidences, with Mr Ashby. Mr Linnell said he regarded Mr Ashby as his "best friend"; and that is the type of relationship demonstrated by the telephone conversations.

148. Counsel argued that any inaccuracy in Mr Linnell's evidence "did not relate to the whole of the evidence". However, that is not the test. Section 86K of the *Police Regulation Act* provides, so far as relevant:

> *(1) A person who –*
>
> *…(c) wilfully makes a statement which the person knows to be false or misleading in a material particular or misleads or attempts to mislead the Director or any person in the exercise of his or her powers under this Part – is guilty of an offence.*

149. The subsection does not require that the whole of the person's evidence be false or misleading. Provided that the statement is wilful, a precondition not contested by counsel in relation to items one and two, it is enough that it be false or misleading in a material particular or that the person has misled, or attempted to mislead, the Director or some other person, obviously including a Delegate of the Director, in the exercise of the person's powers under the Act.

150. Counsel argued that it was not false or misleading for Mr Linnell to say he could not recall "discussing" the Briars Taskforce with anyone other than members of the taskforce and other named individuals (item one (3)), because there was no "discussion" when Mr Linnell showed Mr Ashby the document on his computer and "(a)ny subsequent discussion was at the instigation of and pressure by Assistant Commissioner Ashby".

151. The evidence does not reveal exactly what was said between the two men on the occasion of Mr Ashby's visit to Mr Linnell's office to view the computer screen; perhaps not much, but there must have been enough for Mr Ashby to understand that Mr Linnell wished him to view the screen. There was a conveying of information. That seems to be enough to constitute a "discussion".

152. Having regard to the content and tone of the telephone interception tapes, I reject the suggestion that the subsequent discussions stemmed from pressure by Mr Ashby. Many conversations were initiated by Mr Linnell. Anyway, even if counsel was correct, that would not affect the falsity of Mr Linnell's denial of discussions.

153. In relation to para (4) of item one, counsel observed that there is no evidence that Mr Linnell knew that Mr Mullett's phone was "off". That is true but irrelevant; there was certainly plenty of discussion on the subject.

154. Despite the submissions of counsel for Mr Linnell, it seems to me that items one and two of the notice identify material which might constitute offences under section 86K (1) (c) of the *Police Regulation Act* and/or the offence of perjury: see section 314 of the *Crimes Act* 1958.

155. I recommend the OPP give consideration to the possibility of prosecuting Mr Linnell, under one or both these provisions, in respect of items one and two of Attachment C. If section 86K(1)(c) is to be used, it may be desirable to lay alternative charges: (1) that Mr Linnell wilfully made a statement that he knew

be false in a material particular and (2) that he attempted to mislead the Director in the exercise of his powers under the Act.

(c) Failure to comply with OPI confidentiality requirements

156. Counsel for Mr Linnell did not challenge the factual correctness of the assertions made in item three of the notice but claimed again that Mr Linnell was subordinate to Mr Ashby, to whom he felt "a degree of loyalty". Bearing in mind those matters, he contended, "any disclosure may be deemed reasonable".

157. The problem about that submission is that the *Police Regulation Act* itself dictates what constitutes reasonable disclosure. Section 86KA(3) of the Act provides that, if the Director gives a notice under subsection (2) of the section, as happened here, "a person must not disclose to anyone else the existence of the summons or the subject matter of the investigation to which it relates, unless the person has a reasonable excuse". Subsection (4) stipulates that it is a "reasonable excuse" if the disclosure is made for any one of three purposes and the person to whom the disclosure is made is informed that it is an offence for that person further to disclose to anyone else. There is no evidence that Mr Linnell ever gave Mr Ashby that information. More importantly, his disclosure was not for any of the three purposes stipulated by subsection (4): seeking legal advice, "obtaining or providing information in order to comply with the summons" and "the administration of this Act".

158. I recommend the OPP consider whether Mr Linnell committed offences against section 86KA(3) of the *Police Regulation Act* in respect of the disclosures noted in item three of Attachment C.

159. Attachment C also refers to section 102G of the *Police Regulation Act* and section 19B(2) of the *Evidence Act* 1958.

160. Section 102G(1) of the *Police Regulation Act* makes it an offence for any person, including the Director or a member of the staff of OPI, subject to exceptions, to disclose information that person has obtained or received "in the course or as a result of the performance of the functions of the Director under this Act".

161. In a submission furnished on behalf of Mr Ashby, counsel argued that "a mere witness" could not be a person who fitted the description contained in section 102G(1) of the *Police Regulation Act*. They did not say why not. The reason is not obvious to me. The subsection was obviously intended to have a wide application. Where the Director conducts an inquiry, whether personally or through a Delegate, he performs functions under the Act. A witness who attends such an inquiry will necessarily obtain or receive information in the course of the inquiry and, therefore, as a result of the performance of the functions of the Director; information such as the identity of the persons who participated in the hearing, the questions that were asked, the nature and duration of the hearing and the like. In the case of a private hearing, there is every reason for keeping such information confidential. So it cannot be said an interpretation of the subsection

in such a manner as to allow it to apply to a witness is obviously contrary to the statutory purpose.

162. I see no reason to read down section 102G of the *Police Regulation Act*. As it is clear Mr Linnell did disclose to Mr Ashby information he had obtained by the service of the summons upon him and his attendance at the inquiry, I recommend the OPP also give consideration to a prosecution under this section.

163. Section 19B(1) of the *Evidence Act* empowers a person conducting a hearing under the *Police Regulation Act* to make an order excluding from it members of the public generally or specified people. Section 19B(2) provides that, in such a case, the presiding officer "may make an order prohibiting the publication of a report of the whole or any part of the proceedings of a hearing or part of a hearing to which an order under subsection (1) applies" or any information derived from it. In such a case, a copy of the order must be posted on the hearing room door: see subsection (3). It is an offence, under subsection (4), for anyone to contravene the order.

164. Mr Linnell gave evidence at a private hearing on 25 September. I made an order, under section 19B(1) and (2) of the *Evidence Act*, in relation to that hearing. A copy of the order made under section 19B(2) was posted on the hearing room door. Mr Linnell later told Mr Ashby something of what had occurred during the course of that hearing. Might this constitute an offence under subsection (4) of section 19B?

165. Counsel for Mr Linnell made no submission on the point. However, counsel for Mr Ashby argued that a private report of what had happened at the hearing could not constitute "publication of a report" of the whole or any part of the hearing. They based themselves upon the Shorter Oxford English Dictionary definition of the word "publish": "make publicly or generally known; to declare openly or publicly…" The Macquarie Dictionary definition is to similar effect; the emphasis being on the public disclosure of the information. As the Macquarie Dictionary noted, in the context of defamation law, the word has a different connotation. One may "publish" a libel in a private letter to a third party. However, we are not here concerned with defamation law, so I think it is reasonable to give to the word "publication", in section 19B of the *Evidence Act*, its everyday, popular meaning. On that approach, Mr Linnell did not contravene that provision when he reported to Mr Ashby about the hearing on 25 September 2007.

(d) Breach of obligations of employment

166. Items four and five of Attachment C identify several acts of Mr Linnell which are said to be improper and in breach of his obligations of employment with Victoria Police. In his submission, counsel for Mr Linnell did not dispute that his client performed all the alleged acts. However, he submitted that Mr Ashby "was superior in the structure of the organization rending(sic) such disclosure not in breach of his employment" and that, in relation to information about the OPI inquiry, "Assistant Commissioner Noel Ashby…was entitled to know as much as Mr Overland was entitled to know, thereby not breaching his obligations."

167. Both these submissions are misconceived. As already mentioned, Mr Ashby was not Mr Linnell's "superior"; Mr Linnell was not accountable to him. Both men were bound by the "need to know" principle and, as both acknowledged, Mr Ashby had no need to know anything about Operation Briars. Mr Linnell's disclosure of information to Mr Ashby, about that operation, on 15 August was an egregious breach of his obligations towards his employer. The breach went to the heart of the Chief Commissioner's ability properly to manage Victoria Police. She is entitled to have the "need to know" principle punctiliously observed by everyone under her command, including non-police officers attached to the service. In relation to the disclosure of information about this inquiry, section 86KA of the *Police Regulation Act* speaks for itself.

168. In his submission, counsel for Mr Linnell stated that Mr Linnell was never aware that Mr Mullett's phone was "off" and "any belief he might have had did not result from confidential information that he had received".

169. I agree that Mr Linnell never knew, for sure, that Mr Mullett's phone was "off" but it is wrong to say any belief did not result from confidential information received by him. The foundation of Mr Linnell's belief, or at least concern, was the confidential information given to him by Mr Overland on 14 August about the interception that day of a conversation between Mr Mullett and Mr Lalor. He passed on that information to Mr Ashby.

170. Paragraph (3) of item four of the notice may be incorrect in alleging that Mr Linnell informed Mr Ashby of the proposed appointment of Inspector Curran as chief of staff to the Minister. Mr Ashby may have first learned of the appointment from someone else. However, I think Mr Linnell breached the obligations of his employment in discussing the merits of the proposal with Mr Ashby. When Inspector Curran called Mr Linnell to tell him about the proposal, he made it very clear that he was telling Mr Linnell only to enable him to be ready for any media inquiry that might arise; that the appointment was not yet finally approved; and that the information was to be held in strict confidence until after the formal announcement. Mr Linnell acknowledged his obligation in that regard. Yet when, a few hours later, Mr Ashby asked Mr Linnell for the source of the information about the proposed appointment, Mr Linnell unhesitatingly identified the source (Inspector Curran) and went on to criticise the proposal. Knowing Mr Ashby's relationship with Mr Mullett, he must have expected the confidential information would now go much further.

171. Counsel for Mr Linnell concluded his submissions with some general comments about the position in which his client found himself. Counsel said Mr Linnell was only 35 years of age when appointed; he received assistance from Mr Ashby and "found himself caught between the politics of the force command", between Mr Overland and Mr Ashby; there was "no intention to cause any harm or injure the organization". Counsel submitted that, having regard to "the hierarchal nature and structure of the Victoria Police" and "the unenviable position Mr Linnell found himself in", no adverse finding, comment or recommendation should be made about him.

172. This special pleading must be rejected. Although then still comparatively young, Mr Linnell had come to his position in Victoria Police after 17 years in the workforce. He had been appointed to a senior position, reporting direct to the Chief Commissioner and supervising about 100 other employees. He was not a baby.

173. There is no evidence there was a political war between Mr Overland and Mr Ashby, as distinct from attempts by Mr Ashby to undermine Mr Overland. However, supposing there was, the proper course for Mr Linnell would have been to remain rigorously neutral, to put his head down and concentrate on doing his own work. Instead, he became Mr Ashby's enthusiastic henchman, frequently supplying him with confidential information and encouragement. Mr Linnell may not have intended to harm Victoria Police but he should have realised that its effectiveness and reputation depended upon the loyalty of all officers and employees to their seniors and scrupulous adherence to rules about the confidentiality of information. He brushed that aside in his misguided support for Mr Ashby's vendetta against Mr Overland.

174. In relation to items four and five, Attachment C drew attention to the common law offence of misfeasance/misconduct in public office. The parameters of this offence are not well defined; however, it is now clear that it covers a wide range of misconduct. In *Question of Law Reserved No 2 of 1996* (1996) 67 SASR 63, Chief Justice Doyle adopted a statement by Dr Paul Finn, now Justice Finn of the Federal Court of Australia: "Official misconduct is not concerned with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him." In that case, the South Australian Full Supreme Court held that allegations against certain police officers of having "leaked" confidential information fell within the scope of the offence.

175. Given the width of this offence, I see no reason to doubt that the matters set out in items four and five of Attachment C are capable of supporting a charge of misfeasance/misconduct in public office. Mr Linnell's counsel has not submitted otherwise.

176. In my opinion, Mr Linnell seriously breached the obligations of his employment. The breaches were wilful. They arose out of a public office.

177. I recommend the OPP consider the possibility of prosecuting Mr Linnell for the common law offence of misfeasance/misconduct in public office, in relation to the matters identified in items four and five. However, paragraph (3) of item four should be recast in such a manner as to refer to the supply of information to Mr Ashby concerning the projected appointment, rather than the supply of information about the fact of the proposed appointment.

178. Reference was made in Attachment C to the possibility of two other offences: attempt to pervert the course of justice and breach of section 63 of the TI Act.

179. I do not think it is useful for the OPP to pursue the first of those offences. Although Mr Linnell consulted Mr Ashby about the evidence he should give at this inquiry, and took advice to give false statements about non-recollection, the attempt would occur only when he sought to put the advice into effect by giving false evidence. So any prosecution for attempt to pervert the course of justice would simply be a more complicated way of prosecuting for giving false evidence.

180. The possible application of section 63 of the TI Act depends on whether it can be said that information that a telephone is "off" (that is, being intercepted) falls within the definition of "interception warrant information" in section 6EA of the TI Act. That is because section 63(2)(a) of that Act makes it an offence to "communicate interception warrant information to another person". Section 6EA defines "interception warrant information" as being (1) information about an application for an interception warrant, or the issue, existence, non-existence or expiry of a warrant or (2) information that is likely to enable the identification of the telecommunications service to which, or person to whom, an interception warrant relates.

181. There is no evidence that Mr Linnell knew anything about an interception warrant. He knew that a conversation between Mr Mullett and Mr Lalor had been intercepted. Depending on his knowledge of investigatory procedures, that may have led him to assume the existence of an interception warrant. He may have surmised as to the identity of the intercepted service and the person involved. However, so far as the evidence reveals, Mr Linnell never disclosed any such surmise to Mr Ashby.

182. The argument in favour of the proposition that Mr Linnell contravened section 63 of the TI Act has to be that, by telling Mr Ashby about the likelihood of Mr Lalor's phone being intercepted, he was conveying to Mr Ashby the likelihood that a supporting warrant was in existence. Perhaps that argument might find favour with a court, but I doubt it. The problem is that it necessarily involves two assumptions: one, that there was indeed a supporting warrant and, two, that both Mr Linnell and Mr Ashby turned their minds to the matter and made the connection between interception and warrant. While all this is possible, I doubt that any judge would rule that either of these assumptions could be regarded as being established beyond reasonable doubt. I am not prepared to recommend consideration of a prosecution under section 63 of the TI Act, although the OPP is entitled to act upon its own view.

(3) Mr Ashby

(a) Preliminary

183. I understand that, during the course of the public hearings of this inquiry, Mr Ashby resigned from Victoria Police. Consequently, it seems, there is no longer any question of disciplinary action against him. However, issues of possible criminality remain.

184. Attachment D1 lists the allegations initially made against Mr Ashby. Items one and two concern alleged false evidence at this inquiry. Items three and four raise issues of misconduct.

185. After completion of the main hearings, the Director received further information in respect of Mr Ashby's conduct. Mr Ashby was examined further, on 13 and 18 December 2007, and a further notice was delivered (Attachment D2). Counsel for Mr Ashby made supplementary submissions regarding that notice.

186. In their first submissions, before going to the detail of the allegations against their client, counsel for Mr Ashby made a general complaint of unfairness to him. They gave particulars. I will comment briefly on them.

187. First, counsel say the summons issued to Mr Ashby was insufficiently specific to alert him to the questions likely to be asked, so that he could reflect upon them. However, Mr Ashby brought his diary to the hearing. He was allowed to refer to it whenever he wished. Neither he nor his counsel suggested he was ever rushed or pressured in giving evidence. In granting counsel leave to appear for Mr Ashby, I indicated that, at the end of the examination, counsel could seek leave to ask further questions by way of elucidation of Mr Ashby's evidence. Counsel took that course but only in relation to one minor matter.

188. Second, there is a complaint about playing only excerpts from the telephone tapes. However, as I have already mentioned, counsel were given transcripts of the full conversations. I appreciate it might have been difficult for them to absorb everything in the transcripts while the tapes were running, but counsel were allowed access to the full transcripts for an unlimited time during adjournments. They never suggested the choice of excerpts was unfair or sought to supplement them.

189. Third, counsel say that, as Counsel Assisting and I "controlled the agenda of the questioning at all hearings, this was a further obstacle to Mr Ashby in defending his position adequately". This submission overlooks the fact that there were breaks in the hearing, some at the request of counsel, during which counsel had access to their client and I had indicated I would be prepared to allow counsel, in effect, to re-examine Mr Ashby at the conclusion of questioning by Counsel Assisting.

190. It is significant, in relation to all three complaints, that none of them was raised at the time. I do not think there was any unfairness in the conduct of Mr Ashby's examinations.

191. Counsel observed that "the conversations isolated by the OPI are but a small portion of hundreds of conversations that Mr Ashby took part in on a weekly basis". That may be right, although "hundreds" may be an exaggeration. However, I reject what follows: that this not only makes it "difficult to recall the detail of any specific telephone conversation (particularly when taken out of context), but it leaves Mr Ashby in an impossible situation so far as teasing out other explanatory conversations". As I have pointed out, there has never been a complaint about material having been taken out of context. Nor did Mr Ashby ever suggest that the apparent effect of what had been said in a selected excerpt would be changed by reference to other material.

192. I appreciate it is difficult for people to remember the detail of their conversations, whether telephone or face-to-face. However, it is important to note that almost all the conversations had taken place within three months of Mr Ashby giving evidence and they related to dramatic and unusual events. Under those circumstances, I cannot accept that Mr Ashby may have forgotten their substance.

193. I will deal with Attachment D1 in full before turning to Attachment D2.

(b) False evidence

194. I turn to the detail of the alleged false evidence. In relation to item one (1), counsel say that Mr Ashby may not have realised that Operation Briars was the subject of the OPI investigation. That may be correct, so the first leg of this paragraph should be omitted. However, the second and third legs are not tied to Operation Briars. They apply to any OPI hearing. Mr Ashby had certainly discussed with Mr Linnell the fact that he (Mr Linnell) was called to an OPI hearing, and the evidence he should give.

195. In relation to item one (2), counsel say call 700 establishes that Mr Ashby did not know who Mr Lalor was. Counsel must have forgotten the laughter that followed his pretence in that conversation. See also call 736 on 6 September.

196. Counsel suggest that Mr Ashby told the truth in saying, item one (3), that the names mentioned in the "Age" article of 14 September 2007 were previously "completely foreign" to him, as was the name and content of Operation Briars. I do not agree. Mr Ashby admitted that he had seen a document he referred to as the terms of reference on Mr Linnell's computer only one month before the newspaper article. The document contained the name of the operation. It is not clear whether it named the "targets", but Mr Ashby was given this information. It was information of great importance to him. He was in a panic about the possibility of his conversations with Mr Mullett having been intercepted. He and Mr Linnell, obviously concerned for their careers, needed to consider whether there was an alternative explanation for the Mullett-Lalor conversation having been picked up. The fact that Mr Lalor was a Briars "target", and therefore likely to be the subject of interception, provided for them an alternative explanation of the Mullett-Lalor call being intercepted. How could Mr Ashby have forgotten the names? Anyway, once again, call 736 shows that Mr Ashby knew about both

Mr Lalor and Mr Waters on 6 September, one week before publication of the "Age" articles.

197. Counsel offer an equally unrealistic submission regarding Mr Ashby's false evidence that he had never discussed telephone interceptions with Mr Linnell, except in relation to traffic matters: see item one (4). Counsel say that "(g)iven the frequency of conversations with Mr Linnell, and the very large number of topics discussed, it would not be unusual if Mr Ashby failed to recall this topic of conversation". However, this was no ordinary topic. It had recently been a matter of enormous moment to Mr Ashby.

198. The next matter mentioned in item one is Mr Ashby's denial that Mr Mullett had ever asked him where Senior Sergeant Ron Iddles, Superintendent Rod Wilson and Detective Gavan Ryan were working. I am prepared to accept counsel's submission that Mr Mullett's inquiry may have slipped Mr Ashby's mind. This was a matter of little importance to Mr Ashby. Although the inquiry was improper, impropriety was not such a rarity in his conversations with Mr Mullett as to render it memorable on that account. I think paragraph (5) should be omitted from any particulars of false evidence.

199. The submission in relation to item one (6) is that this was a case where, Mr Ashby having had "no time to think about anything", his evidence in relation to the Jennifer McDonald case should be seen only as "inaccurate in irrelevant detail". However, Mr Ashby did not seek time to think about what had happened in regard to Ms McDonald. He had over three weeks, from 15 October to 8 November, to consider his evidence about that matter, before re-affirming it in the public hearing. Mr Ashby's evidence was inaccurate in much more than irrelevant detail.

200. Counsel state that item one (7) is repetitive of item one (1). It is not. Paragraph (7) is specific to Mr Mullett. I think it is clear that Mr Ashby gave a false denial in respect of that matter.

201. Finally, counsel claim that item one (8) "borders on nonsense". That is a harsh criticism. I do not think it is justified. Page after page of Mr Ashby's evidence reads as an attempt to mislead me, and the Director, as to the true nature of his relationship with Mr Mullett. However, on reflection, I think this particular may require a judgment too subjective comfortably to support a criminal prosecution.

202. In the result, I recommend the OPP consider the possibility of a prosecution of Mr Ashby, either under section 86K(1)(c) of the *Police Regulation Act* or for the offence of perjury, in respect of the matters identified in item one (1), (2), (3), (4), (6) and (7). It is not necessary to consider the possible application of any of the other provisions listed in the notice in regard to item one.

203. Consistently with the above, I recommend consideration of a prosecution, under one or other of the same provisions, in relation to item two (1) and (3), but not (2).

(c) Breach of obligations of employment

204. Counsel argue the fact that Mr Overland might go to Fontainebleau was not confidential; it was the subject of gossip outside Victoria Police; that is how Mr Ashby had heard about it. Perhaps there is force in this. The information was known to few; that is why Mr Ashby was so concerned about it being traced back to him. However, it may be difficult to contend, in a criminal proceeding, that this is a case of misconduct through leaking information that was confidential to members of Victoria Police. On reflection, I would not recommend that a criminal proceeding in respect of item three should include paragraph (1).

205. Counsel for Mr Ashby put a similar argument concerning their client informing Mr Mullett about the proposed appointment of Mr Curran: see item three (2). They say "the possibility of Mr Curran's appointment (and its dubious propriety) was widely known".

206. As the statement has been made, I think I should say that I see no basis for impugning the propriety of Mr Curran's appointment. Mr Mullett's argument that it offended the "separation of powers" is highly confused. Mr Ashby's opposition arose out of self-interest.

207. I also reject the argument that Mr Curran's proposed appointment was so widely known that it was no longer confidential. So far as the evidence goes, until Mr Ashby told Mr Mullett, the information was known only to a small number of people in the upper echelon of Victoria Police and, I suppose, in government. When Mr Curran told Mr Linnell, he specifically asked him to keep it confidential. The fact that information might be known to more than one person within an organisation does not destroy its confidential nature or mean it is acceptable for someone in that organisation to pass it to a person outside the organisation.

208. Counsel's submission concerning item three (3) is disappointing. Counsel say: "Frankly, this particular is nonsense. All that the intercepted conversations reveal is people speculating about whether their telephones are being intercepted. Such speculation is neither a crime nor improper. Moreover, there is no evidence – direct or circumstantial – to support the Delegate's 'belief'. It is submitted that no finding consistent with the 'belief' could properly be made."

209. I would have expected a more helpful – not to say, courteous – submission on what is a key factual issue in the inquiry. It is clear that Mr Linnell knew the Mullett-Lalor call of 14 August had been intercepted; Mr Overland had told him so. It is clear that he made Mr Ashby aware of his concern that Mr Mullett's phone might be "off". On the other hand, the second party to the intercepted call was one of the Briars "targets". So Mr Linnell decided to give Mr Ashby some information about Briars, especially the names of the "targets", in order to harness his expertise in determining whether the tap was at Mr Lalor's end. How likely is it that he withheld from Mr Ashby the critical information that the other party to the 14 August conversation was Mr Lalor? Moreover, if he had withheld that information, what was Mr Ashby talking about when, early the following

morning (16 August), he said to Mr Linnell (call 4555): "I was thinking about that stuff last night…I wouldn't be too worried, after reading those TORs and stuff", and went on to agree with Mr Linnell's comment: "The more I think about it, the-its more on the target"?

210. The only possible explanation is that, by then, Mr Ashby knew that the other party to the intercepted Mullett call was Mr Lalor, one of the "targets". We know, from his comment to Mr Linnell, that he believed it was Mr Lalor's phone, not Mr Mullett's, that was "off".

211. One other matter we know for certain is that, early on that same morning, 16 August 2007, Mr Mullett enlisted Mr Rix to convey an urgent message to Mr Lalor to be careful because his phone might be "off". The haste of the communication suggests this was something Mr Mullett had just learned. Given Mr Ashby's practice of sharing information with Mr Mullett, what more likely explanation than that Mr Mullett had recently learned this from Mr Ashby?

212. I would have appreciated a thoughtful submission from counsel for Mr Ashby explaining why this chain of reasoning, encapsulated in my "provisional view", was wrong. They chose not to give me that assistance. Perhaps they had nothing to say. In the result, I adhere to my provisional view and recommend that thought be given to the possibility of a prosecution of Mr Ashby for misfeasance/misconduct in public office in respect of item three (2) and (3).

213. I turn to item four of Attachment D1.

214. The most serious aspect of Mr Ashby's action in discussing telephone intercepts with Mr Linnell (item four (1)) was that Mr Ashby was thereby encouraging him to lie at the private hearing of this inquiry. The fact that Mr Ashby's statements were themselves false is irrelevant: Mr Ashby used his police knowledge, and the name of an innocent serving officer, in order to induce Mr Linnell to lie to OPI.

215. Item four (2) and (3) can be taken together. Counsel for Mr Ashby point out that the detailed contents of the terms of reference have not been proved. However, both Mr Ashby and Mr Linnell have deposed to their nature and agreed they should never have been disclosed to, or read by, Mr Ashby.

216. Finally, in relation to item four (4), counsel say there is no evidence that Mr Ashby attempted to influence the assignment and outcome of the Jennifer McDonald case. I accept this in relation to the assignment: despite his assurances to Mr Mullett, it is not established that Mr Ashby ever spoke to anyone at ESD about re-assignment of the case to himself. However, there is evidence that Mr Ashby sought to influence the outcome of the case. Why else did he ring Mr Bannon and talk about alternatives to dismissal? Mr Ashby already knew Mr Bannon had the case.

217. I think all four paragraphs in item four raise matters warranting consideration by the OPP in connection with a possible prosecution for misfeasance/misconduct in public office.

218. I turn now to Attachment D2.

(d) False evidence

219. Item one of Attachment D2 asserts that Mr Ashby gave false evidence on 15 October that he had discussed the fact that he had been summoned to give evidence only with counsel and his wife. The date for which he had been summoned was not stipulated but it could have referred only to 15 October. It was so understood by counsel for Mr Ashby who submitted that Mr Ashby's evidence was not false because the relevant evidence was prefaced by the question "who else knows that you are here giving evidence today?" However, the questions asked by Counsel Assisting went on to inquire to whom Mr Ashby had spoken in respect of the hearing. It was in that context that Mr Ashby referred only to counsel and his wife, explicitly stating that he had spoken to nobody else. It is now clear this evidence was false: see para 133 above. Mr Ashby told Ms Tibaldi (call 1547) "I've got to go to the OPI on Monday." He referred to having seen his barrister and commented: "It's nasty." It is obvious from her response that Ms Tibaldi understood Mr Ashby had been summoned for interrogation. I recommend that OPP consider the possibility of a prosecution under section 86K(1)(c) of the *Police Regulation Act*, or for perjury, in relation to that matter.

220. Item two of Attachment D1 alleges that Mr Ashby gave false evidence on 18 December that he had discussed only with counsel the fact that he had been summoned to give evidence and, in particular, that he had not discussed the matter with Mr Linnell.

221. This item is based on a transcript of Mr Ashby's part of a telephone conversation, or perhaps conversations, recorded, on 30 October, on a listening device; not a telephone intercept. That transcript first records face-to-face exchanges on the occasion of service of a summons upon Mr Ashby by OPI officers, requiring his attendance at the public hearing of this inquiry. This is followed by one or more telephone conversations, in relation to which only Mr Ashby's contributions may be heard. The uncertainty as to whether there was only one conversation arises because there were sound drop-outs. They were brief, leading me to believe there was only one conversation, but it is impossible to be certain about that.

222. The telephone conversation, or the first of them, arose out of a call received by Mr Ashby. He did not say anything that expressly identifies the caller. However, after saying he would shut the door, Mr Ashby said: "me too", leading to the suspicion that the caller was Mr Linnell, who had also just been served with a summons to attend the public hearing. However, Mr Ashby went on to give contact details of people at OPI and to say: "I'll meet you then and there" and say: "I've got your number". No doubt because of these statements, counsel for Mr Ashby submit that it was likely he was speaking to one of his lawyers.

223. It must always be difficult to base a successful prosecution on a transcript of only one side of a conversation. In the present case, I believe this would be impossible. The quality of the recording is poor and it is not possible positively to identify the

other party. Perhaps it was Mr Linnell, but "me too" could be a response to one of any number of statements. Having regard to what followed, it is not fanciful for counsel to suggest that the other party was a lawyer.

224. I do not recommend a prosecution in relation to this item.

(e) Improper disclosure of OPI summons

225. Item three of Attachment D2 claims that Mr Ashby acted improperly, and in breach of the obligation of confidentiality, in relation to four matters: (1) disclosure to Ms Tibaldi of his summons to attend the OPI hearing (on 15 October), (2) disclosure to her regarding phone listening, Operation Briars arrests and OPI hearings, (3) disclosure to Ms Tibaldi of Mr Linnell's summons to attend an OPI hearing and (4) disclosure to Mr Linnell regarding Mr Ashby's attendance at an OPI hearing.

226. I have already noted that the first disclosure is established by the evidence. At the private hearing on 13 December, Mr Ashby admitted he had told Mr Linnell about his attendance at OPI on 15 October, but he said he only told him "I had been along". He claimed not to have gone into detail. Nonetheless, it is clear that alleged disclosures (1) and (4) did take place.

227. The position in respect of alleged disclosures (2) and (3) is less clear. Counsel Assisting put questions about all these subjects to Mr Ashby, but he did not succeed in obtaining clear admissions and there are no telephone interception tapes that establish the fact of the alleged disclosures of these matters.

228. In the result, it seems to me that any prosecution in respect of item three would need to be confined to alleged disclosures (1) and (4).

229. Item three of Attachment D2 identifies four possible sources of criminality in relation to the disclosures that it mentions. I doubt that the disclosures constitute misfeasance/misconduct in public office. In making the disclosures, Mr Ashby was not performing any official or public function, but rather passing on information about a personal problem; albeit one arising out of his employment. And, for the reasons given in para 165 above, section 19B of the *Evidence Act* would not apply. However, I see no reason to doubt the application of the remaining two sources: section 86KA(3) and section 102G of the *Police Regulation Act*.

230. I recommend that OPP consider the possibility of a prosecution of Mr Ashby, under either or both those provisions, in respect of disclosures (1) and (4).

(4) Mr Weir

(a) Preliminary

231. The notice given to Mr Weir is Attachment E. It raises the suggestion that Mr Weir acted improperly, and in breach of the obligations of his employment, in two respects: assisting Mr Linnell to circumvent a suspected telephone interception in relation to a proposed call between himself and Mr Ashby and in discussing, with Mr Linnell, Mr Linnell's pending appearance at this inquiry.

232. So far as I am aware, Mr Weir continues to be a member of Victoria Police. So there may be a possibility of disciplinary action against him if I find he committed a breach of his employment obligations in either of these respects.

233. Attachment E identifies four possible bases of criminality: the offence of misfeasance/misconduct in public office, sections 102G and 86KA of the *Police Regulation Act* and the provisions of the *Crimes Act* 1985 (sections 321G and 324) dealing with aiding, abetting, counselling and procuring offences.

234. In his submission in response to the notice, counsel for Mr Weir stated he assumed that the conduct identified in the notice would constitute a breach of Mr Weir's employment obligations only if it also constituted one or more of the specified offences. I do not think that is correct. The Chief Commissioner will, no doubt, consider this report. If there are findings that, in her opinion, warrant consideration of disciplinary action against a continuing police officer, she may think it appropriate to initiate such action, whether or not I have recommended that the OPP consider possible criminal proceedings. However, Mr Weir will not be disadvantaged by his counsel's error; counsel has put full submissions about the identified conduct.

235. Mr Weir played only a minor role in the events revealed during the course of this inquiry. His role is recounted at paras 111 – 118 above. But it is desirable briefly to note what he did.

236. First, on the afternoon of 20 September 2007, the day of service on Mr Linnell of the summons to attend the OPI hearing scheduled for 25 September, Mr Weir became aware of the fact that Mr Linnell had been, or was to be, summoned to give evidence. He also became aware that Mr Linnell was concerned that his phone, or Mr Ashby's phone, might be "off". In that situation, Mr Linnell asked Mr Weir to contact Mr Ashby and arrange for Mr Ashby to ring him (Mr Linnell) that evening at home, on a number to be notified by text message. Mr Weir complied with this request. He gave the message to Mr Ashby, and texted the phone number, knowing this course was being taken in order to circumvent any possible telephone interception. In evidence, Mr Weir conceded that, at the time, he believed there was a "possibility" that Mr Linnell might wish to talk to Mr Ashby about the OPI summons. Later that evening, Mr Weir himself had a telephone conversation with Mr Linnell that included talk about the OPI summons and Mr Linnell's forthcoming appearance at this inquiry.

(b) Setting up the Linnell-Ashby conversation

237. So far as the evidence reveals, Mr Weir did not say anything to Mr Ashby about Mr Linnell's OPI summons. Accordingly, in relation to the Ashby contact, Mr Weir could not have committed any offence, as a principal, under section 86KA or 102G of the *Police Regulation Act*. The critical question is whether he aided and abetted Mr Linnell in breaching either of those provisions. The answer to that question depends upon whether one accepts Mr Weir's claim that he thought there was only a "possibility" that Mr Linnell intended to disclose the OPI summons to

Mr Ashby, or whether he set up the contact in order to facilitate that disclosure. It is my opinion that Mr Weir believed disclosure was more than a possibility; it was the very purpose of the telephone call and the reason why it was necessary for Mr Ashby and Mr Linnell to use "safe" phones. Accordingly, I think there is a possible case against Mr Weir of aiding and abetting.

238. Even if Mr Weir's action did not constitute a criminal offence, it was wrong for him to accede to Mr Linnell's request that he arrange a telephone call that would bypass any telephone intercept. During the course of his evidence, Mr Weir sought to justify his action by pointing out that Mr Linnell was his senior and by arguing he was bound to obey his instructions. This is "the Nuremberg defence", so called from having been advanced by many of the people charged before the Nuremberg War Crimes Tribunal after World War Two. The defence failed then and has failed ever since. People are responsible for their own conduct. The fact that an offence was committed pursuant to the orders of a superior officer may be important in relation to penalty; it is never a defence.

239. Mr Weir was an experienced police officer. He knew that a telephone interception could lawfully be made only pursuant to a warrant issued by a designated person who was satisfied of a reasonable suspicion of serious criminality. As Mr Weir eventually conceded, for a police officer to participate in an action that was likely to defeat the purpose of the warrant was wrong. It seems to me strongly arguable that Mr Weir's action fell within the ambit of the offence of misfeasance/misconduct in public office. Whether or not it did, in my opinion, it is something that might legitimately give rise to disciplinary action.

240. I do not think Mr Weir's action constituted an attempt to pervert the course of justice. This is not because this offence usually arises in cases where legal proceedings have already been commenced. It is now clear that it is not so limited. In *Regina v. Murphy* (1985) 158 CLR 596 at 609, the High Court of Australia cited with approval a New Zealand decision, *Regina v. Kane* (1967) NZLR 60, in which it was held that "a person commits the offence of attempting to pervert the course of justice if, when a crime has been committed and the police are investigating it, he is guilty of conduct aimed at perverting or obstructing a prosecution which he contemplates may follow". The problem about any prosecution would not be the fact that no curial proceeding had yet been commenced, but that there is no evidence, and no reasonable inference, that Mr Weir's action in setting up the Linnell-Ashby conversation was aimed at or preventing a criminal prosecution. I think Mr Weir acted only out of a misguided sense of loyalty and friendship to Mr Linnell.

(c) Mr Weir's conversation with Mr Linnell

241. The second allegation against Mr Weir is based on call 1456: see para 117 above. It seems Mr Weir rang Mr Linnell to report he had delivered the message to Mr Ashby. During a rambling conversation, Mr Linnell referred to the contents of the documents, with which he had been served that afternoon. Mr Linnell talked about having found an "outage", in relation to the obligation of non-disclosure.

The two men discussed that subject, and Mr Linnell's appearance at OPI, before going on to other matters.

242. It was unwise of Mr Weir to allow himself to be drawn into a conversation about the summons and, in particular, possible circumvention of the non-disclosure obligation. However, I doubt that his action constituted a criminal offence. It did not constitute the offence of aiding, abetting, counselling or procuring a contravention of either section 86KA or 102G of the *Police Regulation Act*. Mr Linnell did not disclose the existence of the summons during this telephone call. Mr Weir already knew about it. There is no evidence about the circumstances of the initial disclosure; presumably it was during a face-to-face conversation in the office. There is nothing to indicate that Mr Weir aided, abetted, counselled or procured that disclosure.

243. I have considered whether Mr Weir's conduct during the evening telephone call could be regarded as misfeasance/misconduct in public office. As I have already said, the parameters of this offence are unclear. However, it seems to go too far to say that Mr Weir's comments on what Mr Linnell was telling him was a "wilful act contrary to the duties of his office… an abuse of the trust reposed in him".

244. It follows that I do not think there is a sound basis for any criminal prosecution of Mr Weir in relation to this telephone conversation. Whether it should form part of any disciplinary action is a matter for the Chief Commissioner.

(5) Mr Mullett

(a) False evidence/mislead or attempt to mislead the Director

245. Item one of the notice issued to Mr Mullett (Attachment F) raises seven matters about which, it is suggested, he gave false evidence or misled, or attempted to mislead the Director. In most of these cases, Mr Mullett answered the relevant question by saying he did not recall. Counsel for Mr Mullett disputes that his client gave any false evidence or engaged in misleading conduct. He asserts, correctly no doubt, that Mr Mullett was a busy man, particularly while the new EBA was being negotiated; he had many telephone and other conversations and was the recipient of much information. Under such circumstances, counsel argues, it was understandable that Mr Mullett would not recall the particular matters put to him.

246. There is some force in that submission. On the other hand, it is only too easy for a witness, confronted with an inconvenient question, to use the formula "I don't recall", rather than to make a denial that might be shown to be false or misleading. The question is whether, and if so to what extent, Mr Mullett took that course, as distinct from truthfully claiming a lack of recollection. Given the standard of proof that must be applied, I would not be justified in recommending consideration of criminal proceedings, in relation to any matter, unless I was comfortably satisfied that, in relation to that matter, Mr Mullett denied recollection as a screen for avoiding an admission.

247. So considering the situation, I have concluded that the matters raised by paragraphs (2), (3) and (4) should not be taken any further. Although I am suspicious about Mr Mullett's denial of recollection in relation to these matters, it is possible that his denials of recall were true. They were each gossipy matters, the detail or provenance of which he may genuinely have forgotten.

248. I would discard paragraph (1) for a different reason. The question on which it is based was a double question; which fact, unfortunately, nobody noticed at the time. Counsel Assisting asked: "Did you talk to any other Assistant Commissioner or did you ask any other Assistant Commissioner other than Mr Cornelius whether your telephone was being tapped". Mr Mullett responded: "Not that I can recall…" Item one (1) is based on the first part of this double question but it is not clear that Mr Mullett was turning his mind to that part, rather than the second. It is commonplace for a witness, asked a multiple question, to address only the last part of it. That is why such questions ought not be asked. In the present case, Counsel Assisting seemed to take the answer as one relating to the second part: he went on to ask about inquiries about telephone tapping, as distinct from talk about it.

249. I cannot accept that the matter raised by item one (5) was an honest failure of recollection. The question asked by Counsel Assisting was: "Have you had a conversation with any Assistant Commissioner about an OPI investigation into leaks?" Mr Mullett responded: "Not that-no, not to my recollection." This evidence was given only three weeks after Mr Mullett's conversation with Mr Ashby (call 1378), in which Mr Mullett had asked: "Did your mate attend that location?" which, Mr Ashby acknowledged, meant this inquiry. As noted in para 131 above, Mr Ashby went on to depose to discussing Mr Linnell's attendance at this inquiry when he met Mr Mullett at a café on the following day. An OPI investigation into leaks would not have been an everyday event, even in Mr Mullett's busy life. I think he would have remembered learning about it from Mr Ashby.

250. I put item one (6) into a similar category. This relates to Mr Mullett's approaches to Mr Ashby to see if he could take over the Jennifer McDonald case. It is true that a greater time lapse had occurred: Mr Mullett's calls to Mr Ashby were in late June and early July, over three months earlier. But the tapes show Mr Mullett was very concerned about this case. Although he was not the person within the Police Association who was to represent her at the hearing, Mr Mullett rang Mr Ashby on no less than three occasions to enlist his aid: first, to take over the hearing and, when that failed, to make representations to Mr Bannon. This was extraordinary activity, explicable only on the basis that Ms McDonald was an important factional ally. I cannot accept Mr Mullett's evidence that he could not recall asking Mr Ashby "if he could get hold of the files so he could be the hearing officer".

251. Item one (7) does not necessarily depend on all six previous paragraphs. Mr Mullett admitted at the public hearing that Mr Ashby was "a person who was providing me with information, and he's a good source of information". There was no hint of that type of relationship at the earlier private hearing.

Mr Ashby was then just one of three Assistant Commissioners with whom he occasionally had out-of office contact, usually over breakfast. Otherwise, according to the impression imparted at the private hearing, Mr Mullett's relationship with Mr Ashby, like his relationship with the other Assistant Commissioners, was a formal one, contact being mainly confined to pre-arranged "forums" at which others were present. The telephone intercept transcripts show the true relationship was very different.

252. In the result, I recommend that the OPP give consideration to criminal proceedings against Mr Mullett, either under section 86K of the *Police Regulation Act* or for perjury, in respect of the matters identified in item one (5), (6) and (7) of Attachment F.

(b) Disclosure to Mr Lalor about a telephone interception warrant

253. Item two of Attachment F alleges that Mr Mullett "disclosed to Mr Lalor the existence, or possible existence, of a telephone interception warrant covering his (Mr Lalor's) telephone and, thereby inferentially, the fact that Mr Lalor was suspected of having committed a serious crime" by telling Mr Lalor about the interception of the 14 August conversation and his disclosure on 16 August. The item went on to set out my provisional view that these conclusions were supported by the "facts" set out in the following sub-paragraphs A to Q.

254. Counsel for Mr Mullett challenges one of my conclusions of fact: that Mr Ashby told Mr Mullett, in an unrecorded telephone conversation during the evening of 15 August, that he (Mr Ashby) had learned that day about the recording of the Mullett-Lalor conversation of 14 August. Counsel points out that, when first asked about this, Mr Mullett said only that Mr Ashby "may have" told him that. Commonsense suggests Mr Ashby must have told him this; otherwise why would he think to warn Mr Lalor. However, the matter was put beyond doubt when Mr Mullett later assented to this question: "You had learned through Mr Ashby that a conversation you'd had with Lalor had been recorded. Right?" Mr Mullett then agreed that was why he had sent the message to Mr Lalor to be careful.

255. Counsel for Mr Mullett points out that his client denied, or at least declined to admit, some of the "facts" identified in item two. It is not necessary to go through the details of Mr Mullett's evidence. As I have pointed out, Mr Mullett ended by unambiguously acknowledging that he had sent a warning to Mr Lalor, through Mr Rix, to be careful to whom he spoke on the telephone; the clear message being that the telephone might be "off". I am in no doubt about the proper factual conclusion in relation to item two; it is in accordance with my articulated provisional view. The more difficult question is whether those facts appear to indicate commission of a criminal offence.

256. There appear to be three possible offences in connection with item two: contravention of section 63(2) of the TI Act, misfeasance/misconduct in public office and attempting to pervert the course of justice. I see major difficulties about the first two possibilities.

257. At para 182 above, when discussing the possible case against Mr Linnell, I expressed the opinion that, merely to inform someone, even an experienced police officer, that his/her phone was "off" did not amount to a communication of "interception warrant material". If that is correct, giving the information cannot constitute a breach of section 63(2) of the TI Act. Some people may consider that to be an undesirable limitation on the efficacy of the subsection, but we must take the statute as it is.

258. If Mr Mullett had been a serving officer at the time of the events set out in item two, there would, in my opinion, have been a strong argument available that his conduct constituted misfeasance/misconduct in office. For Mr Mullett to have warned Mr Lalor that his phone may be "off", thereby also conveying to him that he may be suspected of a serious crime, would have been a seriously wrong thing for him to do. Mr Mullett himself said, in the course of his evidence, that for him to have passed on information about murder suspects being under surveillance would be "one of the worst things a police officer could do". Mr Mullett thought this would be "a denial of the very purpose of a police officer", which is the protection of the public, and could put lives of both innocent people and police officers at risk. Mr Mullett agreed that, for the Secretary of the Police Association to have done this, would be a betrayal of his own members.

259. I fully appreciate the seriousness of my finding that this is exactly what Mr Mullett did do. However, I see no escape from the conclusion that he caused Mr Rix to warn Mr Lalor that his phone may be "off" and, contrary to Mr Mullett's protestations, this was done in the context of possible criminal activity by Mr Lalor, not "Kit Walker".

260. I am not concerned with any ramifications of that finding within the Police Association. The question for me is whether Mr Mullett's disclosure may have constituted an offence. I do not think it can be said to have constituted the offence of misfeasance/misconduct in public office, for the simple reason that Mr Mullett was not then acting as a public officer. Although he retained the status of a sworn police officer, Mr Mullett was acting as the servant of the Police Association. He was not fulfilling any public duties.

261. In discussing Mr Weir's position, I mentioned that the offence of attempting to pervert the course of justice may be committed notwithstanding that there is not then a pending legal proceeding: see para 240 above. I mentioned the test applied in *Kane* and indicated that I thought it did not cover Mr Weir's conduct. However, I take a different view about Mr Mullett's conduct in warning Mr Lalor, through Mr Rix, that his telephone may be "off". If the "Kit Walker" claim is discarded, as I believe it must be, there is only one explanation for the possible telephone interception: that Mr Lalor was suspected of criminal conduct in relation to which there might be some future criminal proceeding. And, unlike Mr Weir, Mr Mullett acted, not at someone else's behest, but of his own initiative. He did so with the intention of thereby assisting Mr Lalor to foil an aspect of the official investigation into his possible criminal activity. It does not matter whether or not Mr Mullett knew the suspected criminal activity was complicity in the murder

of Mr Chartres-Abbott. It would be sufficient, as I believe to be the case, that Mr Mullett knew there was *some* suspected crime.

262. I recommend that OPP consider the possibility of prosecuting Mr Mullett for attempting to pervert the course of justice in relation to his warning to Mr Lalor.

(c) Aiding and abetting disclosure of information about OPI hearing

263. Item three of Attachment F raises two issues. The first is whether evidence of an improper disclosure of OPI information can be inferred from the comment attributed to Mr Mullett, by Mr Ashby in his conversation with Mr Linnell on 13 September 2007 (call 700), "they're having another dip at Peter" and, later, "So that'll be another round that we've got to go with the OPI." I agree with counsel that this is too tenuous a basis from which to conclude that Mr Mullett committed an offence under either section 86KA(3) or 102G(1) of the *Police Regulation Act*. It is not even clear that the "they" in the quote means OPI. Given that Mr Lalor had been suspended by the Chief Commissioner on the previous day, on suspicion of having committed a crime, this may be a reference to the senior ranks of Victoria Police.

264. The other matter raised in item three emerges out of call 1378, on 27 September 2007. On that occasion, Mr Mullett asked Mr Ashby about Mr Linnell's appearance at "that location". In evidence, Mr Mullett was asked whether Mr Ashby had informed him in advance that "Mr Linnell had to come to the inquiry". Mr Mullett replied: "That he was coming to the OPI." He would not concede that he realised this must be for a hearing, rather than a meeting.

265. Counsel for Mr Mullett submits that section 102G(1) of the *Police Regulation Act* applies only to the Director and his staff: as Mr Ashby did not fall into that category, the argument runs, Mr Mullett could not be convicted of having incited or procured a breach of that provision by Mr Ashby.

266. I see no justification for the limitation counsel seeks to impose on the ambit of section 102G(1). The drafter of the provision has chosen the noun of widest possible connotation: "person". This word is said to *include* the Director and members of his/her staff, not to *mean* such people.

267. Counsel also contends that section 102G(1) has no application where information is obtained through an intermediary, here Mr Linnell. Counsel argues that such information is not obtained or received as a result of the Director's performance of functions under the Act.

268. That approach is arguable, but I do not think it is correct. The root cause of the information is action taken by the Director, pursuant to his/her statutory functions, to conduct an inquiry. The legislation is concerned to protect the confidentiality of that action. When a person passes on information about the conduct of an inquiry, whether going into the detail of the evidence or simply reporting its existence, that person is disclosing information about the function performed by the Director.

269. Counsel for Mr Mullett correctly says it would be necessary, before Mr Mullett could be convicted of counselling or procuring a breach by Mr Ashby of section 102G(1), to show that Mr Mullett intended Mr Ashby to disclose information about the inquiry. But I think he is wrong to suggest that there would have needed to be an intention to elicit information about the content of the evidence given at the inquiry. It would be enough, in my opinion, for Mr Mullett to have intended to ascertain whether the inquiry went ahead and, if so, whether Mr Linnell was called as a witness. Mr Mullett certainly intended to find out that much.

270. It is clear that Mr Mullett's reference to "that…location" is a reference to the OPI; however, counsel for Mr Mullett argued it did not necessarily refer to an OPI hearing, as distinct from a meeting at OPI. Given that Mr Mullett made his inquiry only two days after Mr Linnell attended an OPI hearing, this seems rather fanciful. But I do not think it would make any difference if the attendance was only at a meeting. When the Director, and members of the Director's staff, hold meetings, they do so in performance of the Director's functions. So section 102G(1) still applies.

271. I recommend the OPP give consideration to the possibility of prosecuting Mr Mullett for the offence of counselling and procuring the commission by Mr Ashby of an offence, under section 102G(1) of the *Police Regulation Act*, in relation to the conversation recorded as call 1378.

(6) Mr Rix

272. The only matter raised against Mr Rix is his contact with Mr Lalor on 16 August 2007. The notice (Attachment G) suggests two possible offences: contravention of section 63(2) of the TI Act and malfeasance/misconduct in public office.

273. In his submission in response to Attachment G, counsel for Mr Rix argues an approach to the evidence that differs markedly from the conclusions I have set out above. Counsel emphasises Mr Rix's denial that the conversation with Mr Lalor concerned telephones and his claim that the concern was all about "Kit Walker". I have already given my reasons for adopting a different view. I add only that, contrary to counsel's submission, there is a basis for inferring that Mr Rix informed Mr Lalor that his phone may be being intercepted – that is, that Mr Rix carried out the mission given to him by Mr Mullett – as distinct from him giving Mr Lalor a warning not to talk about Fontainebleau. It is the phone call that Mr Lalor immediately made to Mr Waters, to arrange to see him when he returned from Adelaide. Why would Mr Lalor have bothered to do this, if the conversation with Mr Rix had nothing to do with the status of Mr Lalor and Mr Waters as Briars "targets"?

274. It follows that I reject the factual submissions put by counsel for Mr Rix. However, any prosecution of Mr Rix would face the same difficulties, in respect of the identified possible offences, as any prosecution of Mr Mullett for those offences. I do not think the warning given by Mr Rix to Mr Lalor constituted a communication of "interception warrant information" within the meaning of the TI Act. And although Mr Rix remained a sworn officer of Victoria Police on 16 August 2007, he was on leave without pay, like Mr Mullett. When he spoke to Mr Lalor, he was not acting in public office, but on behalf of the Police Association.

275. It may be open to the Chief Commissioner, if she should see fit, to take disciplinary action against Mr Rix, but I think any prosecution of him would fail.

Murray Rutledge Wilcox QC
25 January 2008

Other OPI Reports

- Report on the 'Kit Walker' investigations
  (tabled December 2007)
- A Fair and Effective Victoria Police Discipline System
  (tabled October 2007)
- Ceja Task Force - Drug Related Corruption: Third and Final Report
  (tabled July 2007)
- Past Patterns - Future Directions: Victoria Police and the problem of corruption and serious misconduct
  (tabled February 2007)
- Report on Victoria Police Missing Persons Investigations
  (released October 2006)
- Conditions for persons in custody
  (tabled July 2006)
- Review of fatal shootings by Victoria Police
  (tabled November 2005)
- Investigation into the publication of One Down, One Missing
  (tabled September 2005)
- Review of the Victoria Police Witness Protection Program
  (tabled July 2005)
- Investigation into the Victoria Police's Management of the Law Enforcement Assistance Program (LEAP)
  (tabled March 2005)
- Report on the Leak of a Sensitive Victoria Police Information Report
  (tabled February 2005)

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